

# Stabilizing Low-Wage Work

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*Low-wage, hourly-paid service workers are increasingly subject to employers' "just-in-time" scheduling practices. In a just-in-time model, employers give workers little advance notice of their schedules, call workers in to work during non-scheduled times to meet unexpected customer demand, and send workers home early when business is slow. The federal Fair Labor Standards Act, the main guarantor of workers' wage and hour rights, provides no remedy for the unpredictable work hours and income instability caused by employers' last minute call-in and send-home practices. This Article examines two alternative sources of legal protection that have received little attention in the literature on low-wage work: provisions in unionized workers' collective bargaining agreements that guarantee a minimum number of hours of pay when workers are called in to or sent home from work unexpectedly, and state laws that contain similar guaranteed-pay provisions. The Article concludes by assessing these tools' effectiveness in stabilizing low-wage work.*

## TABLE OF CONTENTS

INTRODUCTION . . . . .	2
I. JUST-IN-TIME SCHEDULING . . . . .	7
II. IMPACT ON WORKERS . . . . .	11
III. THE FAILURE OF THE FAIR LABOR STANDARDS ACT . . . . .	13
IV. REGULATING WORK HOURS THROUGH UNION CONTRACTS AND STATE LAWS . . . . .	19
A. <i>Call-In Pay</i> . . . . .	20
B. <i>Send-Home Pay</i> . . . . .	25
V. ASSESSMENT OF EFFECTIVENESS AND PROPOSALS FOR REFORM . . . . .	30
A. <i>Broadening State Guaranteed-Pay Laws</i> . . . . .	34
B. <i>Amending the FLSA</i> . . . . .	35
C. <i>Changing the DOL's Interpretation of FLSA "On-Call"             Time</i> . . . . .	37

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<i>D. Engaging in Union and Worker Campaigns</i> .....	39
CONCLUSION .....	40
APPENDIX .....	41
<i>Table 1: State Call-In Pay Laws</i> .....	41
<i>Table 2: State Send-Home Pay Laws</i> .....	46

## INTRODUCTION

The Emmy Award-winning CBS show *Undercover Boss* follows the same formula each week: A CEO, disguised as a new employee, spends several days working on a company's front lines. At the end of each episode, the CEO reveals his or her true identity, sometimes fires some workers, rewards others, and often pledges to make changes to company policy to address issues discovered while undercover.

In a 2010 episode, Kimberly Schaefer, CEO of the Great Wolf Lodge chain of indoor waterpark resorts, works in disguise alongside Jackie, a front desk clerk. Jackie, who is a single mom, explains her variable work hours: "I work [from] 7:00 in the morning 'til 3:30 in the day . . . [or] 3:30 in the day until 11:30 at night. . . . I have no regularity." She tells Kim, "[There are] days [my kids] wish I could stay home and be a parent . . . but I always tell them, 'I'm your only income, so I have to go to work.' . . . [M]y kids are in sports and I never get to go to a game . . . . I don't get to be involved in anything. I just have to work."<sup>1</sup>

At the end of the episode, Kim gives promotions and raises to employees she met while undercover, a college scholarship for one employee's daughter, paid leave for a waitress with a new baby, and flight school tuition for another employee who dreams of flying. To Jackie, the front desk clerk, Kim gives paid leave to recover from knee surgery, a promotion, and, significantly, "a 7:00 [AM]–3:00 PM shift, a permanent shift." In tears, Jackie responds, "I can be a mom again."

The fact that Jackie is "rewarded" at the end of the show with a stable schedule suggests two things about the nature of contemporary low-wage, hourly work. First, work hour insecurity has become the norm.<sup>2</sup> Rather than

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<sup>1</sup> *Undercover Boss: Great Wolf Resorts* (CBS television broadcast Oct. 3, 2010).

<sup>2</sup> STEPHANIE LUCE & NAOKI FUJITA, DISCOUNTED JOBS: HOW RETAILERS SELL WORKERS SHORT 3 (2012), available at [http://retailactionproject.org/wp-content/uploads/2012/03/7-75\\_RAP+cover\\_lowres.pdf](http://retailactionproject.org/wp-content/uploads/2012/03/7-75_RAP+cover_lowres.pdf), archived at <http://perma.cc/4P8M-ZU9Z> (describing increasing prevalence of unstable schedules in service jobs); Steven Greenhouse, *A Part-Time Life, as Hours Shrink and Shift*, N.Y. TIMES, Oct. 27, 2012, <http://www.nytimes.com/2012/10/28/business/a-part-time-life-as-hours-shrink-and-shift-for-american-workers.html?pagewanted=all>, archived at <http://perma.cc/Z248-XCMS> (discussing growth in just-in-time scheduling practices).

This Article defines "low-wage workers" as those "whose hourly wage rates are so low that even if they worked full-time, full-year their annual earnings would fall below the poverty line for a family of four." U.S. DEP'T OF HEALTH & HUMAN SERVS., ASPE RESEARCH BRIEF 1 (2009), available at <http://aspe.hhs.gov/hsp/09/lowwageworkers/rb.pdf>, archived at <http://perma.cc/44ZS-R9XY>. By another measure, a low-wage job is "one paying less than two-thirds

schedule a fixed number of workers for fixed shifts, employers adjust staffing levels in real time, calling workers in to meet unexpected customer demand and sending them home early when business lags.<sup>3</sup> As a worker at clothing and housewares seller Urban Outfitters describes it, “[T]hey would call you literally one hour before the shift, and then what do you do? I have also had the experience where I got to work and then they would say, ‘I don’t need you.’”<sup>4</sup> Indeed, a 2012 report on New York City retail workers found that only 17% of workers had a set schedule, and 70% were given fewer than seven days’ advance notice of their work hours for the coming week.<sup>5</sup> These workers also reported average fluctuations in their weekly schedules of between twelve and sixteen hours, meaning that one week’s hours could be twelve to sixteen hours higher or lower than the next.<sup>6</sup> Another study of over 6,000 retail service workers found that half of workers surveyed experienced consistent days of work but shift times that fluctuated within those days, while 59% faced weekly changes in work days, shift times, or both.<sup>7</sup> These practices are not limited to retail: restaurant owners and managers employ similar strategies, routinely sending waitstaff home before the end of their scheduled shifts when customer traffic is slow.<sup>8</sup> “Just-in-time” scheduling has become so widespread in the service sector that a deviation from

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of the median [U.S.] wage.” HEATHER BOUSHEY ET AL., *THE MOBILITY AGENDA, UNDERSTANDING LOW-WAGE WORK IN THE UNITED STATES 2* (Mar. 2007), available at <http://www.inclusionist.org/files/lowwagework.pdf>, archived at <http://perma.cc/BT9Z-M5CW>. According to the Bureau of Labor Statistics, seven of the top ten occupations predicted to create the most jobs by 2020 are “low-wage service and laborer jobs.” See Annette Bernhardt, *The Role of Labor Market Regulation in Rebuilding Economic Opportunity in the United States*, 39 *WORK AND OCCUPATIONS* 354, 355 (2012) (citing C. Brett Lockhard & Michael Wolf, *Occupational Employment Projections to 2020*, 135 *MONTHLY LAB. REV.* 84, 84–102 (2012)).

<sup>3</sup> See, e.g., Anna Haley-Lock, *Place-Bound Jobs at the Intersection of Policy and Management: Comparing Employer Practices in U.S. and Canadian Chain Restaurants*, 55 *AM. BEHAV. SCIENTIST* 823, 833–34 (2011) (describing just-in-time scheduling practices in restaurants); Susan J. Lambert, *Passing the Buck: Labor Flexibility Practices that Transfer Risk onto Hourly Workers*, 61 *HUM. REL.* 1203, 1203–09 (2008) (discussing unstable scheduling practices).

<sup>4</sup> Gus Lubin, *Retail Workers Can’t Stand This Growing Management Trend*, *BUSINESS INSIDER* (Jan. 17, 2012), [http://articles.businessinsider.com/2012-01-17/strategy/30634343\\_1\\_shifts-schedule-worker](http://articles.businessinsider.com/2012-01-17/strategy/30634343_1_shifts-schedule-worker), archived at <http://perma.cc/9A2X-KPKV>.

<sup>5</sup> LUCE & FUJITA, *supra* note 2, at 3.

<sup>6</sup> See Authors’ original analysis of the data set in LUCE & FUJITA, *supra* note 2, reported fully in Charlotte Alexander & Anna Haley-Lock, *Underwork, Work Hour Insecurity, and a New Approach to Wage and Hour Regulation* 11 (Ga. State Univ. Coll. of Law, Legal Studies Research Paper No. 2013-24, 2013), available at <http://ssrn.com/abstract=2367070>, archived at <http://perma.cc/E2CU-4N7V> (forthcoming 2015, *INDUSTRIAL RELATIONS*).

<sup>7</sup> JENNIFER E. SWANBERG ET AL., *CITISALES STUDY: JOBS THAT WORK FOR HOURLY WORKERS*, ISSUE BRIEF NO. 1: INTRODUCTION 4 (2009), available at [http://www.uky.edu/Centers/iwin/citisales/\\_pdfs/IB1-HourlyWorkers.pdf](http://www.uky.edu/Centers/iwin/citisales/_pdfs/IB1-HourlyWorkers.pdf), archived at <http://perma.cc/47P9-WH4Z>.

<sup>8</sup> See, e.g., Haley-Lock, *supra* note 3, at 833 (“Numerous managers also acknowledged that they often sent scheduled waiters home, or called them to tell them not to come in, when business was unexpectedly slow.”).

the norm — Jackie’s “permanent shift” — can serve as a reward on par with promotions, raises, and paid college tuition.<sup>9</sup>

The second insight that *Undercover Boss* provides is that work hour insecurity creates substantial financial, logistical, and emotional problems for workers. These problems can be so significant that relief from them, as in Jackie’s case, makes for compelling television.<sup>10</sup> Similar stories told by workers at lingerie retailer Victoria’s Secret reveal that “being a mom” is not the only thing that suffers as a result of unstable schedules: “Our hours fluctuate wildly, so we never know how much our paychecks will be, and since we don’t have guaranteed minimum hours, our hours are slashed without notice — leaving us unable to pay our rent, succeed at school, get promotions, or take care of our families.”<sup>11</sup> Workers also report having to take on second jobs to compensate for the hours they lose when shifts are cancelled without pay,<sup>12</sup> and having to skip or drop out of school to make shifts that are scheduled at the last minute.<sup>13</sup>

Just-in-time scheduling transfers the risk of doing business from employers to their low-wage, hourly-paid employees.<sup>14</sup> In economic terms, service-sector employers are externalizing the disruption caused by unexpected changes in customer demand, shifting it onto workers via last-minute scheduling. In the process, they are deliberately reshaping the traditional, stable, full-time employment relationship to their advantage. Just-in-time scheduling is in fact one of an array of related cost-cutting strategies that service sector employers have adopted as the economy has worsened, including con-

<sup>9</sup> Of course, the practice of adjusting staffing to handle unexpected changes in demand is not new, such as when a large party enters a restaurant without a reservation. This type of occasional, ad hoc request for extra help is distinct from the just-in-time scheduling practices that are the subject of this Article. In a just-in-time scheduling regime, requests from managers to handle unexpected demand are not occasional or abnormal; they, along with early send-homes, are the new norm, as employers’ scheduling and staffing practices increasingly produce fluctuating, variable, and unpredictable work hour assignments.

<sup>10</sup> Not only is Jackie in tears at the end of the episode, but Kim, the CEO, is too. The two hold hands and hug as they discuss the challenges Jackie has faced in trying to manage her unstable work schedule while parenting her children.

<sup>11</sup> *Victoria’s Secret: Don’t Keep Workers’ Schedules a Secret*, CHANGE.ORG (July 23, 2013, 12:53 AM), <http://www.change.org/petitions/victoria-s-secret-don-t-keep-workers-schedules-a-secret>, archived at <http://perma.cc/F4BM-8XJN>.

<sup>12</sup> See Maggie Freleng, *Retail Workers Fight “Just in Time” Scheduling*, WOMENSENEWS.ORG (Nov. 12, 2012), <http://womensenews.org/story/equal-payfair-wage/121109/retail-workers-fight-just-in-time-scheduling#.Ud9Lm20yhvI>, archived at <http://perma.cc/CV9Z-M5EQ> (describing a worker who would report for a scheduled shift, only to be sent home because the store was overstaffed: “I didn’t get paid for that at all. It was hard to work around that”); Susanna Kim, *Abercrombie and Fitch, Other Retail Workers Protest “Abusive” Scheduling*, ABC NEWS (Oct. 17, 2012), <http://abcnews.go.com/Business/abercrombie-fitch-best-buy-retail-workers-protest-abusive/story?id=17501604#.UeA0r20yiVh>, archived at <http://perma.cc/TR9N-CMD3>.

<sup>13</sup> See Freleng, *supra* note 12 (describing a worker having “to take on a second job and at times skip classes to attend on-call shifts she [is] required to make in order to keep her job”).

<sup>14</sup> See generally JACOB HACKER, *THE GREAT RISK SHIFT* 61–86 (2006) (describing in a variety of settings the ways in which institutions have shifted risk onto workers and their families rather than absorbing the risk themselves).

verting formerly full-time jobs to part-time<sup>15</sup> and relying more heavily on temporary, contingent, and contract labor.<sup>16</sup> As the CFO of restaurant chain Jamba Juice reports, such practices, aided by sophisticated scheduling software, have “‘helped us take 400, 500 basis points out of our labor costs’ . . . a savings of millions of dollars a year.”<sup>17</sup> Often, these savings are being extracted from workers who are particularly ill-equipped to absorb the impact of inadequate, variable, and unpredictable work hours, as they already exist at the edge of poverty with little to no job security.<sup>18</sup>

U.S. employers have wide discretion over establishing these conditions, and the federal Fair Labor Standards Act (“FLSA”),<sup>19</sup> the main legal mechanism for assuring a wage floor for workers, does not reach this issue. Though the FLSA guarantees a minimum wage for all hours worked and requires overtime pay for more than forty work hours per week, it does not establish minimum hours requirements or regulate employers’ scheduling practices.<sup>20</sup> Nor does it offer protection to a worker who is given fewer work hours than she believed a job would provide.

This Article examines two alternative approaches to regulating unpredictable work hours and income instability in low-wage workplaces: (1) contract terms in unions’ collective bargaining agreements (“CBAs”) that require “call-in pay” and “send-home pay,” and (2) statutes and regulations in some U.S. states and the District of Columbia that contain similar mini-

<sup>15</sup> *Economic News Release: Table A-8. Employed Persons by Class of Worker and Part-Time Status*, BUREAU OF LABOR STATISTICS (Aug. 2, 2013), <http://www.bls.gov/news.release/empsit.t08.htm>, archived at <http://perma.cc/64PS-64KW> (reporting that 25.5 million workers in America are considered part-time, defined as working thirty-four or fewer hours in a week; 8.3 million are “involuntarily” part-time, representing those who want but are denied full-time hours).

<sup>16</sup> See Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73, 74 (1998) (“[T]he most celebrated ‘crisis of work’ of the past decade is the perceived replacement of career employment with ‘contingent’ jobs of limited duration, hours, or security.”); Michael Grabell, *The Expendables: How the Temps Who Power Corporate Giants Are Getting Crushed*, PROPUBLICA (Jun. 27, 2013), <http://www.propublica.org/article/the-expendables-how-the-temps-who-power-corporate-giants-are-getting-crushed>, archived at <http://perma.cc/E9JN-7PJ4> (citing data from the Bureau of Labor Statistics and the American Staffing Association reporting that since the end of the recession in mid-2009, “almost one-fifth of the total job growth . . . has been in the temp sector,” in jobs which typically lack benefits, security, and a path toward promotion).

<sup>17</sup> Greenhouse, *supra* note 2; see also NANCY K. CAUTHEN, DEMOS, SCHEDULING HOURLY WORKERS: HOW LAST MINUTE, “JUST-IN-TIME” SCHEDULING PRACTICES ARE BAD FOR WORKERS, FAMILIES AND BUSINESS 1 (2011), available at [http://www.demos.org/sites/default/files/publications/Scheduling\\_Hourly\\_Workers\\_Demos.pdf](http://www.demos.org/sites/default/files/publications/Scheduling_Hourly_Workers_Demos.pdf), archived at <http://perma.cc/6PDM-YFHE> (“Used widely in the service sector, employers rely on scheduling software and measures of demand (such as floor traffic, sales volume, hotel registrations, or dinner reservations) to match workers’ hours to labor needs.”).

<sup>18</sup> See *infra* notes 53–57 and accompanying text.

<sup>19</sup> 29 U.S.C. §§ 201–219 (2012).

<sup>20</sup> In some narrowly defined circumstances, the FLSA does require payment of wages to workers who are held in an “on call” status for the time they spend waiting to be summoned to work. As Part III discusses further, courts have not extended, and are not likely to extend, this “on call” protection to workers who are subject to just-in-time scheduling. See *infra* notes 104–108 and accompanying text.

num hours and pay guarantees. These contractual, statutory, and regulatory rules, referred to here collectively as “guaranteed-pay provisions,” require employers to pay a minimum number of hours of wages to workers who are called in to or sent home from work unexpectedly. The hours guarantees apply even if workers do not actually perform that many hours of work: Workers are usually entitled to the guaranteed minimum or their actual hours worked, whichever is greater.

By attempting to establish some predictability in work hours and income, guaranteed-pay provisions are designed to protect workers’ expectations about when their time will be their own and when they will be required to work.<sup>21</sup> They also create a financial disincentive for employers to shift the risk of business fluctuations onto their workforce through last-minute scheduling changes.<sup>22</sup> Though many guaranteed-pay provisions significantly predate the current popularity of just-in-time scheduling,<sup>23</sup> these legal remedies appear to be relatively underutilized by workers today.<sup>24</sup> In addition, despite increasing scholarly and media attention to scheduling and work hour issues, there has been little recent focus on these tools for stabilizing low-wage work.<sup>25</sup> This Article begins to fill that gap.

<sup>21</sup> Roger I. Abrams & Dennis R. Nolan, *Buying Employees’ Time: Guaranteed Pay Under Collective Agreements*, 35 SYRACUSE L. REV. 867, 872 (1984) (noting that “call-in pay represents . . . the price of availability outside the employee’s regular shift” (citation and internal quotation marks omitted)).

<sup>22</sup> As with any discussion of the enactment of additional workplace regulations or expanded enforcement of existing ones, one might argue that guaranteed-pay requirements result in employers’ hiring fewer workers for more hours, thereby eliminating jobs. This is an empirical question that has not been investigated. In labor-intensive service industries, however, there is likely an employment floor below which employers cannot go, as some minimum number of staff are needed to wait tables, cater to hotel guests, and assist retail shoppers.

<sup>23</sup> See, e.g., Walter P. Reuther, *The United Automobile Workers: Past, Present, and Future*, 50 VA. L. REV. 58, 73 (1964) (noting that the UAW union “established the principle[ ] of ‘call-in pay’ in 1939” and defining “[c]all-in pay,’ otherwise known as ‘reporting pay’ [a]s a minimum guaranteed to employees who report for work as scheduled”).

<sup>24</sup> See *infra* notes 144–147 and accompanying text.

<sup>25</sup> Media outlets and scholars have devoted significant recent attention to scheduling issues. See, e.g., Steven Greenhouse, *Part-Time Schedules, Full-Time Headaches*, N.Y. TIMES (July 18, 2014), [http://www.nytimes.com/2014/07/19/business/part-time-schedules-full-time-headaches.html?\\_r=0](http://www.nytimes.com/2014/07/19/business/part-time-schedules-full-time-headaches.html?_r=0), archived at <http://perma.cc/8ZE7-FN8R> (discussing scheduling issues); Greenhouse, *supra* note 2; Gus Lubin, *supra* note 4 (discussing variable schedules); see generally LOW-WAGE AMERICA: HOW EMPLOYERS ARE RESHAPING OPPORTUNITY IN THE WORKPLACE (Eileen Appelbaum, Annette Bernhardt & Richard J. Murnane eds., 2006); Julia R. Henly, H. Luke Shaefer & Elaine Waxman, *Nonstandard Work Schedules: Employer- and Employee-Driven Flexibility in Retail Jobs*, 80 SOC. SERV. REV. 609, 609–34 (2006) (exploring the challenges created by a lack of control over scheduling); Lambert, *supra* note 3, at 1203–27 (focusing on how managers use variable scheduling to promote labor flexibility in ways that are disadvantageous for some workers); Susan J. Lambert & Anna Haley-Lock, *The Organizational Stratification of Opportunities for Work-Life Balance: Addressing Issues of Equality and Social Justice in the Workplace*, 7 COMMUNITY, WORK & FAM. 181, 181–97 (2004); Nantiya Ruan, *Same Work, Different Day: A Survey of the Last Thirty Years of Wage Litigation and its Impact on Low-Wage Workers*, 30 HOFSTRA LAB. & EMP. L.J. 355 (2013); Françoise Carré & Chris Tilly, *America’s Biggest Low-Wage Industry: Continuity and Change in Retail Jobs* (Inst. for Research on Labor and Emp’t, Working Paper No. 2009-6, 2008) (examining the quality of compensation, scheduling, and hiring and promotions in retail jobs).

Part I summarizes the social science literature on variable work hours and income instability and presents examples of call-in and send-home practices in the restaurant, retail, and hospitality sectors. Part II explores the impact on workers of unpredictable work hour fluctuations and income instability caused by “just-in-time” scheduling. Part III addresses the lack of coverage under the FLSA for the problems caused by call-in and send-home practices. Part IV describes the contractual, statutory, and regulatory protections offered by CBAs and state laws. Part V assesses these tools’ effectiveness and discusses additional possible strategies for increasing stability in low-wage, hourly jobs. The Appendix offers a comprehensive list and brief summary of all state call-in and send-home pay laws.

### I. JUST-IN-TIME SCHEDULING

Today’s just-in-time scheduling practices in service jobs had their origin in 1950s Japan as a way to eliminate waste in manufacturing.<sup>26</sup> According to the just-in-time philosophy, “waste” is “anything other than the minimum amount of equipment, materials, parts, space, and workers’ time, which are absolutely essential to add value to the product or service.”<sup>27</sup> In the manufacturing context, this means reducing the amount of inventory stored in warehouses, and instead “produc[ing] goods ‘just in time’ to meet customer demand.”<sup>28</sup> In other words, “the aim of just-in-time . . . is to perfectly match the output of a manufacturing system to the needs of a market.”<sup>29</sup> Wal-Mart has become synonymous with just-in-time inventory management strategies, famously receiving continuous deliveries of goods to its warehouses, “where they are selected, repacked, and then dispatched to stores, often without ever sitting in inventory. Instead of spending valuable time in the warehouse, goods just cross from one loading dock to another in 48 hours or less.”<sup>30</sup>

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However, the only comprehensive treatment of guaranteed-pay provisions in either CBAs or state laws in the law review literature was written in 1984, and focused only on union contracts. See Abrams & Nolan, *supra* note 21, at 867 (examining the way in which arbitrators handled labor disputes arising under CBAs’ guaranteed-pay provisions).

<sup>26</sup> Cem Canel, Drew Rosen & Elizabeth A. Anderson, *Just-in-Time Is Not Just for Manufacturing: A Service Perspective*, 100 INDUS. MGMT. & DATA SYS. 51, 51 (2000) (surveying the history of just-in-time manufacturing practices); Pei-Chun Lai & Tom Baum, *Just-in-Time Labour Supply in the Hotel Sector: The Role of Agencies*, 27 EMP. REL. 86, 93–94 (2005) (“A pull scheduling technique, the *kanban* system (Japanese for card), employed in the [just-in-time] system seeks to ensure that preceding operations within the manufacturing chain only supply and produce as much as is needed by succeeding operations. . . . Using the *kanban* system, JIT elements are produced to meet exact demand.”).

<sup>27</sup> Canel, Rosen & Anderson, *supra* note 26, at 51; see also Nick Oliver, *The Dynamics of Just-In-Time*, 6 NEW TECH., WORK, AND EMP’T. 19, 19 (1991) (“At its simplest, a just-in-time system means simply that final assembly produces goods just-in-time to be sold; sub-assemblies produce goods just-in-time for final assembly; and bought out parts arrive from outside suppliers just-in-time to be fabricated into subassemblies.”).

<sup>28</sup> CAUTHEN, *supra* note 17, at 3.

<sup>29</sup> Oliver, *supra* note 27, at 19.

<sup>30</sup> George Stalk, Philip Evans & Lawrence E. Shulman, *Competing on Capabilities: The New Rules of Corporate Strategy*, HARV. BUS. REV., Mar.–Apr. 1992, at 58.

Over time, the just-in-time philosophy migrated from inventory management to labor management, taking hold in service sector industries — restaurants, retail, and hospitality — which employ large numbers of low-wage, hourly-paid workers.<sup>31</sup> As employment scholar Susan Lambert has observed, because jobs in these industries are “low-skill, non-production jobs,” “[e]xcess labor . . . cannot be absorbed by producing [additional] goods for inventory.”<sup>32</sup> Instead, in employers’ eyes, excess labor in restaurants, retail stores, and hotels takes the form of service workers “sitting there and doing nothing.”<sup>33</sup> As a result, “pressures to quickly adjust work hours to demand [by adopting just-in-time scheduling models] are likely to be especially strong.”<sup>34</sup> While employers generally strive to keep hours (and therefore payroll) to the barest minimum, they also have a specific incentive to keep workers’ weekly hours below forty, the trigger point under the FLSA for time-and-a-half overtime pay, and, now, thirty, the threshold above which employers must provide health insurance under the new Patient Protection and Affordable Care Act.<sup>35</sup>

Though there has been no definitive study of the prevalence of just-in-time scheduling across the service sector, scholars of low-wage work assert that it is “absolutely common place.”<sup>36</sup> An analysis of 2007 census data for *all* U.S. workers suggests that about 6% of full-time hourly workers had variable hours, while almost 11% of part-time hourly workers’ hours va-

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<sup>31</sup> CAUTHEN, *supra* note 17, at 3 (“Service industries that rely on large numbers of low-wage hourly workers quickly adapted the [just-in-time] concept by calibrating employee work hours to closely match service demand. Adjusting work schedules week by week, day by day, and even hour by hour, employers seek to ensure they have just enough workers to meet the need of the moment.”).

<sup>32</sup> Lambert, *supra* note 3, at 1209 (internal quotation marks omitted).

<sup>33</sup> Lai & Baum, *supra* note 26, at 96.

<sup>34</sup> Lambert, *supra* note 3, at 1209.

<sup>35</sup> *Id.* at 1208–09 (“For example, when fixed costs are low, managers may keep headcounts high in order to avoid paying overtime or to maximize their ability to call workers in at the last minute.”); Carré & Tilly, *supra* note 25, at 12 (“Managers must sparingly manage their use of work hours and many retailers control manager access to overtime for hourly workers (paid time and a half for hours over 40).”). See also 26 U.S.C. § 4980H(c)(4)(A) (2012) (requiring large employers to offer employer-sponsored health insurance plans to employees who, “with respect to any month, [are] employed on average at least 30 hours of service per week”). Employers may also reduce workers’ hours to keep them in part-time status and avoid any obligation under a company’s own internal policies to pay fringe benefits.

<sup>36</sup> CAUTHEN, *supra* note 17, at 5 (quoting Susan Lambert, Audio Conference at the Center for Law & Social Policy: Scheduling Hourly Workers in a Just in Time World: Can Employees and Employers Sync the Clock? 2 (Dec. 11, 2009) (transcript available at [http://www.clasp.org/documents/CLASP\\_121109-2-DS.pdf](http://www.clasp.org/documents/CLASP_121109-2-DS.pdf), archived at <http://perma.cc/R5VY-PWTQ>)). According to the 2008 National Study of the Changing Workforce, between 20% and 30% of workers encounter this version of “just-in-time” scheduling in their jobs. LIZ WATSON & JENNIFER E. SWANBERG, FLEXIBLE WORKPLACE SOLUTIONS FOR LOW-WAGE HOURLY WORKERS: A FRAMEWORK FOR A NATIONAL CONVERSATION 22 (2011), available at <http://workplaceflexibility2010.org/images/uploads/whatsnew/Flexible%20Workplace%20Solutions%20for%20Low-Wage%20Hourly%20Workers.pdf>, archived at <http://perma.cc/SA6P-U8JS>.

ried.<sup>37</sup> Studies of service jobs report much higher percentages. A report on retail employment notes that “[a]lmost 30 percent of workers report having schedules with variable start and end times,” and half of participants interviewed had schedules “posted with advance notice of 1 week or less.”<sup>38</sup>

The mechanics of just-in-time scheduling tend to follow the same broad outlines across service jobs. An employer monitors consumer demand as it relates to labor costs, often assisted by tracking software.<sup>39</sup> In a retail setting, these demand data may include “floor traffic or sales volume”; in restaurants and hotels, they might include meal and room reservations.<sup>40</sup> Managers may consider annual, monthly, weekly, or daily demand trends, and some even report monitoring demand every fifteen or thirty minutes.<sup>41</sup> Using these data, managers estimate future demand and make staffing and scheduling decisions that are designed to maintain a “specified ratio of employee hours worked to [the designated] measure of consumer demand.”<sup>42</sup>

In theory, employers armed with such data should be able to make accurate demand forecasts and schedule workers in a way that both preserves the targeted labor-demand ratio and maintains some consistency and predictability in employees’ work hours. If, for example, a scheduling software program tells an employer that women’s clothing sales tend to spike around 12:30 PM on sunny Fridays in June, then the employer should be able to set staffing levels accordingly.<sup>43</sup> In practice, however, employers’ demand data may be wrong, employers may not use the data available to them, or they may use their data but have little incentive to inform workers of their schedules in advance, relying instead on last-minute call-ins and send-homes.<sup>44</sup>

<sup>37</sup> Lambert, *supra* note 3, at 1208 (“Analyses of 2007 CPS data indicate that 5.7 percent of full-time, hourly workers and 10.6 percent of part-time, hourly workers report that their ‘hours vary.’”).

<sup>38</sup> Henly, Shafer & Waxman, *supra* note 25, at 610, 621.

<sup>39</sup> See, e.g., Gary M. Thompson, *Labor Scheduling, Part 4: Controlling Workforce Schedules in Real Time*, 40 CORNELL HOTEL & RESTAURANT ADMIN. Q. 85, 86–95 (1999) (describing methods of demand tracking).

<sup>40</sup> CAUTHEN, *supra* note 17, at 1, 4.

<sup>41</sup> See Anna Haley-Lock & Susan Lambert, *Delivering Income and Schedule Stability in Hourly Retail Jobs: The Costco Case* (2013) (Jan. 2015) (unpublished manuscript) (on file with authors) (describing fifteen-minute increment monitoring). In restaurants, employers often adjust staffing levels during the day, sometimes in half-hour or shorter increments, in order to achieve predetermined ratios between labor and customer sales. Haley-Lock, *supra* note 3, at 833; see also Lambert, *supra* note 3, at 1212–13 (“Managers responsible for scheduling staff were given a base number of hours to distribute among employees. This initial number was calculated from projected sales (or traffic), commonly based on corporate projections derived from analyses of prior sales and current retail trends.”).

<sup>42</sup> CAUTHEN, *supra* note 17, at 4.

<sup>43</sup> See Greenhouse, *supra* note 2 (describing scheduling software such as Kronos and Dayforce that account for customer demand and even weather forecasts in setting staffing levels).

<sup>44</sup> Lambert, *supra* note 3, at 1213 (“For example, when sales were below expectations, managers reported that they might ‘save hours’ by not calling in a replacement when another sales associate called off work, or they might ask for volunteers to come in an hour later or leave an hour earlier another day, making the adjustment at least predictable.”).

For example, studies of restaurant employment in rural and urban Washington State and suburban Seattle and Chicago found that restaurants carefully monitored ratios between labor costs and customer sales, which could fluctuate during as well as across shifts, days, and seasons.<sup>45</sup> In one rural Washington restaurant, the owner established a target of 21% as his labor cost-to-sales ratio.<sup>46</sup> The manager on duty checked the ratio every thirty minutes and sent staff home to ensure compliance with the 21% figure.<sup>47</sup> Similarly, an urban restaurant owner reported a goal of capping labor costs at 30% of sales, using the send-home practice to make adjustments as needed during the day.<sup>48</sup>

General managers at two chain restaurant sites described similar scheduling conventions. At one suburban location, waitstaff stayed “if the restaurant [was] busy,” but went home “really quickly” if business slowed.<sup>49</sup> This manager also retained one reserve “on-call” waiter who went unpaid unless the waiter was called in, but was required as a condition of employment to stay available for work in the case of an unpredicted uptick in customer traffic.<sup>50</sup> Likewise, a manager at a rural chain location usually reduced waitstaff levels every thirty minutes, starting with nine employees and going as low as four, if business proved slower than expected.<sup>51</sup>

The retail and hospitality industries employ comparable last minute call-in and send-home practices. The stories of workers profiled in the opening paragraphs illustrate employers’ use of just-in-time scheduling in retail stores. In addition, a hospitality industry trade publication lists the following “real time control actions” over hotel employees’ schedules, some of which may have been used to set Jackie’s variable hours at Great Wolf Lodge: “sending employees to or recalling them from break, extending the length of an employee’s shift . . . sending employees home early, [and] calling additional employees in to work.”<sup>52</sup>

In just-in-time scheduling regimes such as these, work hours become like Wal-Mart’s inventory. Instead of sitting in a warehouse waiting to be purchased, Wal-Mart products are delivered from the manufacturer only when consumer demand requires. And instead of waiting in a restaurant, hotel, or retail store to serve customers, workers are called to work only

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<sup>45</sup> See generally Anna Haley-Lock, *The Structural Contexts of Low-Wage Work: Restaurant Employment Practices Across Firm Geography, Size, and Ownership Status*, 16 J. POVERTY 447, 447–68 (2012); Haley-Lock, *supra* note 3, at 823–42.

<sup>46</sup> Haley-Lock (2012), *supra* note 45, at 458.

<sup>47</sup> See *id.* at 458–59.

<sup>48</sup> See *id.* at 458.

<sup>49</sup> *Id.* at 459.

<sup>50</sup> *Id.* See generally *infra* Part III, discussing the legal rules governing whether such on-call waiting time would be compensable under the FLSA.

<sup>51</sup> Haley-Lock (2012), *supra* note 45, at 459.

<sup>52</sup> Thompson, *supra* note 39, at 86. Likewise, a study of the use of just-in-time scheduling practices in the Scottish hospitality industry managers reported that such practices — along with using third-party employment agencies to provide hotel staff — prevented workers from “sitting there and doing nothing.” Lai & Baum, *supra* note 26, at 96.

when customers need to be served, and sent home when customer flow wanes. In this way, employers shift the risk of variable business trends onto their low-wage, hourly-paid workforce, using reductions in labor to absorb business losses.

## II. IMPACT ON WORKERS

Employers' risk-shifting creates three distinct problems for low-wage workers: (1) inadequate work hours; (2) variable work hours; and (3) unpredictable work hours. Each alone can cause significant logistical, economic, and emotional problems for workers; together, inadequate, variable, and unpredictable work hours can severely impede workers' ability to balance work and family responsibilities, as well as to manage financial obligations and budget, plan, and save.<sup>53</sup>

First, *inadequate* work hours due to employers' early send-home practices may threaten workers' eligibility for employer-provided benefits that are available only to workers who qualify as "full time."<sup>54</sup> Moreover, early send-home practices may reduce workers' hours below the threshold required for public benefits programs such as Temporary Assistance for Needy Families and child care subsidies that act as a safety net for the working poor.<sup>55</sup> Inadequate work hours also endanger the income stability of an already vulnerable working population. Hourly-paid service workers' earnings are already at the bottom of the wage scale.<sup>56</sup> Reductions in hours due to just-in-time scheduling keep these workers in a constant state of "underwork," where they are assigned fewer hours, and therefore earn less income than they need to live.<sup>57</sup>

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<sup>53</sup> See Susan J. Lambert, Anna Haley-Lock & Julia R. Henly, *Schedule Flexibility in Hourly Jobs: Unanticipated Consequences and Promising Directions*, 15 COMMUNITY, WORK & FAM. 293, 293–315 (2012); Susan J. Lambert, *Lessons from the Policy World: How the Economy, Work Supports, and Education Matter for Low-Income Workers*, 36 WORK AND OCCUPATIONS 56, 56–65 (2009).

<sup>54</sup> See 26 U.S.C. § 4980H(c)(4)(A) (2012) (defining health insurance-eligible employees as those who, "with respect to any month, [are] employed on average at least 30 hours of service per week"); CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA C. SMITH, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60-243: INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2011 25 & n.45 (2012), available at <http://www.census.gov/prod/2012pubs/p60-243.pdf>, archived at <http://perma.cc/5YTN-3E4C> (noting that employees working for at least thirty-five hours per week and for at least fifty weeks per year "were more likely to be covered by health insurance" than employees working less frequently).

<sup>55</sup> See, e.g., 42 U.S.C. § 607(c)(1)(A)–(B) (2012) (establishing mandatory minimum work hours as a condition of eligibility for benefits under the Temporary Assistance for Needy Families Program).

<sup>56</sup> See *Characteristics of Minimum Wage Workers: 2012*, BUREAU OF LABOR STATISTICS (2013), <http://www.bls.gov/cps/minwage2012.htm>, archived at <http://perma.cc/Q3MU-KU65> (reporting that "three-fifths of workers earning the minimum wage or less in 2012 were employed in service occupations").

<sup>57</sup> Arne L. Kalleberg, *The Mismatched Worker: When People Don't Fit Their Jobs*, 22 ACAD. MGMT. PERSP. 24, 31 (2008) (discussing the concept of underwork, and noting that

Second, *variable* work hours can prevent workers from engaging in the sort of long-term budgeting and saving that might enable them to leave low-wage work entirely, for example by establishing an emergency savings fund or retirement or education savings accounts. As one New York City retail worker comments, “I have been scheduled for as few as six hours in a week, and as many as 40, so my paycheck is always different. How is anyone . . . supposed to plan their budget with such erratic schedules?”<sup>58</sup> Variable schedules have also been shown to harm family dynamics. Studies have found that families led by parents working unstable schedules are less able to follow consistent household routines around children’s homework completion and shared meals.<sup>59</sup> Other research has reported statistically significant associations between parents’ working nonstandard hours and work-family conflict, marital problems, and fewer hours spent with children.<sup>60</sup> Even for workers without caregiving responsibilities, variable schedules can impede planning around education, secondary employment, transportation, and other personal obligations.<sup>61</sup>

Third, layering *unpredictability* on top of work hour inadequacy and variability can have particularly “dire implications for workers with care responsibilities.”<sup>62</sup> When workers with dependents are required to come in at a moment’s notice, they are put in untenable situations of finding last-minute coverage, paying premium rates for unplanned care, or leaving their charges without adequate supervision.<sup>63</sup> And when workers are sent home early after arranging care, they may nonetheless have to pay for that care

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“underworking is usually related to economic hardship and often does not lead to better jobs in the future”).

<sup>58</sup> Lubin, *supra* note 4 (quoting a sales associate at clothing retailer Uniqlo).

<sup>59</sup> Lambert, *supra* note 3, at 1204 (“For example, instability in work schedules can make it difficult to secure reliable child care and to establish family routines such as homework monitoring and regular mealtimes.”); *see also* Henly, Shaefer, & Waxman, *supra* note 25, at 610 (“Compared with working standard times, working at nonstandard times is linked to fewer hours spent in specific family activities such as eating meals together, homework supervision, and shared leisure time.”).

<sup>60</sup> Henly, Shaefer & Waxman, *supra* note 25, at 610 (“For example, survey findings reveal that working nonstandard hours is statistically significantly associated with work-family role conflict, low marital quality and stability, and reduced time spent with children.” (citations omitted)). *Cf.* Mark Tausig & Rudy Fenwick, *Unbinding Time: Alternate Work Schedules and Work-Life Balance*, 22(2) J. FAM. ECON. ISSUES 101, 103 (2001) (finding that greater stability in work hours improves work-life balance).

<sup>61</sup> *See* Liz Watson & Jennifer E. Swanberg, *Flexible Workplace Solutions for Low-Wage Hourly Workers: A Framework for A National Conversation*, 3 AM. U. LAB. & EMP’T. L.F. 380, 386 (2013); *see also* LUCE & FUJITA, *supra* note 2, at 13–14.

<sup>62</sup> Carré & Tilly, *supra* note 25, at 1. Moreover, workers who are called in to work hours beyond their scheduled shifts often lose hours elsewhere, as employers seek to keep workers’ total labor hours part-time or below the forty-hour overtime threshold. *See* Henly, Schaefer & Waxman, *supra* note 25, at 621 (“Given their poor economic circumstances, participants report that additional hours are often welcomed. Some employees report, however, that extra hours worked one day could result in shortened shifts on another. Employers thereby keep workers within the hourly range of part-time status or avoid the accumulation of overtime hours.”).

<sup>63</sup> Though a last minute call-in can produce (desired) additional income, for the reasons explored in this Part, the uncertainty associated with unpredictable work schedules is problematic in and of itself.

even though they themselves are not earning wages. Unpredictable work schedules may also harm workers who are taking classes or enrolled in training programs, as changing work shifts make regular class attendance extremely difficult.<sup>64</sup> Finally, unpredictability can present challenges for workers who have limited transportation options, preventing them from carpooling and requiring them to rely on expensive last-minute options such as taxis.<sup>65</sup>

In some ways, the problems that just-in-time scheduling causes for low-wage, hourly workers may be seen as corollaries to the problems with work-life balance experienced by upper-income professionals, a topic that has recently received much popular attention.<sup>66</sup> Many commentators have suggested increased flexibility around work hours and schedules as a way to address the conflict between work and family obligations, particularly for professional women.<sup>67</sup> Low-wage workers who experience the effects of just-in-time scheduling are subject to “flexibility,” but it is flexibility by fiat, imposed externally by their employers with little to no input by the workers themselves. As Susan Lambert and Elaine Waxman have argued, this flexibility without control can be extremely harmful to workers: “Without control, variations in work hours are better characterized as introducing instability rather than flexibility into workers’ lives.”<sup>68</sup>

### III. THE FAILURE OF THE FAIR LABOR STANDARDS ACT

Consider Jackie, the front desk clerk featured on *Undercover Boss*, who had “no regularity” in her job, sometimes working from the early morning into the afternoon, and sometimes from the afternoon until almost midnight. Consider also the Urban Outfitters worker quoted in the Introduction: her employer would call her unexpectedly to work, “literally one hour” before she had to report to the store.<sup>69</sup> The same worker would sometimes arrive at

<sup>64</sup> See Watson & Swanberg, *supra* note 61, at 386 & n.28.

<sup>65</sup> See *id.*

<sup>66</sup> See, e.g., SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* (2013); Anne-Marie Slaughter, *Why Women Still Can't Have it All*, *THE ATLANTIC* (Jun. 13, 2012), <http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020>, archived at <http://perma.cc/F86P-66J7>.

<sup>67</sup> See, e.g., Slaughter, *supra* note 66 (proposing flexible work arrangements to improve work-life balance). Pro-business lobbying efforts have also attempted to capitalize on the interest in flexibility to promote their desire to abolish overtime premium pay requirements under the FLSA. For example, the Working Families Flexibility Act of 2013 would allow employers to pay their workers nothing extra for overtime work beyond a promise of compensatory time that may only be used at the employers’ discretion. See H.R. 1406, 113th Cong. (2013). Although the bill passed the House, it ultimately died in committee in the Senate. See S. 1623, 113th Cong. (as reported by S. Comm. on Health, Education, Labor, and Pensions, Oct. 30, 2013).

<sup>68</sup> Susan J. Lambert & Elaine Waxman, *Organizational Stratification: Distributing Opportunities for Work-Life Balance*, in *WORK AND LIFE INTEGRATION: ORGANIZATION, CULTURAL, AND INDIVIDUAL PERSPECTIVES* 103, 115 (Ellen Ernst Kossek & Susan J. Lambert eds., 2005) (citation omitted).

<sup>69</sup> Lubin, *supra* note 4.

work, only to have her employer say, “I don’t need you,” and send her home.<sup>70</sup> The FLSA, the main guarantor of wage and hour rights for workers, provides no remedy for the instability introduced by these sorts of irregular call-in and send-home practices.

While the work of American laborers has evolved over the last century in myriad ways, the FLSA has not undergone major revision since its enactment in 1938.<sup>71</sup> The FLSA was “[p]assed as part of the New Deal legislation of the early twentieth century” and “was enacted during a time when workers desired more leisure time away from their jobs but also wanted protection from job insecurity and unemployment.”<sup>72</sup> The impetus during this time period was to employ more people, to “spread the work” across society, but also to create a minimum set of worker-protective labor standards.<sup>73</sup> As President Roosevelt commented in support of the FLSA’s enactment, “[a] self-supporting and self-respecting democracy can plead no . . . economic reason for chiseling workers’ wages or stretching workers’ hours.”<sup>74</sup>

Today, eight decades after its enactment, the FLSA remains the primary source of wage protection for low-wage workers.<sup>75</sup> The statute mandates a minimum hourly wage,<sup>76</sup> requires premium overtime pay for work exceeding forty hours per workweek,<sup>77</sup> prohibits child labor,<sup>78</sup> and requires employers to keep accurate time records.<sup>79</sup> Though some scholars have questioned whether changes in the U.S. economy have rendered the FLSA obsolete,<sup>80</sup> the fundamental principles that gave rise to the statute remain true today: regardless of the current economic climate, the intent of the law is both to

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<sup>70</sup> *Id.*

<sup>71</sup> The FLSA’s only substantive addition occurred in 1947 with the passage of the Portal-to-Portal Act, Pub. L. No. 80-49, 61 Stat. 84 (1947) (codified as amended at 29 U.S.C. §§ 251–262 (2012)).

<sup>72</sup> Ruan, *supra* note 25, at 2.

<sup>73</sup> See Scott Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 2 (2001).

<sup>74</sup> Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 MONTHLY LAB. REV. 22, 30 (1978) (quoting Franklin D. Roosevelt, Message to Congress on Establishing Minimum Wages and Maximum Hours, 4 PUB. PAPERS 209–14 (May 24, 1937)).

<sup>75</sup> Numerous scholars on the subject of wage theft have recognized the FLSA as the main source of statutory authority utilized by low-wage workers to vindicate wage rights. See, e.g., KIM BOBO, *WAGE THEFT IN AMERICA* 58 (2d ed. 2011); Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 1 (2010); Nantiya Ruan, *What’s Left to Remedy Wage Theft?: How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1103–47 (2014).

<sup>76</sup> 29 U.S.C. § 206 (2012).

<sup>77</sup> *Id.* § 207(a)(1).

<sup>78</sup> *Id.* § 212.

<sup>79</sup> *Id.* § 211(c).

<sup>80</sup> Ruan, *supra* note 25, at 3 (“Workplace scholars have disputed and questioned the continued viability of the FLSA, juxtaposing the need for employer flexibility, worker compensatory time, and the need to expand its protections to new categories of workers.”).

guarantee a living wage and to protect workers against the “evils of overwork.”<sup>81</sup>

Yet despite these goals, the FLSA exempts many types of low-wage work from its coverage. The FLSA’s minimum wage and overtime protections cover only employers of a certain size — enterprises with gross annual sales of at least \$500,000 — or whose employees engage in interstate commerce.<sup>82</sup> In addition, certain types of low-wage work are specifically exempted, including some home care workers, who are not covered by the minimum wage or overtime protections,<sup>83</sup> live-in domestic workers, who are not covered by overtime pay requirements,<sup>84</sup> and many agricultural workers, who are also exempt from the overtime pay mandate.<sup>85</sup>

In addition, with narrow exceptions, the FLSA’s pay mandates apply only to work *actually performed*.<sup>86</sup> Workers who report for a scheduled shift but are then sent home receive no compensation under the FLSA, as they never engaged in productive activity. Nor can workers receive compensation under the FLSA for the disruption caused by their employers’ last minute calls to work.

In a narrowly drawn exception to this rule, courts have permitted some workers who are “on call” or “engaged to wait” by their employers to collect compensation under the FLSA for their waiting time.<sup>87</sup> Although the

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<sup>81</sup> *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942) (canvassing the FLSA’s legislative history and identifying its objectives of protecting a “general maximum working week,” ensuring “longer hours on the payment of time and a half for overtime,” and preventing “the evil of overwork as well as underpay” (internal quotation marks omitted)).

<sup>82</sup> 29 U.S.C. § 203(s)(1) (2012).

<sup>83</sup> *See id.* § 213(a)(15) (exempting domestic workers providing “companionship services” from the FLSA’s minimum wage and overtime guarantees); 29 C.F.R. § 552.6 (effective Jan. 1, 2015) (interpreting “companionship services” to encompass the provision of both “fellowship,” such as engaging in conversation or activities, and “protection,” such as personal supervision).

<sup>84</sup> 29 C.F.R. § 552.102 (2014).

<sup>85</sup> *See* 29 U.S.C. §§ 213(b)(12)–(16) (2012). *See also* Rebecca Smith & Catherine Ruckelshaus, *Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers as a Centerpiece of Immigration Reform*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 555, 586 (2007).

<sup>86</sup> The Supreme Court has held that in enacting the FLSA, Congress intended “to guarantee ei[t]her regular or overtime compensation for all actual work or employment. To hold that an employer may validly compensate his employees for only a fraction of time consumed in actual labor would be inconsistent with the very purpose and structure of the Act.” *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597–98 (1944); *see also* 29 C.F.R. § 778.223 (2014) (“Under the Act an employee must be compensated for all hours worked.”). Accordingly, courts have recognized that work “actually performed” should be paid to all workers, including unauthorized workers. *See, e.g., Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 937 (8th Cir. 2013) (holding that unauthorized workers may sue under the FLSA to recover statutory damages for “work actually performed”).

<sup>87</sup> *See Missouri, Kansas & Texas Ry. Co. v. United States*, 231 U.S. 112, 119 (1913) (holding that inactive time counted in applying a federal act prohibiting the keeping of employees on duty for more than sixteen consecutive hours). In answer to the argument that the employees were not on duty during the period when they were waiting, the Court pointed out that the employees were under orders, liable to be called upon at any moment, and not at liberty to leave, such that they were on duty when inactive—their duty being “to stand and wait.” *Id.*

FLSA was enacted in 1938, the Supreme Court recognized as early as 1913 the principle that “inactive duty” may still constitute “duty.”<sup>88</sup> Two seminal Supreme Court cases on the compensability of “on-call” time came in 1944, in *Armour & Co. v. Wantock*<sup>89</sup> and *Skidmore v. Swift & Co.*,<sup>90</sup> where the Court held that neither the FLSA nor common law precluded waiting time from being counted as working time under the Act.<sup>91</sup> Today, whether waiting time must be compensated under the FLSA depends upon the circumstances of each particular case and is a question of fact to be resolved by appropriate findings of the trial court.<sup>92</sup>

In conducting this inquiry, courts consider a variety of factors, including the agreement between the parties, the restrictions placed on the worker by the employer, the degree to which the worker is free to engage in personal matters during the waiting time, any requirement that the worker remain on the employer’s premises or in a designated area, and, most importantly, whether the time spent waiting is predominantly for the employer’s or the worker’s benefit.<sup>93</sup>

In a recent example, a hotel maintenance worker brought FLSA and New York State wage claims for unpaid wages and overtime where the worker was required to be on call at the hotel many days and nights during each week.<sup>94</sup> The worker was required to stay on the premises during the on-call time, and although he could socialize at the hotel while waiting for assignments, the court found those facts insufficient to render the on-call time

<sup>88</sup> *See id.*

<sup>89</sup> 323 U.S. 126 (1944).

<sup>90</sup> 323 U.S. 134 (1944).

<sup>91</sup> *See Armour*, 323 U.S. at 134; *Skidmore*, 323 U.S. at 136.

<sup>92</sup> *Skidmore*, 323 U.S. at 136–37 (“Whether in a concrete case [waiting] time falls within . . . the Act is a question of fact to be resolved by appropriate findings of the trial court.”). *See also FLSA Hours Worked Advisor: On-Call Time*, U.S. DEP’T OF LABOR, <http://www.dol.gov/elaws/esa/flsa/hoursworked/screenER80.asp> (last visited July 24, 2013), *archived at* <http://perma.cc/F97U-5YJY> (“Whether hours spent on-call is hours worked is a question of fact to be decided on a case-by-case basis. All on-call time is not hours worked.”). The Department of Labor’s Wage and Hour Division has interpreted the FLSA’s requirement that an employee must be compensated for “all hours worked” to require compensation for “(a) [a]ll time during which an employee is required to be on duty or to be on the employer’s premises or at a prescribed workplace”; and “(b) all time during which an employee is suffered or permitted to work[,] whether or not [the employee] is required to do so.” 29 C.F.R. § 778.223 (2014). Therefore, “working time is not limited to the hours spent in active productive labor, but includes time given by the employee to the employer even though part of the time may be spent in idleness.” *Id.* State wage and hour laws follow similar contours. *See, e.g.*, ARIZ. ADMIN. CODE § 20-5-1202 (2013) (“‘On duty’ means time spent working or waiting that the employer controls and that the employee is not permitted to use for the employee’s own purpose.”).

<sup>93</sup> *See, e.g.*, *Renfro v. Cty. of Emporia*, 948 F.2d 1529, 1536 (10th Cir. 1991); *Cent. Mo. Tel. Co. v. Conwell*, 170 F.2d 641, 646 (8th Cir. 1948); *Campbell v. Jones & Laughlin Steel Corp.*, 70 F. Supp. 996, 998 (W.D. Pa. 1947).

<sup>94</sup> *See Moon v. Kwon*, 248 F. Supp. 2d 201, 229 (S.D.N.Y. 2002) (“Moon claims that nearly all of the time spent at the hotel during the night-time hours is compensable, since he was ‘never off duty’ and often slept in the basement near the boiler, which interrupted his sleep.”).

his own.<sup>95</sup> Concluding that the worker's waiting time was essentially working time, the court awarded the worker over \$350,000 in damages.<sup>96</sup>

Because "on-call" wage claims such as these are heavily fact-dependent, labeling particular types of waiting time as *a priori* compensable or non-compensable is difficult. Nevertheless, three rough generalizations are possible. First, workers who are regularly employed, and for whom on-call or standby time is inherent in the nature of their job, may be compensated for that time.<sup>97</sup> For example, courts have deemed compensable the time spent "engaged to be waiting" by private firemen, private security guards, watchmen, and messengers, but these holdings are mostly from the 1940s, 1950s, and 1960s.<sup>98</sup> More recently, courts have been reluctant to compensate time spent waiting by public firemen and bus and truck drivers,<sup>99</sup> and on-call or standby time spent by maintenance employees has been held to be non-compensable.<sup>100</sup>

Second, if a worker is regularly employed and forced to spend time waiting due to unanticipated work stoppages, including mechanical and equipment breakdowns, that waiting time may be compensable.<sup>101</sup> Third, workers employed on an irregular basis, such as on-call workers who voluntarily report, and thereafter spend significant amounts of time waiting for active work to become available, will not be compensated for that waiting time.<sup>102</sup>

At first glance, this departure from the FLSA's focus on compensation for work actually performed would seem to open the door to claims by workers who are called in or sent home from work unexpectedly. Indeed, many service workers in a just-in-time economy, who may be required to report to work at a moment's notice, are functionally "engaged to be waiting" under the compensability factors. For example, some retail workers report having to "attend on-call shifts . . . in order to keep [their] job."<sup>103</sup>

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<sup>95</sup> *Id.* at 230.

<sup>96</sup> *Id.* at 238.

<sup>97</sup> See, e.g., Elizabeth D. Feigin, Note, *Achieving Justice for On-Call Workers: Amending the Fair Labor Standards Act*, 84 IOWA L. REV. 351, 352 (1999); Loren Schwartz, Comment, *Reforming the Fair Labor Standards Act: Recognizing On-Call Time as a Distinct Category of Compensable Work*, 40 U.S.F. L. REV. 217, 224 (2005).

<sup>98</sup> See *Armour & Co. v. Wantock*, 323 U.S. 126, 134 (1944) (holding private firefighters' waiting time, during which they were subject to the employer's call and confined to the employer's premises, to be compensable); *Loveday v. Camel Mfg. Co.*, 326 F. Supp. 1388, 1388 (E.D. Tenn. 1970) (holding night watchman's meal break, during which he was "subject to call by the employer," to be compensable); *Walling v. Allied Messenger Serv., Inc.*, 47 F. Supp. 773, 779 (S.D.N.Y. 1942) ("Time spent by defendants' messenger employees in waiting for calls is time worked and must be compensated for according to the provisions of the Act.").

<sup>99</sup> E.g., *Largent v. E. Ala. Water, Sewer, & Fire Prot. Dist.*, 330 F. Supp. 2d 1252, 1264 (M.D. Ala. 2004).

<sup>100</sup> See *Cannon v. Vineland Hous. Auth.*, 627 F. Supp. 2d 171, 176–80 (D.N.J. 2008).

<sup>101</sup> See, e.g., *Wirtz v. Sullivan*, 326 F.2d 946, 948–49 (5th Cir. 1964) (holding that time sawmill employees spent waiting during breakdowns at mill were compensable).

<sup>102</sup> See *Irwin v. Clark*, 400 F.2d 882, 883–84 (9th Cir. 1968).

<sup>103</sup> Freleng, *supra* note 12.

Short time windows for reporting to work, such as the one-hour advance notice described by the Urban Outfitters worker above, also impede a worker's ability to make her leisure time her own.

However, courts' on-call determinations thus far have not addressed service workers subject to just-in-time scheduling practices. And given the limitations that courts have placed on the compensability of on-call waiting time over the last several decades, the likelihood that courts will begin to compensate low-wage workers for the instability caused by unexpected call-ins and send-homes is slim.<sup>104</sup> As one commentator has observed, "under the [FLSA], even in extraordinary circumstances, courts do not generally award compensation for time spent on call."<sup>105</sup> Winning on-call pay would likely be particularly difficult for hourly service workers who are subject to last minute call-in practices because many of them are never formally placed on on-call or standby status.<sup>106</sup> As a result, there is never a clear set of restrictions placed on their time and location of the sort that courts recognize as indicators of compensable on-call time.<sup>107</sup> Instead, workers are broadly expected to make themselves generally available for a last minute call-in to work in order to keep their jobs.<sup>108</sup>

Whereas the FLSA offers no remedy to workers like Jackie and the Urban Outfitters employee, two other sources may provide a legal remedy: contractual guaranteed-pay provisions under unions' CBAs and states' guaranteed-pay laws. States and localities can go above the FLSA "floor" in providing additional protections,<sup>109</sup> while unions are free to seek more

<sup>104</sup> See, e.g., Feigin, *supra* note 97, at 355 ("While on-call employees must conform to the restrictions contained in their employer's on-call policy, these restrictions do not generally amount to compensable 'work' under the FLSA"). Part V, *infra*, discusses a different possible interpretation of the FLSA's on-call analysis to bring workers subject to call-in practices within the ambit of the statute.

<sup>105</sup> Feigin, *supra* note 97, at 351.

<sup>106</sup> See Lambert, *supra* note 3, at 1217 (describing how many workers were expected to be available "at virtually any time of the day or night" and "would need to prepare for seven days of work, just in case").

<sup>107</sup> Cf., e.g., *Renfro v. Cty. of Emporia*, 948 F.2d 1529, 1536 (10th Cir. 1991); *Cent. Mo. Tel. Co. v. Conwell*, 170 F.2d 641, 646 (8th Cir. 1948); *Campbell v. Jones & Laughlin Steel Corp.*, 70 F. Supp. 996, 998 (W.D. Pa. 1947).

<sup>108</sup> See Lambert, *supra* note 3, at 1217 (describing employers' expectation of "open availability"); see also Lai & Baum, *supra* note 26, at 88 (describing restaurant policy that conditioned waitstaff's employment on workers' open availability for unexpected call-ins).

<sup>109</sup> The FLSA expressly states that it does not preempt state or local laws granting broader minimum or overtime wage rights. 29 U.S.C. § 218(a) (2012); see also 29 C.F.R. § 778.5 (2014). Additional wage rights provided by some states include (1) a minimum wage rate higher than that of the FLSA (see U.S. DEP'T OF LABOR, WAGE AND HOUR DIV., *Minimum Wage Laws in the States* (Jan. 1, 2015), <http://www.dol.gov/whd/minwage/america.htm>, archived at <http://perma.cc/47VR-4NA7> (mapping states with minimum wage rates higher than the federal level)); (2) "daily" overtime for long work days (e.g., CAL. LAB. CODE § 510(a) (2013) (requiring compensation at overtime rate for each hour over eight worked in a day)); (3) "spread of hours" pay, such as one extra hour's minimum wage for each day of ten or more work hours (e.g., N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.4 (2013)); and (4) statutory damages and/or attorney's fees for any unpaid wages (e.g., R.I. GEN. LAWS § 28-14-19.2 (2013) (allowing workers and their representatives "aggrieved by the failure to pay

worker-protective terms of employment as part of their contractual collective bargaining agreements. The following Part examines guaranteed-pay provisions in CBAs and state statutes and regulations as written and as implemented in decisions by labor arbitrators, the National Labor Relations Board (“the Board”), and the courts.<sup>110</sup> It considers the protections’ coverage, exceptions, and exemptions. The subsequent Part examines the effectiveness of guaranteed-pay provisions in stabilizing low-wage work in today’s just-in-time economy.<sup>111</sup>

#### IV. REGULATING WORK HOURS THROUGH UNION CONTRACTS AND STATE LAWS

Guaranteed-pay protections in both union contracts and state laws fall into two categories: call-in pay (also known as call-back pay) and send-home pay (also known as reporting or show-up pay). Call-in protections require a minimum number of hours of pay for workers who are called to their jobs during times when they are not otherwise scheduled to work. Workers who are called in are paid either for their actual number of hours worked or the guaranteed minimum, whichever is greater. Similarly, send-home provisions require a minimum number of hours of pay for workers who appear for a scheduled shift but are then sent home early. Again, workers are entitled to pay for the greater of their actual hours worked or the statutory, regulatory, or contractual minimum.

Both types of guaranteed-pay provisions protect workers’ expectations about their labor hours: “A call-in pay clause protects the employee’s expectation that leisure time will be available during off-duty hours. A send-home

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wages” to collect back pay, compensatory damages, liquidated damages at an amount twice back pay, equitable relief, and attorneys’ fees and costs).

<sup>110</sup> Disputes arising under collective bargaining agreements can be resolved by a variety of adjudicators: labor arbitrators, Administrative Law Judges working under the auspices of the National Labor Relations Board, and federal courts. See *Unfair Labor Practice Process Chart*, NAT’L LABOR RELATIONS BD., <http://nlrb.gov/sites/default/files/attachments/basic-page/node-3339/process-1.png> (last visited Oct. 4, 2014), archived at <http://perma.cc/6L4A-YLKT>.

<sup>111</sup> Part IV, *infra*, does not address other possible sources of call-in and send-home protection, including individually negotiated employment contracts (sometimes called employment or wage agreements), minimum-pay guarantees voluntarily provided by employers, or arguments made under theories of quasi-contract or promissory estoppel. Though individualized contracts and voluntary-pay guarantees may provide workers protection against unpredictable work hour fluctuations and income instability, they are not readily accessible for analysis. Moreover, although workers might bring a quasi-contract or promissory estoppel suit to enforce an employer’s promises about work hours or scheduling, unless they possess a written employment contract with minimum-hours guarantees (a rarity in low-wage, non-union workplaces), such a claim would likely be difficult to win. See, e.g., *Ayers v. Marsh & McLennan Cos.*, No. 2:03-2239, 2004 U.S. Dist. LEXIS 29103, at \*6–7 (S.D. W. Va. Dec. 30, 2004) (describing a worker’s burden in such circumstances as “heavy”). In addition, the discussion in Part IV is confined to non-salaried, hourly-paid employees. Although salaried workers may suffer some of the same challenges as do hourly workers due to unpredictable work schedules (giving rise, in part, to the work-life flexibility debates mentioned in *supra* Part II), they tend not to be covered by the call-in and send-home pay protections addressed by this Article. See *infra* notes 133–138 and accompanying text.

pay clause protects the employee's expectation that work will be available during regularly scheduled hours."<sup>112</sup> Because employers' last minute call-in and send-home practices disrupt these expectations, "[g]uaranteed pay provisions were demanded by unions [and passed into law by the states] to redress the unfairness of this uncertainty."<sup>113</sup> By establishing minimum pay requirements, guaranteed-pay protections also create a disincentive for cost-minimizing employers to manipulate workers' hours in response to changing customer demand.

### A. *Call-In Pay*

Call-in pay protections began to appear in union contracts as early as 1939.<sup>114</sup> In a 1969 decision, the Second Circuit characterized them as among the "most fundamental terms and conditions of employment."<sup>115</sup> Today, they are extremely common union contract terms. Among states, almost half have passed laws that provide for some form of call-in pay, some as early as 1966.<sup>116</sup>

The call-in pay provisions of union contracts require payment of a set number of hours at either the worker's regular pay rate or a premium rate, depending on the contract. For example, one union contract's call-in pay requirement mandates that:

Any employees called from home or while away from their jobs for special or emergency duty between shifts shall be compensated

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<sup>112</sup> Abrams & Nolan, *supra* note 21, at 895; *id.* at 872 (characterizing call-in pay as "represent[ing] . . . the price of availability outside the employee's regular shift" (citation and internal quotation marks omitted)).

<sup>113</sup> *Id.* at 869.

<sup>114</sup> Reuther, *supra* note 23, at 73.

<sup>115</sup> NLRB v. Patent Trader, Inc., 415 F.2d 190, 198 (2d Cir. 1969).

<sup>116</sup> New York's call-in pay law was first enacted in 1966. See N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.3 (2013). Appendix Table 1 provides a complete listing of state call-in pay laws. Statutes or regulations in twenty states and the District of Columbia require some form of call-in pay. Montana and New Mexico are also listed in Table 1, but call-in compensation in those states is paid only where an underlying employment agreement requiring call-in pay exists between the employee and employer (Montana), or where authorized by individual state agencies for state employees (New Mexico). In addition, certain federal executive branch employees are entitled to call-in pay. See 5 C.F.R. § 550.112(h) (2015) ("Irregular or occasional overtime work performed by an employee on a day when work was not scheduled for him, or for which he is required to return to his place of employment, is deemed at least 2 hours in duration for the purpose of premium pay, either in money or compensatory time off."); *id.* § 550.101 (2015) (covered and exempted employees). Finally, some local ordinances provide for call-in or send-home pay for certain municipal workers. See, e.g., Columbus, Ohio, Management Compensation Plan, Attachment to Ordinance 2713-2013 § 7(D)(1)-(2) (Dec. 1, 2014), available at [http://perma.cc/U7A2-Y7FA](http://columbus.gov/WorkArea/DownloadAsset.aspx?id=66622) (requiring three hours of "report-in pay" and either two or four hours of "call-in pay," depending on the circumstances, for certain municipal workers).

for a minimum of (2) hours time, which compensation shall be at the applicable overtime rate.<sup>117</sup>

Similarly, a contract between Verizon New York and the Communications Workers of America requires that the company pay “one-half day’s pay at [the] basic hourly wage rate” when a worker is “required to report . . . for work on a non-scheduled day.”<sup>118</sup>

States’ call-in pay laws generally follow these same contours, requiring a designated number of hours of pay for covered workers who are summoned to work during non-scheduled times. On one end of the spectrum, Delaware provides robust protection, requiring four hours of call-in pay at the regular hourly rate.<sup>119</sup> Similarly, Connecticut requires four hours of straight pay when workers in certain industries are unexpectedly called into work,<sup>120</sup> and New York requires the lesser of four hours or the number of hours in a regular shift, paid at the state minimum wage.<sup>121</sup> Other states provide for three hours,<sup>122</sup> and the majority of states require two hours of guaranteed pay, some at the regular hourly rate, and others at the premium time-and-a-half overtime rate.<sup>123</sup> At the bottom end of the scale, two states provides one hour of guaranteed pay: New Jersey and Maryland.<sup>124</sup> Finally, some state laws do not create specific hours guarantees, but instead leave the decision up to individual employers’ determinations,<sup>125</sup> or provide only for called-in workers’ travel time, rather than a set number of hours.<sup>126</sup>

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<sup>117</sup> Agreement Between Amalgamated Sugar Co. and Local Unions Nos. 282G, 283G, 284G & 290G, Bakery, Confectionary, Tobacco Workers & Grain Millers Int’l Union, art. 5.5(a) (Aug. 1, 2000), available at <http://www.irl.berkeley.edu/library/pdf/0012.pdf>, archived at <http://perma.cc/2MR8-B6T5>.

<sup>118</sup> Agreement Between Verizon New York, Inc., et al. and Commc’ns Workers of Am., art. 19.09 (Aug. 6, 2000), available at <http://www.irl.berkeley.edu/library/pdf/0172.pdf>, archived at <http://perma.cc/X4Z9-QMLG>.

<sup>119</sup> 19 DEL. ADMIN. CODE § 3001-5.16.1 (2013).

<sup>120</sup> See, e.g., CONN. AGENCIES REGS. § 31-62-D2(d) (2014) (providing for four hours of call-in pay for workers in mercantile trade).

<sup>121</sup> See N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.3 (2013).

<sup>122</sup> E.g., MICH. CIVIL SERV. R. 5-4.4(b) (2013); N.H. CODE ADMIN. R. ANN. PER. 903.06 (2013).

<sup>123</sup> Compare, e.g., ARK. CODE ANN. § 21-5-221(k)(3)(C)(i) (West 2013) (two hours at regular rate) with NEV. ADMIN. CODE § 284.214(1) (2013) (two hours at premium overtime rate).

<sup>124</sup> See N.J. ADMIN. CODE § 12:56-5.5(a) (2013) (one hour at regular rate); MD. CODE REGS. 17.04.02.12(A) (2013) (requiring one hour of call-in pay plus travel time).

<sup>125</sup> E.g., 25 N.C. ADMIN. CODE 1.D.1504(a) (2013) (Office of State Human Resources determines on-call or emergency callback compensation based on prevailing practices in the applicable labor market); cf. N.M. CODE R. §1.7.4.15(B) (LexisNexis 2014) (permitting state agency to establish a minimum number of call-in pay hours “in accordance with [its] policy”).

<sup>126</sup> ILL. ADMIN. CODE tit. 56, § 210.110 (2013) (providing, as an example of compensable time, an employee’s travel time when she must report “in response to an emergency call back to work outside . . . her normal work hours”); OR. ADMIN. R. 839-020-0045(2) (2013) (requiring compensation for travel time “spent in excess of time spent in normal home-to-work travel” when an employee “has left the employer’s premises or job site after completing the

Interpretation of CBA and state law call-in pay provisions varies across courts, the Board, and labor arbitrators. Adjudicators have reached differing conclusions, for example, on the threshold issue of what counts as being “called in” to work. Interpreting union contracts, some arbitrators have decided that workers who clock out, but are then required to stay on the employer’s premises to complete additional work, count as being “called in,” while others require that workers physically leave the work site and then return.<sup>127</sup> Similarly, Delaware and Maryland’s laws apply only when a worker has physically left the work site and then returned pursuant to a call-in.<sup>128</sup> Location also matters with respect to work performed remotely: Both Nevada’s call-in pay law and some labor adjudicators have adopted a bright-line rule excluding work that a “called-in” employee performs from home.<sup>129</sup> Finally, in order for a call-in provision to apply, workers need actually to accept their employer’s call to work. An employer’s call alone, even if it is quite disruptive, does not trigger a call-in pay requirement if the worker declines to report.<sup>130</sup>

When a worker is properly called back to the employer’s premises, however, adjudicators are often quite generous in granting call-in pay. For example, arbitrators in labor disputes have held that workers called in to participate in disciplinary investigations or to provide testimony in court are entitled to call-in pay, even though they did not actually perform any work.<sup>131</sup>

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day’s work and is subsequently called out to travel [a distance of at least thirty miles from her employer’s place of business] to perform an emergency job”).

<sup>127</sup> See *Fyfe v. City of Fort Wayne*, 241 F.3d 597, 600 n.2 (7th Cir. 2001) (“It is unclear why Zettle received ‘call in’ pay instead of the regular overtime rate of time and one-half. ‘Call in’ pay, as we read the collective bargaining agreement, is required only when an employee is called to work by supervisors at a time when he or she is not otherwise scheduled to work. As Fyfe points out, there is no evidence that Zettle was called to work from home, as opposed to merely staying at work at the end of her shift to complete the spraying.”). Compare, e.g., *Joseph T. Ryerson & Sons*, 97 Lab. Arb. Rep. (BNA) 1187, 1188 (1991) (Imundo, Arb.) (awarding call-in pay to worker who had remained on the premises after clocking out to complete work at his employer’s request because the employer’s “request was an imposition on [the worker’s] personal time whether or not he had left plant”), with *Gen. Am. Transp. Corp.*, 73 Lab. Arb. Rep. (BNA) 478, 480 (1979) (Caraway, Arb.) (deciding that “where the employee [wa]s physically present on the Company’s premises” when he was called back to work, he could not demand four hours of call-in pay, but was limited to pay for the thirty minutes he actually worked).

<sup>128</sup> 19 DEL. ADMIN. CODE § 3001-5.16.1 (2013); MD. CODE REGS. 17.04.02.12(A) (2013).

<sup>129</sup> NEV. ADMIN. CODE § 284.214(2)(e) (2013); e.g., *Dep’t of Veterans Affairs*, 114 Lab. Arb. Rep. (BNA) 1665, 1669 (2000) (Benedetto, Arb.).

<sup>130</sup> See *Sw. Gas Corp.*, 119 Lab. Arb. Rep. (BNA) 1284, 1288 (2004) (Bognanno, Arb.) (holding that a service technician for a gas company who was called at 5:00 AM for an unscheduled shift, but refused, “was not assigned work, nor was his time otherwise restricted by the Company,” meriting no call-in pay).

<sup>131</sup> *Mobil Oil Corp.*, 76 Lab. Arb. Rep. (BNA) 3, 6 (1981) (Allen, Arb.); see also *Cnty. of Somerset*, 126 Lab. Arb. Rep. (BNA) 1219, 1225 (2009) (Miles, Arb.) (awarding four hours of call-in pay to correctional officers subpoenaed to testify in legal proceedings where testimony was considered part of officers’ jobs).

Whereas union contracts apply to all workers in a particular bargaining unit,<sup>132</sup> many states' call-in pay laws contain significant carve-outs and exceptions that exempt many categories of workers from coverage. A large majority of state call-in pay laws apply only to state civil service employees,<sup>133</sup> and Connecticut's law limits coverage to two specific industries.<sup>134</sup> Further, some states allow call-in pay only for those employees who are already held in an "on-call" or "standby" status by their employers.<sup>135</sup> Nevada's call-in regulation, however, takes the opposite approach, explicitly excluding any "[e]mployee who is called into work while on standby status,"<sup>136</sup> as do the regulations of four other states.<sup>137</sup> Finally, some states' call-in pay laws apply only to those workers who also qualify for overtime under the FLSA, while some also allow overtime-exempt employees to collect call-in pay with approval by employers.<sup>138</sup>

In addition to carving out certain categories of workers, state call-in pay laws contain a grab bag of other exemptions. Nevada denies call-in pay to workers who are asked to report within an hour of their shift's normal start time, or if the time for beginning call-in work is set at the employee's request.<sup>139</sup> New Jersey exempts employers that have already given a worker "the minimum number of hours of work agreed upon" before the day of the call-in.<sup>140</sup> Oklahoma allows employers to issue "compensatory time in lieu of cash payment."<sup>141</sup>

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<sup>132</sup> More specifically, a CBA applies to all workers in a particular "bargaining unit," whether or not a given worker has actually joined the union. *See Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 739 (1988) ("[T]he union is empowered to bargain collectively with the employer on behalf of all employees in the bargaining unit over wages, hours, and other terms and conditions of employment . . .").

<sup>133</sup> *See generally* Appendix Tables 1 & 2. Other states require call-in pay for subcategories of state workers, such as public university employees. *See, e.g.*, UNIV. OF MINN. CIVIL SERV. EMP'T R. 10.5.1-4, *available at* <http://www1.umn.edu/ohr/policies/governing/civilrules/rule10> (last modified Feb. 23, 2012), *archived at* <http://perma.cc/KM2K-4FKH> (requiring two hours of call-in pay at overtime rate). Because these kinds of call-in pay guarantees apply to relatively small groups of workers, Appendix Tables 1 & 2 do not include them.

<sup>134</sup> *See* CONN. AGENCIES REGS. § 31-62-D2(d), -E1(b) (2014) (providing for two or four hours of call-in pay for workers in mercantile trade and restaurant occupations, respectively).

<sup>135</sup> *E.g.*, ARK. CODE ANN. § 21-5-221(m)(3)(C)(i) (West 2013); D.C. MUN. REGS. tit. 6 § 1137.6 (2013); OKLA. STAT. § 74-840-2.29 (2013); OKLA. ADMIN. CODE § 260:25-7-16 (2014). North Carolina's law applies to state employees on on-call or emergency callback status, but the Office of State Human Resources determines the number of guaranteed hours based on "prevailing practices in the applicable labor market." 25 N.C. ADMIN. CODE 1.D.1504(a) (2013).

<sup>136</sup> NEV. ADMIN. CODE § 284.214(2)(a) (2013).

<sup>137</sup> CAL. CODE REGS. tit. 8, §§ 11010-11150 (subd. 5(D) of each section) (2013); KAN. ADMIN. REGS. § 1-5-25 (2013); MICH. CIVIL SERV. R. 5-4.4(a) (2013); WASH. ADMIN. CODE § 357-28-185(2) (2013).

<sup>138</sup> *Compare, e.g.*, 19 DEL. ADMIN. CODE § 3001-5.16.1 (2013) (FLSA overtime-eligible state employees) *and* WYO. COMP. POLICY CH. 4 § 7 (2010) (same), *with* 4 COLO. CODE REGS. § 801-3-44 (LexisNexis 2013) (overtime-exempt state employees, when approved by department head).

<sup>139</sup> NEV. ADMIN. CODE § 284.214(2)(f)(1)-(2) (2013).

<sup>140</sup> N.J. ADMIN. CODE § 12:56-5.5(b) (2013).

<sup>141</sup> OKLA. ADMIN. CODE § 260:25-7-16 (2014).

Thus, while call-in provisions in union contracts and state laws share some basic characteristics, the strength of any given call-in pay requirement depends on the extent of its coverage and the breadth of its exceptions. Some provisions, such as Connecticut's, have narrow coverage as written and as applied, extending protection only to certain industries or to certain subcategories of workers.<sup>142</sup> Others have generous coverage as written, but include exceptions that, as applied, may swallow the rule. Oklahoma's substitution of compensatory time for actual payment, for example, may undermine the effectiveness of a call-in pay requirement in stabilizing low-wage workers' income, as compensatory time can be a poor substitute for actual payment of wages.<sup>143</sup>

Interestingly, though CBA call-in pay provisions appear to be in active use by workers and employers, disputes arising under states' call-in pay laws are rarely litigated, and have generated very few published court decisions. The lack of case law could mean that employers are generally complying with the law and issuing call-in pay when required. A more likely explanation, however, is that these laws are underutilized and that call-in pay rights are underenforced. This may be because call-in pay laws tend to apply exclusively to front-line, non-managerial, hourly-paid workers, a group that often lacks knowledge of its legal rights and faces barriers to becoming private rights enforcers.<sup>144</sup> As Charlotte Alexander and Arthi Prasad have demonstrated in their empirical work on workplace law enforcement, low-wage workers often have "gaps in [their] legal knowledge and powerful incentives to stay silent in the face of workplace problems,"<sup>145</sup> including a well-founded fear of retaliation and a belief that "their claim[s] would have no effect."<sup>146</sup> Low-wage, hourly-paid service workers may not know about the rights guaranteed by call-in pay statutes and regulations, or may fear the consequences of enforcing those rights. Indeed, as one California court

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<sup>142</sup> CONN. AGENCIES REGS. § 31-62-D2(d), -E1(b) (2014) (applying only to workers in mercantile trade and restaurant occupations); 25 N.C. ADMIN. CODE 1.D.1504 (2013) (applying only to state employees on on-call status, when approved by each agency's personnel director and the state Office of State Personnel).

<sup>143</sup> See Michael Z. Green, *Unpaid Furloughs and Four-Day Work Weeks: Employer Sympathy or a Call for Collective Employee Action?*, 42 CONN. L. REV. 1139, 1174 n.230 (2010) (explaining that a proposed amendment to the FLSA substituting compensatory time for overtime pay failed to win the support of Democrats and union officials "because it would [have] reduce[d] overtime pay and allow[ed] employers to coerce employees into accepting comp time and lost pay with little enforcement opportunities to protect against such coercion"); David J. Walsh, *The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Worker Rights?*, 20 BERKELEY J. EMP. & LAB. L. 74, 136 (1999) ("[P]rivate sector comp time reveals itself to be a change that is far more in the interests of employers . . . than those of workers. It represents a retreat from an entitlement to overtime pay and a step backward toward more individualized dealings between workers and their far more powerful employers."). The call-in pay requirement for federal executive branch employees also allows substitution of compensatory time for pay. See 5 C.F.R. § 550.112 (2015).

<sup>144</sup> Charlotte Alexander & Arthi Prasad, *Bottom Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1071-73 (2014).

<sup>145</sup> *Id.* at 1072.

<sup>146</sup> *Id.* at 1073.

commented, “[I]t is difficult and daunting for employees to challenge allegedly unlawful practices. This is especially true of low-wage workers, who are disproportionately affected by employers’ increasing demands for non-traditional hours of work.”<sup>147</sup>

Moreover, as discussed further in Part V, both the meager damages available to plaintiffs (the few hours of lost pay) and the absence of attorney’s fee awards may provide little incentive for litigation of call-in pay lawsuits. Regardless of the extent of a call-in law’s coverage, therefore, questions of enforcement may ultimately determine the strength of the protection it offers to workers who face unpredictable work hours and income instability.

### B. *Send-Home Pay*

Whereas call-in pay compensates workers whose expectation of leisure time is interrupted by a return to work, send-home pay “protect employees . . . from the expense and inconvenience of reporting to work . . . who are then later sent home without pay because work became unavailable.”<sup>148</sup> Alongside this compensatory goal, courts have recognized send-home laws’ “corollary purpose of shaping employer conduct,”<sup>149</sup> noting the laws’ ability to “encourage proper notice and scheduling” on the part of employers by penalizing their use of just-in-time scheduling.<sup>150</sup> Send-home pay requirements have been included in union CBAs since at least as early as the 1930s;<sup>151</sup> they have been enacted into law in eight states and the District of Columbia.<sup>152</sup>

Send-home pay requirements in collective bargaining agreements tend to range from two to eight hours, or sometimes a worker’s entire shift.<sup>153</sup> As

<sup>147</sup> *Kamar v. Radioshack Corp.*, No. CV07-2252AHM (AJWx), 2008 U.S. Dist. LEXIS 40581, at \*36–37 (C.D. Cal. May 15, 2008).

<sup>148</sup> *Nashua Young Women’s Christian Ass’n v. N.H. Dep’t of Labor*, 597 A.2d 535, 537 (N.H. 1991) (discussing the compensatory purpose of state send-home pay law).

<sup>149</sup> *Securitas Sec. Servs. USA, Inc. v. Superior Court*, 127 Cal. Rptr. 3d 883, 888 (Cal. Ct. App. 2011) (quoting *Murphy v. Kenneth Cole Prods., Inc.* 155 P.3d 284, 295 (Cal. 2007)).

<sup>150</sup> *Murphy*, 155 P.3d at 295 (quoting *Cal. Mfrs. Ass’n v. Indus. Welfare Comm’n*, 167 Cal. Rptr. 203, 213 (Cal. Ct. App. 1980)); *see also Price v. Starbucks Corp.*, 122 Cal. Rptr. 3d 174, 182 (Cal. Ct. App. 2011) (“The reporting time regulation protects an employee from losing all pay because of scheduling errors.”).

<sup>151</sup> Reuther, *supra* note 23, at 73.

<sup>152</sup> See Appendix Table 2 for the full list of state send-home pay laws. Montana is listed as a ninth send-home pay state, but its regulatory language only takes effect where an underlying employment agreement requiring send-home pay exists between the employee and employer.

<sup>153</sup> *See, e.g., New England Joint Bd. Retail v. Decatur & Hopkins Co.*, 677 F. Supp. 657, 658 (D. Mass. 1987) (quoting CBA that required eight hours of send-home pay regardless of scheduled shift length); *Ich Corp.*, 2000 N.L.R.B. LEXIS 550 at \*40 (2000) (discussing CBA that required “show up pay for an entire shift where an employee is sent home soon after arrival”); Agreement Between Bethlehem Steel Corp. and United Steelworkers of Am., art. VII § 7 (Aug. 1, 1999), available at <http://www.irlle.berkeley.edu/library/pdf/0051.pdf>, archived at <http://perma.cc/JL43-C75A> (requiring a minimum payment of four hours of pay at

with call-in pay, workers who qualify receive the guaranteed block of hours, regardless of their actual hours worked. If they do not qualify for the guarantee, they do not receive any compensation for the disruption and instead are paid at their straight or overtime rate, whichever is applicable, for only their actual hours worked.

State laws also provide varying send-home pay guarantees. In California, the most generous state, workers must receive work for at least half of the hours for which they are scheduled, or are entitled to their full shift's pay, amounting to no more than four and no fewer than two hours.<sup>154</sup> Other states mandate between two and four hours of send-home pay, and some require that a worker first be scheduled for a shift of a certain length in order to become eligible for send-home pay.<sup>155</sup> As with call-in pay, New Jersey's send-home pay law is among the least generous, requiring only one hour of pay.<sup>156</sup> Finally, Oregon's law, which applies only to minors, requires that a worker be provided enough work hours to earn at least half the amount that she would have earned had she been given her scheduled number of hours.<sup>157</sup>

In adjudicating send-home pay disputes, courts, the Board, and labor arbitrators must first decide what counts as "reporting" to work, the trigger for the send-home pay requirement.<sup>158</sup> As in the call-in pay inquiry, location matters. Labor adjudicators have found that workers who are merely held over from a previous shift for extra work, and then sent home earlier than expected, cannot claim send-home pay, as they never "reported" for work in the first place.<sup>159</sup>

In addition to location, adjudicators consider a variety of other factors in determining whether workers have properly "reported." For example, in considering whether to award send-home pay to a worker who had reported for his shift wearing street clothes, attended a safety meeting, and then gone home early, a court asked: "[What was] the custom and practice of the . . .

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applicable regular rate "[i]f an Employee shall be required by the Management to report for work on any day and he shall report at the time and place at which he was required so to report"; Amalgamated Sugar Co. Agreement, *supra* note 117, at art. 5.4 ("An employee called to and reporting for work on his regular shift (unless otherwise instructed) shall be given two (2) hours work, or in lieu of being given that much work, shall be given pay equivalent to the amount he would have received had he worked the two (2) hours.").

<sup>154</sup> CAL. CODE REGS. tit. 8, §§ 11010–11150 (subd. 5(A) of each section) (2013).

<sup>155</sup> CONN. AGENCIES REGS. § 31-62-D2(d), -E1(b) (2014) (four hours for workers in mercantile trade and two hours for workers in restaurant and hotel occupations, respectively); D.C. CODE MUN. REGS. tit. 7, § 907.1 (2013) (fewer of either four hours or the number of hours in employee's scheduled shift); N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.3 (2013) (same); 455 MASS. CODE REGS. 2.03(1) (2013) (three hours if employee scheduled for shift of at least three hours); R.I. GEN. LAWS § 28-12-3.2 (2013) (three hours); N.H. REV. STAT. ANN. § 275:43-a (2013) (two hours).

<sup>156</sup> See N.J. ADMIN. CODE § 12:56-5.5(a) (2013).

<sup>157</sup> OR. ADMIN. R. 839-021-0087(5) (2013).

<sup>158</sup> Abrams & Nolan, *supra* note 21, at 877 ("As might appear obvious, in order to qualify for reporting pay an employee must actually report for work. Reporting is 'a condition precedent to compensation.'") (quoting Hamilton Press, Inc., 65 Lab. Arb. Rep. (BNA) 274, 275 (1975) (Belshaw, Arb.)).

<sup>159</sup> *E.g.*, Sandia Nat'l Labs., 123 Lab. Arb. Rep. (BNA) 779, 782 (2006) (Hoose, Arb.).

facility. For example, what was [the plaintiff's] usual attire at work? What was the customary dress for those attending safety meetings? What does 'report to work' mean? Did [the plaintiff] refuse to start work or stop work of his own volition?"<sup>160</sup>

Even if a worker properly "reports" to work before being sent home, both state laws and contractual send-home pay guarantees commonly include exceptions and exemptions that relieve employers of their obligation to pay. These include notice, where the employer informs the worker that her shift is cancelled before she arrives at work; events outside the employer's control that necessitate an early send-home; and a worker's reassignment to other work for the duration of her shift or, in the alternative, volunteering to leave and waiving her entitlement to reporting pay.

The first exception, notice, receives widely varying contractual, regulatory, and statutory treatment.<sup>161</sup> At one extreme, employers are merely required to use "good faith" or "reasonable" efforts to inform workers of a shift cancellation.<sup>162</sup> These provisions do not require actual notice to workers, but instead focus on the efforts made by the employer. At the other extreme, contracts require actual notice to the worker within a designated time prior to the shift's beginning, or specify in great detail the length and manner of the advance notice.<sup>163</sup> For example, Oregon's send-home pay law mandates a specific procedure for issuing notice, requiring employers to formulate a notice policy, post it at the work site, inform minor workers of the

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<sup>160</sup> *Arnold v. Cabot Corp.*, No. 1:99CV75, 2000 U.S. Dist. LEXIS 7709, at \*5–6 (N.D. W. Va. May 8, 2000).

<sup>161</sup> *Abrams & Nolan*, *supra* note 21, at 892 ("Many reporting pay provisions make reference to the issue of notice. Some of these clauses expressly oblige management to notify employees of the lack of work. Others excuse payment of the guarantee when management has used reasonable means to notify employees not to report. Still other clauses excuse the guarantee only if employees have received actual notice not to report. An arbitrator must read and apply the particular notification requirement or notice excuse adopted by the parties in order to resolve their reporting pay dispute.")

<sup>162</sup> *See, e.g.*, N.H. REV. STAT. ANN. § 275:43-a (2013) (requiring a "good faith effort" to notify workers not to report to work); Agreement Between Ass'n of Bituminous Contractors and United Mine Workers of Am., art. 8(b) (Feb. 7, 2002), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1795&context=blscontracts>, archived at <http://perma.cc/RV8V-MBXA> ("Notification of employees not to report means reasonable efforts by management to communicate with the employee.")

<sup>163</sup> *E.g.*, Agreement Between Local Union No. 631, Associated Gen. Contractors Ass'n and Int'l Bhd. of Teamsters, art. XII(E)(1) (July 1, 2004), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2145&context=blscontracts>, archived at <http://perma.cc/6Z96-7NDE> (requiring payment of two hours of send-home pay "unless [the worker] has been notified before the end of the last preceding shift not to report"); Agreement Between Kelly-Springfield Tire Co. Freeport Plant and Local Union No. 745, United Steelworkers of Am.; art. V(2)(b) & (d) (Apr. 7, 2004), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1122&context=blscontracts>, archived at <http://perma.cc/V3PW-W5MX> (allowing notice to be communicated via "verbal instruction to the employee"; a notice posting and notification to the Department Steward "at least one hour prior to the end of the last shift scheduled for the employees involved"; via "[t]elephone notification to an employee prior to the time he normally leaves home for work"; or via announcement on five specifically listed radio stations).

policy on their first day of work, and execute the policy in the event of a cancellation “so as to give the minor notice before the minor must leave home to travel to work.”<sup>164</sup> Some provisions also allow for notice by proxy, deeming sufficient notice given to a worker representative.<sup>165</sup>

Though these notice provisions do not explicitly regulate employers’ scheduling practices, they do so indirectly. The more onerous a notice provision is — the harder it is for an employer to give sufficient notice in order to escape send-home pay obligations — the more careful an employer might be in setting workers’ schedules. The more lenient a notice provision, the more likely an employer might be to play fast and loose with scheduling and change a worker’s shift at the last minute. If, for example, an employer is exempted from send-home pay requirements merely by making a good faith or reasonable effort to notify a worker of a cancelled shift, or simply by making a radio announcement, then the employer may be more willing to cancel shifts unexpectedly. These lenient notice provisions may undermine the effectiveness and deterrent power of send-home pay guarantees.

The second set of send-home pay exemptions and exceptions focuses on the reasons that workers are sent home.<sup>166</sup> These exceptions apply when workers report to work, but their labor is not needed for reasons that are outside the employer’s control. As labor law scholars Roger Abrams and Dennis Nolan put it, “[p]arties to a collective bargaining agreement [and state send-home pay laws] generally recognize these unusual situations — where it cannot be said that the employer mismanaged the scheduling of work — by including express exceptions to the send-home pay clause.”<sup>167</sup> Common exceptions in both CBAs and state laws include work stoppages and labor disputes, storms, flooding, fire, power or utility outages, unforeseeable machinery breakdown, and other “acts of God.”<sup>168</sup>

Because the exempting event must be beyond the employer’s control, the question of control has been the subject of dispute, and influences employers’ operational decisions. For example, an employer may not claim an exception to a send-home pay requirement if workers are sent home due to

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<sup>164</sup> OR. ADMIN. R. 839-021-0087(6)(d) (2013).

<sup>165</sup> See, e.g., Agreement Between Brown & Williamson Tobacco Corp. and Local Union No. 362-T, Bakery, Confectionary, Tobacco Workers & Grain Millers Int’l Union, art. XXIV (Sept. 1, 1996), available at <http://www.irlc.berkeley.edu/library/pdf/0226.pdf>, archived at <http://perma.cc/JL3C-7DZA> (“Notification through bulletin board notices or through the GroupLeader [sic] shall be deemed sufficient[.]”).

<sup>166</sup> See Abrams & Nolan, *supra* note 21, at 879.

<sup>167</sup> *Id.* at 871.

<sup>168</sup> See, e.g., CAL. CODE REGS. tit. 8, §§ 11010–11150 (subd. 5(C) of each section) (2013) (listing various exempting circumstances, including threats to people or property at the work site, utility failures, and acts of God); OR. ADMIN. R. 839-021-0087(7) (2013) (listing, as exempting circumstances, snowstorms, flooding, power outages, and unforeseeable equipment failures); Bethlehem Steel Agreement, *supra* note 153, at art. 7 § 7(c) (relieving employer of send-home pay obligation if work is unavailable “by reason of any strike or other stoppage of work in connection with any labor dispute or any failure of utilities beyond the control of Management or Act of God”).

electrical problems, where the employer had not had the electrical system inspected in twelve years.<sup>169</sup> Likewise, where an employer opted into a utility contract that warned that service interruptions might occur without notice, the employer could not claim such interruptions as a reason not to provide send-home pay.<sup>170</sup> Finally, an employer who sent workers home early due to bad weather, but had made no earlier attempts to learn the weather forecast, could not claim an exception to send-home pay rules.<sup>171</sup> These sorts of limits on the send-home pay exception may influence employers to proceed with prudence in making maintenance decisions, choosing suppliers, and monitoring the weather — all in an attempt to preserve their ability to claim a send-home pay exception.

Third, some union contracts and state laws relieve an employer of send-home pay liability if the worker refuses to perform the assigned work, thereby creating a lack of work due to her own actions, rather than the employer's.<sup>172</sup> Some union contracts also allow workers to “individually waive [the send-home pay] guarantee and leave work upon being released” rather than be transferred to other work for the duration of their scheduled shift.<sup>173</sup>

In addition to these three exceptions, like call-in pay entitlements, many states' send-home pay laws apply only to certain groups of workers. Connecticut's laws apply only to workers employed by mercantile establishments and restaurants.<sup>174</sup> Massachusetts' law does not apply to charitable organizations, while New Hampshire's law exempts employees of counties and municipalities.<sup>175</sup> Oregon's law covers only minors, and California's law leaves out workers who are already on paid standby status.<sup>176</sup>

Unlike call-in pay laws, however, states' statutory and regulatory send-home protections have generated some litigation, an indication that workers, or perhaps the plaintiffs' employment bar, may be more aware of the rights

<sup>169</sup> See *Metalloy Corp.*, 109 Lab. Arb. Rep. (BNA) 1093, 1100 (1997) (Borland, Arb.).

<sup>170</sup> *Indus. Alloys Inc.*, 116 Lab. Arb. Rep. (BNA) 1226, 1231 (2002) (Kaufman, Arb.).

<sup>171</sup> *Thiokol Corp.*, 103 Lab. Arb. Rep. (BNA) 1025, 1031 (1994) (Goodstein, Arb.).

<sup>172</sup> *E.g.*, Associated Gen. Contractors Ass'n Agreement, *supra* note 163, at art. XII(E)(3) (disqualifying workers from receiving reporting pay who “are not able to perform the job to which they are referred because of their own lack of qualifications or for some other reason which is the workman's own responsibility”); CONN. AGENCIES REGS. § 31-62-E1(b) (2014) (“If the employee is either unwilling or unable to work the number of hours necessary to insure the two-hour guarantee, a statement signed by the employee in support of this situation must be on file as a part of the employer's records.”).

<sup>173</sup> Agreement Between Legacy Emanuel Hosp. & Health Ctr. and Local Union No. 49, Serv. Employees Int'l Union, art. 6.1 (July 1, 2011), available at [http://www.seiu49.org/files/2011/09/2011\\_EmanuelContract.pdf](http://www.seiu49.org/files/2011/09/2011_EmanuelContract.pdf), archived at <http://perma.cc/7FUC-V4PW>; see also *Kelly-Springfield Tire Co. Agreement*, *supra* note 163, at art. V(2)(a) (“If the Company offers the employee the choice of other work or going home and he elects to go home, he forfeits [the send-home pay guarantee].”).

<sup>174</sup> CONN. AGENCIES REGS. § 31-62-D2(d), -E1(b) (2014).

<sup>175</sup> 455 MASS. CODE REGS. 2.03(1) (2013); N.H. REV. STAT. ANN. § 275-43a (2013).

<sup>176</sup> OR. ADMIN. R. 839-021-0087 (2013); CAL. CODE REGS. tit. 8, §§ 11010–11150 (subd. 5(D) of each section) (2013).

conferred by these laws.<sup>177</sup> Most of the lawsuits raise claims under California's send-home pay law, and most center on a single issue: the relevance to the send-home pay inquiry of a worker's expectation of the number of hours she will work on the day she is sent home.<sup>178</sup> California's send-home pay law applies to any employee who is required to report for work and does report, but receives "less than half said employee's usual or scheduled day's work."<sup>179</sup> The application of the law hinges on the length of the employee's scheduled shift that day or, as some courts have characterized it, "the employee's expectation of the hours in the customary workday."<sup>180</sup> These courts have held that plaintiffs who reported work for meetings, rather than for normal productive activity, and then were sent home could not claim send-home pay because they did not arrive at their job expecting to work.<sup>181</sup>

Thus, the legal remedies for the inadequate, variable, and unpredictable work hours caused by just-in-time scheduling are marked by variety. They vary in coverage across unions, workplaces, and states. They vary in their exceptions and exemptions, and in the extent to which they are enforced via union grievance procedures and lawsuits. Within this variation, there are pockets of real protection for workers — for those who are in unions, or who work in states with robust guarantees for *both* call-in and send-home pay — but there are also pockets of no protection, where workers bear the brunt of employers' strategic risk-shifting. The final Part assesses this landscape, considering the ability of these legal remedies to create greater stability in low-wage service work.

## V. ASSESSMENT OF EFFECTIVENESS AND PROPOSALS FOR REFORM

The foregoing Parts have highlighted some shortcomings of CBAs' and states' guaranteed-pay provisions: relatively narrow categories of workers who receive protection; exceptions and exemptions that may swallow the rule; possible problems with enforcement; and underuse, as indicated by the paucity of court decisions arising under state laws.

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<sup>177</sup> One California decision addressed the question of whether that state's send-home pay law even permitted private lawsuits, and held that it did. *See Kamar v. Radioshack Corp.*, No. CV07-2252AHM (AJWx), 2008 U.S. Dist. LEXIS 40581, at \*36-37 (C.D. Cal. May 15, 2008). In another California decision, a class of plaintiffs won class certification and a settlement of approximately \$441,000 covering all servers who worked at Olive Garden restaurants who were not paid proper reporting pay. *See Alberto v. GMRI, Inc.*, No. Civ. 07-1895WB-SDAD, 2008 U.S. Dist. LEXIS 91691, at \*20-21 (E.D. Cal. Nov. 12, 2008).

<sup>178</sup> *See, e.g.*, cases cited *infra* notes 180-181.

<sup>179</sup> CAL. CODE REGS. tit. 8, §§ 11010-11150 (subd. 5(A) of each section) (2013).

<sup>180</sup> *Price v. Starbucks Corp.*, 122 Cal. Rptr. 3d 174, 182 (Cal. Ct. App. 2011).

<sup>181</sup> *Id.*; *Johnson v. Sky Chefs, Inc.*, No. 11-CV-05619-LHK, 2012 U.S. Dist. LEXIS 140760, at \*20-21 (N.D. Cal. Sept. 27, 2012) ("Plaintiff here, like the plaintiff in *Price*, has made no allegations that she was scheduled to work or had an expectation of working . . . . The [complaint] alleges simply that Plaintiff 'returned to work for a meeting called by her employer' after a month-long suspension.").

Guaranteed-pay protections may also suffer from additional, structural defects. First, call-in and send-home pay requirements address only one of the three separate problems caused by just-in-time scheduling: inadequate work hours. Guaranteed-pay requirements provide workers with more take-home pay by mandating a minimum number of paid hours in call-in and send-home situations. Nevertheless, no contractual, statutory, or regulatory requirement bars last minute call-in and send-home practices entirely. Instead, CBAs and state laws provide *ex post* compensation to the workers who are called in and sent home unexpectedly. Compensation after the fact may increase workers' pay, but it does not address the disruptive work hour variability and unpredictability that workers like Great Wolf Resorts' Jackie have already experienced by the time they become eligible for compensation.

Guaranteed-pay provisions suffer from a second, related, structural defect with respect to enforcement. Though call-in and send-home pay requirements are primarily compensatory in nature, they also attempt to regulate employer behavior indirectly by raising the cost of just-in-time scheduling practices through private enforcement action. That cost to employers, however, does not take effect until a *worker* decides to take steps to enforce her rights, to engage in a union grievance process, or file a lawsuit. Such steps can be extremely costly, requiring time, financial resources, legal knowledge, belief in the efficacy of the grievance or litigation process, and meaningful protections against retaliation.<sup>182</sup> For the low-wage, hourly-paid service workers who are the subject of this Article, these costs may simply not be worth the benefit of enforcing their call-in or send-home rights, and employers, therefore, may be insufficiently deterred.<sup>183</sup>

Third, there is some risk that guaranteed-pay provisions, if enacted more broadly and enforced more rigorously, might provoke employers to abandon schedules altogether. Most CBA and state call-in and send-home pay requirements take as their starting point a worker's established schedule. For example, Kansas law requires call-in pay when a worker must go to work "on a regular day off" or "after a regular work schedule."<sup>184</sup> Likewise, a typical CBA send-home pay requirement refers to a worker's reporting "at the start of his regular shift."<sup>185</sup> Finally, whether a worker receives compensation under California's send-home pay law hinges largely on her expectation of her work schedule on the day she is sent home. Courts in California have elevated this issue to a pleading requirement necessary to survive a motion to dismiss, stating, for example: "Without an allegation

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<sup>182</sup> Alexander & Prasad, *supra* note 144 (examining barriers to workers acting as private law enforcers).

<sup>183</sup> While some states provide for state labor departments to enforce their guaranteed-pay provisions, there are no reported decisions of cases brought by state agencies to enforce guaranteed-pay laws.

<sup>184</sup> KAN. ADMIN. REGS. § 1-5-25 (2013).

<sup>185</sup> Kelly-Springfield Tire Co. Agreement, *supra* note 163, at art. V(2)(a).

that Plaintiff was either scheduled to or had the expectation of *working a normal shift*, Plaintiff has failed to plead the element of expectation that is needed to claim more than the minimum of two hours of reporting time pay under [the law].”<sup>186</sup>

Given that schedules are a threshold requirement in both the call-in and send-home pay analyses, some employers might decide to avoid guaranteed-pay liability by abolishing schedules altogether and moving to an entirely non-scheduled, on-call model. This is not as farfetched as it might sound: some restaurant managers already maintain a pool of on-call waitstaff ready to come to work when customer demand requires.<sup>187</sup> Similarly, academics writing in the human resources field have suggested that hotels should rely almost entirely on temporary contract workers supplied by an outside agency to fill their front-line service positions, summoning them only “as and when demand requires them so to do.”<sup>188</sup> There is no affirmative legal requirement that employers maintain a schedule, and if employers can steer clear of the FLSA’s relatively lenient compensability requirements for waiting time (see Part III), then they would avoid any penalty associated with such a model.<sup>189</sup>

To mitigate the harm that just-in-time scheduling causes to low-wage workers (and to avoid the “doomsday scenario” of the entirely on-call workplace), state legislatures, Congress, the U.S. Department of Labor (DOL), and worker advocates should pursue the following strategies: (1) strengthen guaranteed-pay provisions in state laws and CBAs; (2) amend the FLSA to penalize employers’ use of fluctuating schedules; (3) adopt a DOL interpretation of “on-call time” under the FLSA that would encompass workers who are unexpectedly called in to work; and (4) continue current union and worker campaigns, and launch new ones, around the importance of stable schedules.<sup>190</sup>

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<sup>186</sup> *Johnson*, 2012 U.S. Dist. LEXIS 140760, at \*21 (emphasis added); see also *Price v. Starbucks Corp.*, 122 Cal. Rptr. 3d 174, 182 (Cal. Ct. App. 2011).

<sup>187</sup> *Haley-Lock* (2012), *supra* note 45, at 459.

<sup>188</sup> *Lai & Baum*, *supra* note 26, at 98.

<sup>189</sup> See, e.g., U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter No. FLSA2008-14NA (Dec. 18, 2008), available at 2008 WL 5483054, at \*2 (“While the FLSA provides many labor standards, it does not generally regulate work schedules and work assignments.”).

<sup>190</sup> An additional avenue for advocacy might be a legal claim of discrimination under Title VII of the Civil Rights Act of 1964, but such a case may be difficult to win. See, e.g., *Nantiya Ruan & Nancy Reichman, Scheduling Shortfalls: Hours Parity as the New Pay Equity*, 59 VILL. L. REV. 35, 57–73 (2014) (discussing possible theories female and minority part-time workers might assert to challenge just-in-time scheduling practices under Title VII, but also the obstacles to successfully proving either disparate treatment or disparate impact). Additionally, focusing on the harms caused exclusively to female workers — while certainly real and consequential — risks obscuring the class-based harms that employers’ call-in and send-home practices create for low-wage workers more generally.

Alternatively, the harms of just-in-time scheduling might be addressed through mitigation — for example, improving access to low-cost, quality childcare, providing income supports to low-wage workers, and expanding public transportation options. A mitigation approach would not address the legality of just-in-time scheduling practices, but it could soften their impacts on workers.

These proposals are justified on at least two grounds. First, some might argue that just-in-time scheduling represents an efficient outcome from an economic perspective, allowing employers to tailor their labor costs to customer demand. This Article demonstrates, however, that last minute call-ins and send-homes in fact allow employers to externalize the true costs of doing business, by shifting risk onto low-wage, hourly-paid workers. In economic terms, this is a negative externality problem, just as when a factory pollutes the air around it, causing community members to develop respiratory diseases, or a homeowner fails to maintain her house, thereby driving down neighbors' property values.<sup>191</sup> Negative externalities create inefficiency, as a party that is the source of externalized costs may overproduce goods or services because externalization keeps the "felt" cost of production artificially low. In the case of just-in-time scheduling, workers' and their families' absorption of their employers' business risks means that employers may make inefficient, or even reckless, planning and strategic decisions that do not fully account for the costs of staffing and scheduling. Regulation is appropriate in such situations to force the factory owner, the negligent homeowner, and the cost-cutting employer to internalize the costs of their actions. A regulatory response is particularly appropriate where, as here, the parties affected by the externality — low-wage, hourly-paid workers — may lack the ability to force change on their own.

Second, just-in-time scheduling practices had their origin in a theory that equates inventory with labor. As outlined in Part I, the just-in-time philosophy originated with the maxim that waste should be eliminated through close management of inventory. But people are not goods, and human dignity demands that some workplace practices yield, even if employers attempt to justify them on economic grounds.<sup>192</sup> For example, child labor practices, though profitable, offend our sense of human rights in the workplace.<sup>193</sup> Likewise, health and safety concerns require expensive mitigation efforts, but our laws nevertheless require such efforts in order to protect workers.<sup>194</sup> Our labor and employment regulations recognize overwork as an evil, and demand premium overtime pay from employers that require such practices.<sup>195</sup> Where the negative human life consequences outweigh economic advantage, law steps in to regulate employers and protect workers. The fact that schedule fluctuations are already regulated by collective bargaining agreements and state statutes evinces their pernicious effects. Just-in-time scheduling should thus be viewed as an affront to workplace fairness

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<sup>191</sup> John A. Henning, Jr., *Mitigating Price Effects with A Housing Linkage Fee*, 78 CALIF. L. REV. 721, 731 (1990) ("An externality arises when the producer of a good imposes a cost on third parties, which he does not pay . . .").

<sup>192</sup> See *supra* notes 31–35 and accompanying text. The negative externalities created by just-in-time scheduling also call into question whether such practices are justified on economic grounds.

<sup>193</sup> 29 U.S.C. § 212 (2012).

<sup>194</sup> *Id.* § 651.

<sup>195</sup> *Id.* § 207(a)(1).

ideals and should be limited, even as the employers that promulgate such practices argue for their continued use as measures to cut costs. Challenging these scheduling practices — along with employers' increasing reliance on part-time, temporary, contingent, and contract labor<sup>196</sup> — is particularly important as the economic climate changes and profitable, but harmful, employment practices become entrenched.

### A. *Broadening State Guaranteed-Pay Laws*

Despite the potential limitations of statutory and regulatory guaranteed-pay provisions outlined above, there is some evidence that state-level call-in and send-home pay requirements can achieve worker-protective outcomes. Anna Haley-Lock studied restaurant workers in Vancouver, British Columbia, where a provincial law guarantees four hours' pay at the minimum wage if a worker is scheduled for a full day of work, and two hours if scheduled for a half day.<sup>197</sup> She found that managers sent waiters home before the end of a scheduled shift much less frequently in Vancouver than in restaurants in Washington and Illinois, states without send-home pay laws.<sup>198</sup> Chain managers in Vancouver were incentivized to be more careful and strategic than their U.S. counterparts in making staffing calculations, taking into account recent and historic shift needs, and having waitstaff engage in side work, such as food preparation or deep cleaning, when business did ebb.<sup>199</sup>

This account of the deterrent effect of guaranteed-pay laws supports expansion of call-in and send-home pay provisions to all states and to broader categories of workers. As described in Part IV, current laws' exceptions, exemptions, and underenforcement by workers limit their effectiveness. While underutilization of the current protections may be addressed by labor advocacy (as discussed in section V.D, *infra*), amending guaranteed-pay laws to broaden their coverage to additional categories of workers would be a positive step in protecting against instability, as would expansion to the dozens of other states that have no such laws on the books. As summarized in Tables 1 and 2 in the Appendix, about half of the states do not have call-in statutes or regulations, and the vast majority of states do not have send-home protections. Twenty-eight states have no form of guaranteed-pay require-

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<sup>196</sup> See sources cited *supra* note 16.

<sup>197</sup> Haley-Lock, *supra* note 3, at 827.

<sup>198</sup> *Id.* at 833 (“Notably, this practice was less commonly reported in Vancouver, where the British Columbia minimum daily pay law limits employers’ freedom to engage in just-in-time staffing adjustments without incurring financial cost.”).

<sup>199</sup> See *id.*

ment at all.<sup>200</sup> Moreover, many states limit their coverage to particular industries or certain subcategories of employees.<sup>201</sup>

Additionally, state laws could be amended to include provisions for higher damages awards and attorneys' fees.<sup>202</sup> As currently written, many state guaranteed-pay laws provide a claim to workers only for the few hours of guaranteed pay that are lost when an employer fails to comply with a call-in or send-home pay requirement. Few rational low-wage workers or plaintiffs' attorneys likely would be willing to expend the time, resources, and effort required to bring a lawsuit over two, three, or four hours of pay. Even fewer workers can be expected to take that step if a worker is required to fund the cost of a lawsuit out of her own pocket. Instituting treble damage awards and allowing fee shifting, in which the losing defendant pays not only the plaintiff's damages but also her attorney's fees, could help eliminate these barriers to enforcement.<sup>203</sup>

While state guaranteed-pay laws do not prohibit last minute call-ins and send-homes outright, they make these practices more expensive, and therefore less attractive, to employers. Spreading call-in and send-home protections across more states and more groups of workers, as well as increasing the costs of noncompliance, could lessen the disruptive effects of just-in-time scheduling on low-wage workers' lives.

### B. Amending the FLSA

Whereas broadening state guaranteed-pay laws would be an important step in reducing employers' reliance on just-in-time scheduling, federal legislation would enact comprehensive, uniform protection for all workers and further incentivize employers to minimize instability in low-wage work. Although the minimum wage has periodically increased,<sup>204</sup> the FLSA has not been amended substantively since 1947.<sup>205</sup> Expanding coverage to protect workers from scheduling instability would recognize the new realities of the

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<sup>200</sup> Those states are Alabama, Alaska, Arizona, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana (*see supra* notes 116 & 152), Nebraska, New Mexico (*see supra* note 116), North Dakota, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin.

<sup>201</sup> *See, e.g.*, 25 N.C. ADMIN. CODE 1.D.1504(a) (2013) (limiting guaranteed pay to state employees on on-call or emergency callback status).

<sup>202</sup> We thank Alex Long for this insight.

<sup>203</sup> Though there is no published case on point, it appears that Rhode Island may be one example of a state that allows prevailing plaintiffs in send-home pay cases to collect liquidated damages and attorneys' fees. *See* R.I. GEN. LAWS § 28-14-19.2 (2013).

<sup>204</sup> *See* 29 U.S.C. § 206(a)(1) (2012) (mandating several yearly increases); *see also Minimum Wage Laws in the States*, U.S. DEP'T OF LABOR (Jan. 1, 2015), <http://www.dol.gov/whd/minwage/america.htm>, archived at <http://perma.cc/ZCF8-3C3T> (showing that many states minimum wage rates are calculated on the basis of a cost-of-living formula).

<sup>205</sup> *See supra* note 71 and accompanying text.

American workplace, and would comport with the FLSA's statutory purpose of protecting workers against exploitive employer policies and practices.<sup>206</sup>

The FLSA could be amended to adopt call-in and send-home pay structures like those in place in state law. With respect to call-in pay, Michigan's civil service regulations provide a model. In Michigan, many state employees who are called in to work unexpectedly are eligible for three hours of guaranteed pay at the premium overtime rate.<sup>207</sup> The two exceptions to the rule would provide some flexibility to employers who are faced with fluctuating customer demand. First, employees who are already on paid standby or on-call status would not receive an additional premium call-in payment, but instead would receive payment only for their on-call hours and actual hours worked. Second, the call-in pay requirement would not apply if workers are called to work within a certain number of hours of their scheduled start time. Michigan's law specifies a three-hour grace period,<sup>208</sup> a proposal more respectful of workers' non-work scheduling needs could be two hours.

With respect to send-home pay, California's law could be duplicated as an amendment to the FLSA. California workers who report to work for a scheduled shift and are then sent home early are entitled to pay at their regular rate for half of their scheduled shift, in any case no fewer than two or more than four hours.<sup>209</sup> Employers are protected via a variety of exceptions,

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<sup>206</sup> In July 2014, companion bills were introduced in the U.S. House and Senate that would have accomplished much of the reform proposed in this section, albeit through novel legislation, rather than through amendments to the FLSA as we suggest. See Schedules That Work Act, S. 2642, 113th Cong. (2014); H.R. 5159, 113th Cong. (2014). The legislation would have given workers the right to request a number of specific schedule terms (*see id.* at § 3); would protect workers from retaliation for such requests, (*see id.* § 5(b)); and, for requests made because of a "serious health condition," caregiving responsibilities, "enrollment in a career-related educational or training program," or a part-time worker's second job, would presumptively *require* the employer to grant the request, absent a "bona fide business reason" (*id.* § 3(c)). The bill also would have required both call-in pay (*see id.* § 4(a)(2) (one hour's worth of wages if a worker is called in with less than twenty-four hours' notice)) and send-home pay (*id.* § 4(a)(1) (four hours of wages)), and would have mandated that employers make shift schedules available with fourteen days' lead time before taking effect (*id.* § 4(c)(2)). See generally NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, SCHEDULES THAT WORK FACT SHEET (July 2014), available at <http://www.nationalpartnership.org/research-library/workplace-fairness/equal-opportunity/schedules-that-work-act-fact-sheet.pdf>, archived at <http://perma.cc/T55U-E583>. Although both bills died in committee, they were an important first step in drawing attention and forging a national solution to scheduling instability and work-hour insecurity. Similar initiatives have been enacted at a local level. In November 2014, San Francisco passed an ordinance requiring chain stores to give two weeks' notice to employees of their schedules and levies a penalty called "predictability pay" if stores fail to do so. San Fran., Cal., Fair Scheduling and Treatment of Formula Retail Employees Ordinance, No. 141024 (Nov. 25, 2014); *see also* Marianne Levine, *San Francisco Passes First-in-Nation Limits on Worker Schedules*, POLITICO (Nov. 25, 2014), <http://www.politico.com/story/2014/11/san-francisco-limits-on-worker-schedules-113177.html#ixzz3OWqgsSLK>, archived at <http://perma.cc/QU93-3VQE>.

<sup>207</sup> MICH. CIVIL SERV. R. 5-4.4 (2013).

<sup>208</sup> *Id.*

<sup>209</sup> CAL. CODE REGS. tit. 8, §§ 11010-11150 (subd. 5(A) of each section) (2013).

including the same exclusion for workers already on paid standby status and in circumstances where the lack of work is beyond the employer's control.<sup>210</sup>

An additional possible FLSA amendment is a mandate that employers adopt a set schedule for workers and notify them at least one month in advance. This one month notice period is quite modest in comparison to the scheduling and notice regimes in place in some European countries: "Danish retail bargaining agreements mandate 16 week advance notice of schedules while German collective bargaining agreements mandate 26 weeks advance notice."<sup>211</sup> Under an amended FLSA, workers who wish to waive this scheduling notice requirement, and to make themselves eligible for paid on-call or standby status, for example, would be free to do so by written agreement with their employer.

Finally, the FLSA could be amended to institute a tiered minimum wage, whereby workers subject to just-in-time scheduling would earn more per hour on a scale dependent on the severity of their schedule fluctuations. These workers would receive a wage premium for the income and scheduling risk they take on, much like the compensating wage differential that some workers in hazardous jobs receive in exchange for facing increased health and safety risks.<sup>212</sup> A tiered minimum wage would also require employers to compensate workers who have to maintain open availability in order to respond to last minute call-ins. Employers would be forced to pay for what they are now getting for free, which is essentially an option on workers' leisure time. Any of these reforms would reduce workers' income instability by establishing an income floor and lessen hours instability by discouraging employers' use of fluctuating schedules.

### C. *Changing the Department of Labor's Interpretation of FLSA "On-Call" Time*

As an alternative to amending the FLSA itself — admittedly a politically challenging proposition — the U.S. Department of Labor ("DOL") might adopt an interpretation of the FLSA that treats workers who are subject to last minute call-in practices as on-call workers. For these workers, the hours spent waiting to be called to work would be compensable. As discussed in Part III, *supra*, courts engage in a fact-intensive inquiry to determine whether workers' waiting time must be paid as working time under

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<sup>210</sup> *Id.* (subd. 5(C)–(D) of each section).

<sup>211</sup> Carré & Tilly, *supra* note 25 at 33; *see also* Watson & Swanberg, *supra* note 61, at 422–35 (identifying voluntary employer practices and public policy options to address employees' scheduling needs, including employer-provided opportunities for input regarding work schedules).

<sup>212</sup> *See* W. KIP VISCUSI, EMPLOYMENT HAZARDS: AN INVESTIGATION OF MARKET PERFORMANCE 241–75 (1979) (showing correlation between both objective and subjective job risk and workers' receipt of compensating wage differentials).

the FLSA.<sup>213</sup> Current case law would likely exclude most workers who are called in to work at the last minute.<sup>214</sup>

To provide greater protection to these workers, the Wage and Hour Division of the DOL might issue a Field Assistance Bulletin<sup>215</sup> clarifying the circumstances under which the time that workers spend waiting, on the chance that they might be called in to work, is compensable. In such an interpretation, the fact that a worker is not formally labeled an “on-call” or “standby” employee should not bar her from being compensated for her waiting time. In addition, if a worker is required to report to work due to a last minute call-in, *or else be fired*, her waiting time should be per se compensable. Such a policy would extend protection to circumstances like those described by Susan Lambert, where retail workers were expected to offer nearly unlimited “open availability” to their employers:

Many employers specified that being available to work a wide span of days and shifts was a necessity for employment at the point of hiring. For one retailer, “open availability” — being willing to work any hours the store is open — was a condition for full-time employment and in all retailers, [human resources] staff said they gave priority when hiring to applicants who could work varying shifts. Managers often expected employees to be available the entire week and scheduled workers accordingly by varying individuals’ work days and shifts. Often this meant that employees would need to be prepared to work at virtually any time of the day or night. A worker might only work three days a week, but would need to prepare for seven days of work, just in case.<sup>216</sup>

Of course, the DOL’s interpretation would need to define the amount of waiting time that would be paid; perhaps the employer’s operating hours, which represent the full length of time during which a worker might be called in at the last minute, would provide the beginning and end point of compensable time. Such an interpretation, and the DOL’s resulting enforcement activity, would make just-in-time call-in practices highly expensive, and therefore highly unattractive, to employers. It would also prevent employers from adopting an all on-call scheduling model, as employers would

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<sup>213</sup> See, e.g., *Renfro v. City of Emporia*, 948 F.2d 1529, 1537 (10th Cir. 1991); *Cent. Mo. Tel. Co. v. Conwell*, 170 F.2d 641, 646 (8th Cir. 1948); *Campbell v. Jones & Laughlin Steel Corp.*, 70 F. Supp. 996, 997 (W.D. Pa. 1947).

<sup>214</sup> See *supra* notes 104–107 and accompanying text.

<sup>215</sup> See *Field Assistance Bulletins*, U.S. DEP’T OF LABOR, WAGE & HOUR DIV., <http://www.dol.gov/whd/FieldBulletins> (last visited Dec. 21, 2014), archived at <http://perma.cc/74UQ-UFKY> (“Field Assistance Bulletins provide Wage and Hour Division (WHD) investigators and staff with guidance on enforcement positions and clarification of policies or changes in policy of WHD. These bulletins are developed under the general authority to administer the various laws enforced by WHD. They typically provide positions reflecting changes or clarifications in the administration of these laws and related regulations based upon court decisions, legislative changes and opinions of the WHD Administrator.”).

<sup>216</sup> Lambert, *supra* note 3, at 1217.

be forced to compensate workers for rearranging their private lives to accommodate a possible disruptive last minute call-in to work.<sup>217</sup>

#### D. *Engaging in Union and Worker Campaigns*

A final reform strategy centers on the power of workers themselves to make change in the workplace. While union CBAs have long addressed scheduling instability through guaranteed-pay provisions, these provisions may be insufficiently expansive to eliminate the harm caused to workers, as outlined in Part IV. Moreover, the fact that only 6.6% of private sector workers are unionized reduces CBAs' effectiveness in addressing this trend.<sup>218</sup>

Advocacy both within and outside traditional labor unions, however, has made gains for low-wage workers around the issue of scheduling stability. For example, the Retail Action Project in New York City has launched a "Just Hours" campaign, targeting unpredictable scheduling practices in retail stores, which has received significant media attention.<sup>219</sup> Additionally, in 2011, Wal-Mart workers began the "Our Wal-Mart" campaign, presenting a "Declaration of Respect" to Wal-Mart management in Arkansas, including as one of their principles the need to create "dependable, predictable work schedules."<sup>220</sup> Likewise, in 2012, the Retail Wholesale and Department Store Union Local 1-S won stable scheduling in their employment at Macy's and Bloomingdales stores in New York City.<sup>221</sup>

Not only does advocacy by unions and worker groups have the potential to convince service sector employers such as Wal-Mart to change their practices voluntarily, but it can also inform workers of their existing rights under state call-in and send-home pay laws and assist them in taking steps to become rights enforcers. The power of worker movements might also be harnessed to push for the types of reforms proposed earlier in this Part:

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<sup>217</sup> Of course, if the DOL were to adopt such an interpretation, employers might respond by overscheduling workers, having workers report at the scheduled time, and then sending them home early in cases of overstaffing. The possibility that employers would engage in such strategic behavior further highlights the need for send-home pay guarantees to create income and schedule stability at both ends of the problem.

<sup>218</sup> *Economic News Release: Union Members Survey*, BUREAU OF LABOR STATISTICS (Jan. 23, 2013), [http://www.bls.gov/news.release/archives/union2\\_01232013.htm](http://www.bls.gov/news.release/archives/union2_01232013.htm), archived at <http://perma.cc/F4DG-DXLN> (noting that the overall union membership rate in 2012 is down from 2011 with only 6.6% of private-sector workers in a union, which is five times lower than that of public-sector workers). See also Steven Greenhouse, *Share of the Work Force in a Union Falls to a 97-Year Low, 11.3%*, N.Y. TIMES (Jan. 21, 2013), <http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html>, archived at <http://perma.cc/KX47-YXGZ>.

<sup>219</sup> *Just Hours New York: Restoring the Fair Workweek*, RETAIL ACTION PROJECT, <http://retailactionproject.org/campaigns-2/sustainable-scheduling-new> (last visited Dec. 21, 2014), archived at <http://perma.cc/Z9CN-53VC>.

<sup>220</sup> *About Us*, OUR WALMART, <http://forrespect.org/our-walmart/about-us> (last visited Aug. 12, 2013), archived at <http://perma.cc/AF7W-Z88R>.

<sup>221</sup> Freलग, *supra* note 12.

broadening state guaranteed-pay laws, amending the FLSA, and changing the DOL's interpretation of on-call time.

#### CONCLUSION

Today's low-wage workers face increased instability in their schedules. Last minute call-ins and send-homes, borne out of a just-in-time scheduling philosophy, can cause a variety of significant financial, logistical, and emotional problems for workers and their families. This Article has examined two legal remedies for workers who are subject to call-in and send-home practices: guaranteed-pay provisions in unionized workers' collective bargaining agreements and state law call-in and send-home pay requirements. While both are steps in the right direction, they are limited in their ability to address the growing hours and income crisis for hourly service workers; therefore, new approaches are needed. Broadening existing guaranteed-pay laws, enacting new federal scheduling rights, recasting called-in workers as on-call workers, and harnessing the power of worker movements are all strategies for reducing work hour fluctuations, smoothing workers' income, and stabilizing low-wage work.

APPENDIX

Table 1: State Call-In Pay Laws

State	Provision(s)	Guaranteed Hours of Pay	Pay Rate	Eligible Employees	Exceptions & Other Notes
Arkansas	ARK. CODE ANN. § 21-5-221(k)(3)(C)(i) (West 2013)	Two	Regular rate or compensation differential, if authorized under § 21-5-221(b)(1)	State employees on standby or on-call status	
California*†	CAL. CODE REGS. tit. 8, § 11010-11150 (subd. 5 of each section) (2013)	Two	Regular rate	Employees who report to work for a second time in any one workday and are assigned fewer than two hours of work, <i>except</i> : • Employees on paid standby status	Does not apply when operations cannot begin or continue due to threats to employees or property, public utility failure, or circumstances outside employer's control
Colorado	4 COLO. CODE REGS. § 801-3-44 (LexisNexis 2013)	Two	Regular rate	Overtime-eligible state employees; overtime-exempt state employees (if approved by department head)	Does not apply when employee is not released from work between regular shift and call-back hours
Connecticut†	CONN. AGENCIES REGS. § 31-62-D2(d), -E1(b) (2014)	Four (employees in mercantile trade) Two (employees in restaurant/hotel occupations)	Regular rate; not less than minimum wage	Employees in mercantile trade (§ 31-62-D2(d)); employees in restaurant/hotel occupations (§ 31-62-E1(b))	Employees in mercantile trade may waive right to four hours of pay and receive only two hours of pay when regularly scheduled employment was less than four hours <i>if</i> the waiver appears in a written agreement between the employer and employee that is approval by state Labor Department (§31-62-D2(d))

State	Provision(s)	Guaranteed Hours of Pay	Pay Rate	Eligible Employees	Exceptions & Other Notes
Delaware	19 DEL. ADMIN. CODE § 3001-5.16.1 (2013)	Four	Greater of regular rate for four hours or overtime pay for actual hours worked	Overtime-eligible state employees who have physically left the employer's premises	
District of Columbia	D.C. MUN. REGS. tit. 6 § 1137.6 (2013)	Two	Regular rate	District employees on on-call status, <i>except</i> : •Employees on paid leave (§ 1137.7)	
Florida	FLA. ADMIN. CODE ANN. r. 60L-34.0031(5) (2013)	Two	Regular rate	State employees on on-call status	
Illinois**	ILL. ADMIN. CODE tit. 56, § 210.110 (2013)	Travel time	Regular rate	All employees	
Kansas	KAN. ADMIN. REGS. § 1-5-25 (2013)	Two	Regular rate or overtime rate, as applicable	Overtime-eligible state employees <i>and</i> law enforcement/firefighting employees (if approved by agency head), <i>except</i> : •Employees on standby status	Does not apply when employee is called in during two-hour period immediately preceding scheduled shift
Maryland	MD. CODE REGS. 17.04.02.12 (2013)	One, plus travel time	Greater of regular rate or applicable overtime rate	State employees	Does not apply if employee is already guaranteed more than one hour of pay No compensation for travel time if employee is paid for eight hours of work or more
Michigan	MICH. CIVIL SERV. R. 5-4.4 (2013)	Three	Overtime rate	State employees classified as "eligible" under compensation schedules approved by state Civil Service Commission, <i>except</i> : •Employees on on-call status	Does not apply to employee called in during three-hour period preceding regular start time

State	Provision(s)	Guaranteed Hours of Pay	Pay Rate	Eligible Employees	Exceptions & Other Notes
Montana***	MONT. ADMIN. R. 24.16.2523 (2013)	Specified in employment agreement	Regular rate or overtime rate, as applicable	Employees subject to employment agreement providing for such compensation	
Nevada	NEV. ADMIN. CODE § 284.214 (2013)	Two	Overtime rate	Overtime-eligible state employees, <i>except</i> : <ul style="list-style-type: none"> <li>• Employees on standby status</li> <li>• Part-time/intermittent employees who worked less than eight hours</li> <li>• Employees with discretion as to performance of duties</li> <li>• Employees who are not required to leave their residence or location to comply with call-in</li> </ul>	Does not apply when: <ul style="list-style-type: none"> <li>• Employee called in during one-hour period immediately before or after scheduled shift</li> <li>• Time for beginning work is set at employee's request</li> <li>• Work begins during same two-hour period already covered by call-in pay</li> </ul>
New Hampshire	N.H. CODE ADMIN. R. ANN. PER. 903.06 (2013)	Three	Overtime rate	Overtime-eligible state employees	Does not apply when employee had prior notice of call-back
New Jersey <sup>†</sup>	N.J. ADMIN. CODE § 12:56-5.5 (2013)	One	Regular rate	All employees	Does not apply when employer has made available the minimum number of work hours agreed upon by the employer and employee prior to commencement of work on the day involved

State	Provision(s)	Guaranteed Hours of Pay	Pay Rate	Eligible Employees	Exceptions & Other Notes
New Mexico***	N.M. CODE R. § 1.7.4.15(B) (LexisNexis 2013)	May be established by relevant agency	Regular rate or overtime rate, as applicable	State employees	
New York†	N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.3 (2013)	Lesser of four hours or the number of hours in employee's regularly scheduled shift	Minimum wage	All employees, <i>except</i> : <ul style="list-style-type: none"> <li>• Employees subject to wage order of the Commissioner of Labor</li> <li>• Employees of a nonprofitmaking institution that has elected to be exempt from coverage under a minimum wage order (§ 142-1.1)</li> </ul>	
North Carolina	25 N.C. ADMIN. CODE 1.D.1504 (2013)	Established by Office of State Human Resources (based on prevailing practices in applicable labor market)	Established by Office of State Human Resources (based on prevailing practices in applicable labor market)	State employees on on-call or emergency call-back status (including those who must respond from home via telephone or home computer) who are: <ul style="list-style-type: none"> <li>• Overtime-eligible</li> <li>• Overtime-exempt (if recommended by agency head and approved by Office of State Human Resources)</li> </ul>	If time worked exceeds guaranteed minimum hours, employee receives the applicable rate of pay <i>or</i> compensatory time for the exact amount of time elapsed
Oklahoma	OKLA. STAT. § 74-840-2.29 (2013); OKLA. ADMIN. CODE § 260:25-7-16 (2014)	Two	Regular rate or compensatory time	State employees on on-call status	
Oregon****	OR. ADMIN. R. 839-020-0045 (2013)	Travel time	Regular rate or overtime rate, as applicable	All employees	

State	Provision(s)	Guaranteed Hours of Pay	Pay Rate	Eligible Employees	Exceptions & Other Notes
South Carolina	S.C. CODE ANN. REGS. 19-705.07(D) (2014)	Two	Regular rate plus any applicable shift differential	Overtime-eligible state employees (if approved by agency)	Does not apply when: <ul style="list-style-type: none"> <li>• Call-in is canceled and employee received advance notice</li> <li>• Employee reports despite employer's attempt to notify, but refuses alternate work</li> </ul>
Washington	WASH. ADMIN. CODE § 357-28-185 (2013)	Two	Regular rate or overtime rate, as applicable	Overtime-eligible state employees <i>and</i> overtime-exempt state employees or employees eligible for law enforcement overtime (if approved by employer), <i>except</i> : <ul style="list-style-type: none"> <li>• Employees on standby status</li> </ul>	
Wyoming	WYO. COMP. POLICY Ch. 4 § 7 (2010)	Two	Regular rate	Overtime-eligible state employees	

\* California's call-in pay requirements are found in wage orders that apply to individual industries. Nevertheless, the requirements are the same across all industries, and the wage orders' coverage is exhaustive.

\*\* Illinois does not have a formal call-in pay statute or regulation. Nevertheless, an employee's travel time "for the employer's benefit," such as when the employee must report "in response to an emergency call back to work outside his/her normal work hours," is given as an example of time that would be compensable as working time under the state minimum wage law. *See* ILL. ADMIN. CODE tit. 56, § 210.110 (2013). Paid travel time therefore functions as a call-in pay guarantee.

\*\*\* Montana's regulation does not itself mandate call-in pay, but gives force to and illustrations of call-in or call-back pay requirements in employment agreements negotiated between employers and employees. It is copied directly from the federal regulation implementing the FLSA, 29 C.F.R. § 778.221 (2014), which concerns whether call-in pay is counted as hours worked for purposes of calculating overtime. New Mexico's regulation leaves the decision about whether to issue call-in pay, and how much, to individual state agencies. N.M. CODE R. § 1.7.4.15(B) (LexisNexis 2013) ("Agencies may establish a minimum number of hours to be paid when employees are called back in accordance with their agency policy.").

\*\*\*\* Like Illinois, Oregon does not have a formal call-in pay statute or regulation. State law requires payment of any travel time "spent in excess of time spent in normal home-to-work travel" when an employee "has left the employer's premises or job site after completing the day's work and is subsequently called out to travel a substantial distance [defined as "beyond a 30-mile radius of the employer's place of business"] to perform an emergency job." *See* OR. ADMIN. R. 839-020-0045(2) (2013).

† The same regulatory language appears to apply to both call-in and send-home situations.

Table 2: State Send-Home Pay Laws

State	Provision	Guaranteed Hours of Pay	Pay Rate	Eligible Employees	Exceptions & Other Notes
California*†	CAL. CODE REGS. tit. 8, § 11010-11150 (subd. 5 of each section) (2013)	Half of scheduled shift, but no fewer than two and no more than four hours	Regular rate	All employees, <i>except</i> : •Employees on paid standby status	Does not apply when operations cannot begin/continue due to threats to employees or property, public utility failure, or circumstances outside employer's control
Connecticut†	CONN. AGENCIES REGS. § 31-62- D2, E1(b) (2014)	Four (employees in mercantile trade) Two (employees in restaurant/hotel occupations)	Regular rate; not less than minimum wage	Employees in mercantile trade (§ 31-62-D2); employees in restaurant and hotel occupations (§ 31-62-E1(b))	Employees in mercantile trade may waive right to four hours of pay and receive only two hours of pay when regularly scheduled employment was less than four hours <i>if</i> the waiver appears in a written agreement between the employer and employee that is approved by state Labor Department (§31-62-D2(d))
District of Columbia	D.C. CODE MUN. REGS. tit. 7 § 907.1 (2013)	Lesser of four hours <i>or</i> the number of hours in employee's regularly scheduled shift	Regular rate for hours worked; minimum wage for hours not worked	All employees	

State	Provision	Guaranteed Hours of Pay	Pay Rate	Eligible Employees	Exceptions & Other Notes
Massachusetts	455 MASS. CODE REGS. 2.03(1) (2013)	Three	Minimum wage	All employees scheduled to work for at least three hours, <i>except</i> : •Employees of IRS-classified charitable organizations	
Montana**	MONT. ADMIN. R. 24.16.2522 (2013)	Specified in employment agreement	Regular rate or overtime rate, as applicable	All employees subject to employment agreement providing for such compensation	
New Hampshire	N.H. REV. STAT. ANN. § 275:43-a (2013)	Two	Regular rate	All employees, <i>except</i> : •Employees of counties or municipalities	Does not apply where: •Employer made good faith effort to notify employee not to report •Employee reports despite employer's attempt to notify, but refuses alternate work
New Jersey <sup>†</sup>	N.J. ADMIN. CODE § 12:56-5.5 (2013)	One	Regular rate	All employees	Does not apply when employer has made available the minimum number of work hours agreed upon by the employer and employee prior to commencement of work on the day involved
New York <sup>†</sup>	N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.3 (2013)	Lesser of four hours or the number of hours in employee's regularly scheduled shift	Minimum wage	All employees, <i>except</i> : •Employees subject to wage order of the Commissioner of Labor •Employees of a nonprofitmaking institution that has elected to be exempt from coverage under a minimum wage order (§ 142-1.1)	

State	Provision	Guaranteed Hours of Pay	Pay Rate	Eligible Employees	Exceptions & Other Notes
Oregon	OR. ADMIN. R. 839-021-0087(5)-(8) (2013)	Greater of one hour or half of the hours in employee's scheduled shift	Regular rate	Minor employees	Does not apply when: <ul style="list-style-type: none"> <li>• Employer posts a notice policy in the workplace, communicates it to the minor, and follows it in making a good faith effort to notify minor not to report</li> <li>• Circumstances beyond employer's control prevent performance of minor's scheduled work</li> </ul>
Rhode Island	R.I. GEN. LAWS § 28-12-3.2 (2012)	Three	Regular rate		

\* California's send-home pay requirements are found in wage orders that apply to individual industries. Nevertheless, the requirements are the same across all industries, and the wage orders' coverage is exhaustive.

\*\* Montana's regulation does not itself mandate send-home pay, but gives force to and illustrates the use of send-home pay requirements in employment agreements negotiated between employers and employees. It is copied directly from the federal regulation implementing the FLSA, which concerns whether send-home, show up, or reporting pay is counted as hours worked for purposes of calculating overtime. 29 C.F.R. § 778.220 (2014).

† The same regulatory language appears to apply to both call-in and send-home situations.