NOTE

Protecting Teleworkers: Unilateral Conflicts and Statutory Interpretation

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ABSTRACT

The COVID-19 pandemic taught us that homes can double as offices. But when a teleworker opens her laptop across state lines from her employer, may she claim the statutory worker protections provided in the employer's state? Too often, courts misunderstand this recurring problem and refuse to extend an employer's state protections to an out-of-state teleworker, granting a defendant's motion to dismiss. Because each statute is analyzed in isolation, a teleworker may be relegated to lawless nowhere land, unable to recover under any state statutory scheme.

This Note argues that, in the absence of legislative direction, a court should always find that the scope of an employer's state statute is broad enough to extend to an out-of-state remote teleworker. Telework is performed using entirely virtual technology and has no physical connection to the place in which it is

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performed. In contrast, the employer is tethered to earth and therefore should permissibly regulate the employer-teleworker relationship. This Note advocates for a judicial solution by examining existing judicial considerations. It argues that, because of the quasi-territorial nature of remote work, a teleworker should always fall within the legislative jurisdiction of an employer's state.

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Introduction

In January of 2020, Kathryn Shiber started a job at Centerview Partners, LLC, a New York City-based investment bank.[1] Because of the COVID-19 pandemic, she "worked remotely from her home in New Jersey."[2] At this new job, Centerview required Kathryn to be available twenty-four hours per day, at one point working from 8:00 AM to 1:00 AM for multiple days in a row.[3] Kathryn had been diagnosed with unspecified anxiety disorder and unspecified mood disorder and found these hours took a substantial toll on her mental and physical health.[4] After speaking with her supervisors about these challenges, it was agreed that Kathryn could log off by midnight and log on at 9:00 AM.[5] But once this plan was implemented, Kathryn was quickly fired via video call.[6] The expectation, Kathryn was told, was that she work for 120 hours per week and that fewer hours was insufficient.[7]

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1 Shiber v. Centerview Partners LLC, No. 21 Civ. 3649, 2022 WL 1173433, at *1 (S.D.N.Y. Apr. 20, 2022).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.* at *1–2.

6 *Id.* at *2.

7 *Id.*

Kathryn brought claims under the New York City Human Rights Law and the New York State Human Rights Law,[8] which ordinarily may have allowed recovery on these facts.[9] But the court found that the plaintiff, because she had never once "stepped foot inside Centerview's New York City office" and "worked exclusively from her home in New Jersey," did not state a claim on which relief could be granted.[10] The court therefore dismissed the teleworker's claim, granting the defendant's 12(b)(6) motion to dismiss.[11]

A court, absent an express statement from the legislature, should not dismiss a teleworker's claim brought under an employer's state statute under the rationale that the teleworker falls outside of the statute's geographic reach. Teleworker plaintiffs will often seek the protection of their employer's state worker protection statutes because employer's state protections are often more favorable than the teleworker's state's protections. Courts should permit this more favorable treatment. But moreover, limiting recovery under the employer's state statute may also give rise to impunity for employers who mistreat their workers and render teleworkers "stateless," without any state-based cause of action. This is because a court, at the defendant's urging, is likely to conduct a unilateral analysis when analyzing worker protection claims, asking only whether one state's statute may permissibly apply to the out-of-state worker. It likely does not take a multilateral approach, asking whether there is *another state's law* that may *instead* apply. Where a court agrees with the defendant that the statute does not apply, the action is dismissed for failure to state a claim. Thus, each state can separately refuse its protections to the worker, and the employer may face zero liability exposure under state law. Indeed, while some employer's state statutes have been interpreted to exclude out-of-state teleworkers, some "teleworker's state" statutes have also been interpreted to exclude teleworker recovery.[12]

This Note argues that, when presented with a teleworker's complaint under an employer's state worker protection statute, a court should always conclude that an employer's state statute is prima facie broad enough to include the remote teleworker in its legislative reach. This is not to suggest that another state's statute may not *also* be broad

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8 *Id.*

9 *See* N.Y.C. ADMIN. CODE § 8-101 (2020) (declaring discrimination based on disability unlawful); *see also* N.Y. EXEC. LAW § 296 (McKinney 2022) (same).

10 *Shiber*, 2022 WL 1173433, at *2, *4.

11 *Id.* at *6.

12 *Compare* Munenzon v. Peters Advisors, LLC, 553 F. Supp. 3d, 187, 200 (D.N.J. 2021) (declining to extend New Jersey protections to an out-of-state teleworker), *with* Steinke v. P5 Sols., Inc., No. 2018 CA 004445 B, 2019 WL 9606798, at *3 (D.C. Super. Ct. July 3, 2019) (refusing to rope an out-of-state employer into the legislative jurisdiction of D.C. where the teleworker resided and dismissing the teleworker's claim on those grounds).

enough to include the teleworker in its reach, nor is it to say that the employer's state law should always be *applied*. Instead, this Note argues that a teleworking employee should always have the *option* of adjudicating her disputes under the protections in the employer's state because the employer's state statute is broad enough to include the teleworker in its reach.

This categorical conclusion follows logically because the teleworker fact pattern presents a "quasi-territorial" scenario: while a teleworker is based primarily in cyberspace, an employer has defined, physical contacts on the ground. This grounded location—whether in its principal place of business, place of incorporation, or place of a branch or satellite office—is appropriate to govern disputes that may arise when teleworkers work from indeterminate locations all over the globe. An employer's brick-and-mortar locations serve as a tether for the otherwise placeless teleworker. These physical locations provide a teleworker with a definite, predictable, and defined legal jurisdiction under which she may negotiate her employment disputes. Without this tether, a teleworker may fall outside the scope of *any* state-based claim for relief.

The battleground for teleworker protection is in the state and federal courts.[13] Because a worker protection statute under which a teleworker seeks protection is almost always silent as to its precise geographical scope, a court has near unfettered discretion to decide whether a statute will protect an "out-of-state" teleworker.[14] Courts, in turn, have not developed a one-size fits all statutory interpretation test to decide a statute's scope.[15] This uncertainty—and possibility of unfair and inefficient outcomes—is significant. Although society will usually respect the outcome of a statutory interpretation decision so long as the court applied some reasonable approach, courts should pay specific attention to worker protection statutes in light of the new telework phenomenon. Courts looking at teleworker cases are faced with a matter suddenly impacting millions of people, involving "highly significant

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13 A state court is entitled to determine the scope of its own state statutes. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 71 (1938); Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 497 (1941).

14 *See infra* notes 74–78.

15 Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1170 (2000) ("Since legislators rarely contemplate this issue, courts must resort to an exploration of constructive intent: What would the legislature have preferred if it had thought about the problem? Unfortunately, however, constructive intent proves no more fruitful than actual intent because it is not clear what principles should guide the construction."); RESTATEMENT (SECOND) CONFLICT OF LS. § 5 (AM. L. INST. 1971) ("The rules of Conflict of Laws, and especially the rules of choice of law, are largely decisional and, to the extent that this is so, are as open to reexamination as any other common law rules.").

policy considerations"[16] with almost no guidance from the state legislature. A court's decision in these cases has far-reaching impacts beyond the immediate claim dismissal: it may render the teleworker "stateless," without state-based recovery at all. This Note provides guidance to both advocates and judges addressing the novel "teleworker problem."

This Note identifies five major considerations that a court will often examine when conducting this prima facie statutory interpretation analysis. To derive statutory intent, a court is likely to consider (1) the statutory text, (2) precedent interpreting the statute, (3) a teleworkers' "contacts" with the employer's state, (4) the employer's state's "interests" in regulating the substance of the dispute, and possibly, (5) a presumption against extraterritoriality. These often-used considerations arise from a mix of traditional choice of law considerations and statutory interpretation tools and canons. They are not an exhaustive list, for example, notably excluding legislative history, but they are some of the most often used rationales used when deciding a statute's geographical scope.

Each of these considerations guide in favor of protecting a teleworker under an employer's state statute. First, a teleworker may be properly said to "work within the state" of the employer in accordance with the statutory text since this terminology takes on new meaning as applied to teleworking. Second, prepandemic precedent does not provide meaningful guidance because a teleworker presents a quasi-territorial fact pattern, where one party is in "cyberspace." In contrast, historical cases are entirely territorial. Third, because a teleworkers' job is not meaningfully connected to the state where it was performed, process of elimination dictates that a teleworker has the most meaningful contacts with the employer's state. Fourth, an employer's state clearly has an interest in regulating the *in-state conduct* of the employer, such as preventing in-state employers from discriminating

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[16] Trevejo v. Legal Cost Control Inc., No. A–1377–16T4, 2018 WL 1569640, at *4 (N.J. Super. Ct. App. Div. Apr. 2 2018) ("Based upon current computer technology and the forward thinking concept of 'telecommuting,' we are satisfied that determining who may be entitled to protection under the NJLAD is a novel question of law that involves highly significant policy considerations."); Poudel v. Mid Atl. Pros., Inc., No. 21-1124, 2022 WL 345515, at *5 (D. Md. Feb. 4, 2022) (recognizing "particularly in light of the recent advent of remote telework, that there may be examples of work by individuals physically located outside of Maryland that could arguably be considered to be work within the state," but declining to address such cases); Malloy v. Superior Ct. of L.A. Cnty., 83 Cal. App. 5th 543, 546 (Cal. Ct. App. 2022) ("Today, more than four decades after the original passage of [the Fair Employment and Housing Act ('FEHA')], as a result of advances in technology and the impact of the COVID-19 pandemic, working remotely is no longer an infrequently conferred perquisite, but an increasingly common and necessary adaptation to the demands of modern life."); Sexton v. Spirit Airlines Inc., No. 21-cv-00898, 2023 WL 1823487, at *4 (E.D. Cal. Feb. 7, 2023) ("Remote work has added an additional complexity to the analysis outlined above as some employers have been more flexible with authorizing their employees to work at home as a result of the COVID-19 pandemic.").

based on race or gender. Lastly, the conclusion that a presumption against extraterritorial application prevents the application of a state statute to an out-of-state teleworker is inappropriate because an employer's state statute as applied to teleworkers does not govern conduct that occurs wholly outside the state.

I. Background

A. The Teleworker Phenomenon

Since the World Health Organization declared COVID-19 a pandemic on March 11, 2020,[17] and state and local governments began issuing work-from-home orders,[18] the number of Americans working from home over tripled, from 5.7% of Americans (nine million people) to 17.9% of Americans (27.6 million people) between 2019 and 2021.[19] As of July 2023, researchers estimate that over forty percent of U.S. employees now work remotely for part of the workweek.[20] This pandemic-era lifestyle change tested the bounds of what could be done without ever entering the office.[21] As a result of work from home, workers relocated in huge numbers.[22] Notably, teleworkers[23] are most frequently relocating from states with better worker protections—California, New York, Washington, D.C., Washington State, and Illinois—to a state with the

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17 *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19—11 March 2020*, World Health Org. (March 11, 2020), https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 [https://perma.cc/57GC-P8VA].

18 *See* Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. Times (Apr. 20, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html [https://perma.cc/GB7V-NBWF].

19 Press Release, U.S. Census Bureau, The Number of People Primarily Working from Home Tripled Between 2019 and 2021 (Sept. 15, 2022), https://www.census.gov/newsroom/press-releases/2022/people-working-from-home.html [https://perma.cc/36XS-8G5G]; *see also* Matthew Dey, Harley Frazis, Mark A. Loewenstein & Hugette Sun, *Ability to Work from Home: Evidence from Two Surveys and Implications for the Labor Market in the COVID-19 Pandemic*, Monthly Lab. Rev., June 2020, https://www.bls.gov/opub/mlr/2020/article/ability-to-work-from-home.htm [https://perma.cc/6NPC-3B2G].

20 Jose Maria Barrero, Nicholas Bloom & Steven J. Davis, *The Evolution of Work from Home*, 37 J. Econ. Persps. 23, 28 tbl.1 (2023).

21 Tim Bajarin, *Work from Home Is the New Normal for Workers Around the World*, Forbes (Apr. 29, 2021), https://www.forbes.com/sites/timbajarin/2021/04/29/work-from-home-is-the-new-normal-for-workers-around-the-world/ [https://perma.cc/2HY2-49NQ].

22 Stephan D. Whitaker, *Did the COVID-19 Pandemic Cause an Urban Exodus?*, Clev. Fed Dist. Data Brief, Feb. 5, 2021, at 2, https://doi.org/10.26509/frbc-ddb-20210205 [https://perma.cc/G83L-RN39]; *see also* Laurel Wamsley, *Workers Are Moving First, Asking Questions Later*, NPR (Mar. 9, 2021, 8:28 AM), https://www.npr.org/2021/03/09/974862254/workers-are-moving-first-asking-questions-later-what-happens-when-offices-reopen [https://perma.cc/B9DT-CCAZ].

23 This Note uses the terms "telework," "remote work," and "work from home" interchangeably.

worst protections—Texas.[24] Others have given up the traditional notion of "home" altogether to become digital nomads.[25] Now, some workers are starting their employment remotely from the outset, and will never once step foot in the office.[26] There is no sign of slowing the remote worker trend.[27]

The nature of telework deserves special attention. Telework is "a work flexibility arrangement under which an employee performs the duties and responsibilities of such employee's position, and other authorized activities, from an approved worksite other than the location from which the employee would otherwise work."[28] Flexibility is a key element of this work style: a worker may work remotely a few days per week or full-time.[29] A work-from-home solution may, from the outset, be temporary or permanent, but may evolve.[30] Remote workers perform the same work that they would perform in an office; the nature and essence of the work does not meaningfully change based

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24 *Compare* Emily Badger, Robert Gebeloff & Josh Katz, *The Places Most Affected by Remote Workers' Moves Around the Country*, N.Y. Times (June 17, 2023), https://www.nytimes.com/interactive/2023/06/17/upshot/17migration-patterns-movers.html [https://perma.cc/8BZQ-W395] (finding that New York City saw the highest number of remote workers relocate at 116,000; followed by Los Angeles at 53,000; San Francisco at 32,000; Chicago at 29,000; San Jose at 27,000; Washington, D.C. at 11,000; and Seattle at 3,000, but in contrast, Austin, Texas gained the highest number of teleworkers of any metro area: 28,000), *with Best and Worst States to Work in America 2022*, OxFam, https://www.oxfamamerica.org/explore/countries/united-states/poverty-in-the-us/best-states-to-work-2022/ [https://perma.cc/E8KR-Q4RB] (ranking, in terms of worker protection policies, California as number two, Washington State as number three, the District of Columbia as number four, New York as number five, Illinois as number ten, and Texas as forty-eight).

25 MBO Partners, COVID-19 and the Rise of the Digital Nomad 3 (2020) ("In 2020, the number of traditional workers working as digital nomads grew 96 percent, from 3.2 million to 6.3 million.").

26 Kathryn Vasel, *These Recent Grads Landed Office Jobs, But They've Barely Set Foot in the Office*, CNN (Jan. 21, 2022, 2:29 PM), https://www.cnn.com/2022/01/21/success/young-employees-remote-work/index.html [https://perma.cc/C2LD-7UHB].

27 *See* Lydia Saad & Ben Wigert, *Remote Work Persisting and Trending Permanent*, Gallup (Oct. 13, 2021), https://news.gallup.com/poll/355907/remote-work-persisting-trending-permanent.aspx [https://perma.cc/FRY2-HZ6E] (finding, as of 2021, "[n]ine in 10 remote workers want to maintain remote work to some degree"); Molly Bolan, *The Places Where Remote Work Became Most Common*, Route Fifty (Sept. 30, 2022), https://www.route-fifty.com/tech-data/2022/09/places-where-remote-work-became-most-common/377927/ [https://perma.cc/J35V-GYW4] (stating that even as people return to in person work, the impact of remote work is still likely to be felt in the years to come).

28 5 U.S.C. § 6501 (listing one definition).

29 *See* Int'l Lab. Org., An Employers' Guide on Working From Home in Response to the Outbreak of COVID-19 5 (2020), https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---act_emp/documents/publication/wcms_745024.pdf [https://perma.cc/N9CL-KQUE] ("[Work from home] is a working arrangement in which a worker fulfils the essential responsibilities of his/her job while remaining at home, using information and communications technology (ICT).").

30 *See id.* at 5, 8.

on where it is conducted.[31] The work is accomplished via the internet,[32] and remote workers frequently correspond with their supervisors through electronic communications, such as Zoom, Webex, e-mail, or phone call.[33] The location of the work is dependent only upon all but ubiquitous Wi-Fi—which means it can be done from almost anywhere.[34] Crucially, remote workers are *not* based in a branch or a satellite office established by the employer.[35] Unlike other out-of-state workers who travel *because of* an in-person assignment, teleworkers travel because of the *absence of* an in-person assignment.[36]

In sum, telework is work that is (1) conducted entirely through virtual means which (2) has no physical relationship to the place in which it is performed. To illustrate, a teleworker may work remotely in Connecticut for the Boston branch of a large law firm that is incorporated in Delaware and has its principal place of business in New York. He may participate in daily Zoom calls with his three supervisors based in San Francisco, Georgia, and Denver, respectively. He may use Westlaw, headquartered in Minnesota, to conduct research for a memo he writes on Microsoft Word, based in Washington. He may work for a client incorporated in Delaware with its principal place of business in Phoenix but communicate with the client representatives who are based in New York. He may be fired via Zoom call while visiting family in New Jersey.

Not one of these locations matters to a teleworker, who conducts his work through cyberspace.[37] Each one of these geographic locations

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31 *See id.* at 5.

32 *See* Zoltán Bankó, *The Situation of Telework Regulation in Hungary*, 2020 Reg'l L. Rev. 115, 117.

33 *See* Wait v. Travelers Indem. Co. of Ill., 240 S.W.3d 220, 225 (Tenn. 2007) ("An employee telecommutes when he or she takes advantage of electronic mail, internet, facsimile machines and other technological advancements to work from home or a place other than the traditional work site."); *see also Report on the Implementation of the European Social Partners' Framework Agreement on Telework*, at 6, COM (2008) 2178 final (Feb. 7, 2008).

34 *But see* Int'l Lab. Org., Teleworking During the COVID-19 Pandemic and Beyond 8 (2020) ("[O]nly a quarter of the population in Sub-Saharan Africa has access to the internet and only half in the Maghreb, compared to four-fifths in Europe. In the countries where regular power cuts and weak internet service makes even sending an e-mail a challenge, teleworking is practically impossible." (citation omitted)).

35 *See, e.g.*, Munenzon v. Peters Advisors, LLC, 553 F. Supp. 3d 187, 202 (D.N.J. 2021).

36 *See, e.g.*, Hannah Towey, *4 Remote Workers Who've Secretly Worked from Abroad Without Their Employers Knowing Describe How They Keep Up the Charade*, Insider (Oct. 16, 2022, 6:52 AM), https://www.businessinsider.com/meet-remote-workers-secretly-working-abroad-without-boss-knowing-2022-10 [https://perma.cc/JNX4-6SLY].

37 *See* Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. Pa. L. Rev. 1951, 1951 (2005) ("The current Internet technology creates ambiguity for sovereign territory because network boundaries intersect and transcend national borders.").

is purely incidental.[38] Were they to change, the nature and substance of a teleworker's work would remain the same.[39] Cyberspace *is* a teleworker's office.[40] Work conducted through internet communications is not performed in any singular "place."[41] This work has its effects all over the country and is enabled only through the placeless internet channels of communication.[42] The employer allows the work to be performed from any remote location, because they know that the work product will look the same regardless of where it is conducted.[43] The work a teleworker performs from home, therefore, has no necessary local impact—even though such impact may be incidental.

In contrast, the location of an employer is finite and determinable—it can be understood as any place where an employer has its place of incorporation, principal place of business, or any branch office.[44] These terms are well-defined in American jurisprudence. In *Hertz Corp. v. Friend*,[45] for example, the Supreme Court defined a company's principal place of business for diversity jurisdiction purposes as its "nerve

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38 *See* Huw Halstead, *Cyberplace: From Fantasies of Placelessness to Connective Emplacement*, 14 MEMORY STUD. 561, 561 (2021) (noting that "cyberplace" is "malleable, shifting, often disorienting; but also textured, uneven, and located").

39 *See supra* note 36.

40 *See* David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 84 STAN. L. REV. 1367, 1370 (1996) (identifying cyberspace as a separate "place" for jurisdictional purposes). *But see* Mark A. Lemley, *Place and Cyberplace*, 91 CALIF. L. REV. 521, 529 (2003) (arguing in part that this metaphor has misled courts into inappropriately expanding "real world" doctrines, such as tort). The web has substantially advanced to accommodate this shift. Zoom added new features, including webinars, virtual events, telemedicine, and resources for remote workers. *See, e.g., Support During the COVID-19 Pandemic*, ZOOM, https://explore.zoom.us/en/covid19/ [https://perma.cc/ZB3R-KH69]; *Telemedicine*, OPENMD, https://openmd.com/directory/telemedicine [https://perma.cc/TZK3-CZ3G] (telemedicine apps for virtual medicine and therapy); META, https://about.meta.com/metaverse/ [https://perma.cc/PEN2-BBSC] (the "metaverse" promises to make virtual activities feel in person, allowing greater flexibility).

41 *See* Ashwin Jacob Mathew, Where in the World is the Internet? Locating Political Power in Internet Infrastructure 1 (2014) (Ph.D. dissertation, University of California, Berkeley) (on file with author) ("It is these interconnections—in the shape of the inter-domain routing system—which allow the Internet to appear to be a single entity, and provide the means through which the apparent placelessness of virtual space is produced.").

42 *Id.*

43 *See* Michelle Cheng, *Employers Are Giving Workers the Work from Home Days They Want*, WORLD ECON. F. (June 26, 2022), https://www.weforum.org/agenda/2022/07/work-from-home-employers-workers-work-life/ [https://perma.cc/YG8Q-4955] ("Employers that have increased the number of remote days they offer have done so out of concern for worker productivity and retention, an economist says.").

44 *See* 28 U.S.C. § 1332(c) (defining a corporation's domicile for diversity purposes as its place of incorporation or principal place of business). Similarly, section 188 of the Restatement Second on Conflict of Laws recommends considering, in the choice of law selection process for contract claims, "the domicile, residence, nationality, place of incorporation and place of business of the parties." RESTATEMENT (SECOND) OF CONFLICT OF LS. § 188(e) (AM. L. INST. 1971).

45 559 U.S. 77 (2010).

center," or "the place where a corporation's officers direct, control, and coordinate the corporation's activities."[46] It would be reasonable to import these definitions to the statutory protection context.[47] A corporation answering for its wrongs under the law of its domicile, place of business, or place of incorporation should hardly come as a surprise to an employer.[48]

B. Statutory Interpretation, Extraterritoriality, and Conflicts of Law

The conflicts of laws field has long wrestled with the question of which state law should apply to a dispute. In a conflicts analysis, a court asks the question: of the possible states that may have an interest in this conflict, which state law should apply to the dispute at hand? The First Restatement offered a strictly territorial approach that defined which state's law should apply based on the "place of the wrong."[49] The Second Restatement then gave rise to increased flexibility and allowed courts to weigh a list of possible locations that could control, in light of a list of six possible considerations that include states' interests, among other factors.[50] Professor Currie's interest analysis allowed a court to compare the underlying interests of two potentially interested states, and then ask which state's interests were best furthered on the facts of the case.[51] And Professor Leflar progressively offered five "choice-influencing considerations," also known as the "better law" approach.[52]

But in the statutory worker protection context, the conflicts analysis is often a unilateral question that asks only whether the statute is broad enough to apply to an out-of-state plaintiff. This approach finds

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46 *Id.* at 78.

47 *See* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. Chi. L. Rev. 1199, 1236 (1998) ("For example, the skeptics are wrong to the extent that they believe that cyberspace transactions must be resolved on the basis of geographical choice-of-law criteria that are sometimes difficult to apply to cyberspace, such as where events occur or where people are located at the time of the transaction. But these are not the only choice-of-law criteria, and certainly not the best in contexts where the geographical locus of events is so unclear. Domicile (and its cognates, such as citizenship, principal place of business, habitual residence, and so on) are also valid choice-of-law criteria that have particular relevance to problems, like those in cyberspace, that involve the regulation of intangibles or of multinational transactions.").

48 *See infra* notes 209–10 (discussing the constitutional Due Process standard, which protects against "unfair surprise").

49 *See* Restatement (First) of Conflict of Ls. § 384 (Am. L. Inst. 1934).

50 Restatement (Second) of Conflict of Ls. §§ 6, 146, 188 (Am. L. Inst. 1971).

51 Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 Duke L.J. 171, 176.

52 Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. Rev. 267, 275, 282 (1966) (suggesting that courts consider five main factors when deciding a choice of law question: (1) predictability of results, (2) maintenance of interstate order, (3) simplification of the judicial task, (4) advancing forums governmental interest, and (5) applying the "Better Law," or the law that restricts the plaintiff the least).

support in the conflicts field because "[c]hoice of law can be thought of as a two-step process."[53] First, a court must "determin[e] the scope of the potentially applicable laws to see if more than one law applies."[54] Second a court "determin[es] which law should be given priority if more than one law applies," turning to one of the theories outlined above.[55] The Draft of the Third Restatement favors this two-step approach, which first requires a court to evaluate the internal scope of the statute.[56] This is known as the "extraterritoriality approach" and arises at a motion to dismiss stage.[57] As Professor Kramer notes, "the familiar problem of determining whether the plaintiff states a claim is, in fact, a choice of law problem."[58] This approach is unilateral rather than multilateral, in the sense that it "focus[es] simply on whether the forum's law applies to the activity in question, without worrying that another forum might also apply its law."[59] This is a statutory interpretation question that asks whether the plain text of the statute, the statutory intent, the legislative purpose, and applicable canons conspire to permit it to apply to an out-of-state teleworker. State courts have a range of understandings about how to reconcile a statutory interpretation question with a conflicts of laws question, with some courts expressly using a two-step process, others supplanting the conflicts analysis with a statutory interpretation analysis, and still others replacing a statutory interpretation analysis with a conflicts analysis.[60]

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53 William S. Dodge, *Presumptions Against Extraterritoriality in State Law,* 3 U.C. DAVIS L. REV. 1389, 1423 (2020).

54 *Id.*

55 *Id.*; *see also* Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 280 (1990) ("When the parties disagree about what law governs their dispute, the court chooses the applicable law through a two-step process of interpretation—first determining the apparent scope of the laws in question in order to ascertain whether there is a conflict of laws, and then resolving any conflicts it finds. The second step is usually accomplished through the use of rules or canons of construction.").

56 *See* RESTATEMENT (THIRD) OF CONFLICT OF LS. § 5.01 cmt. b (AM. L. INST., Tentative Draft No. 3, 2022) ("Resolving a choice-of-law question requires two analytically distinct steps. First, it must be decided which states' laws are relevant, meaning that they might be used to govern a particular issue. This is typically a matter of discerning the scope of the various states' internal laws, i.e., deciding to which people, in which places, and under which circumstances, they extend rights or obligations. Second, if states' internal laws overlap and conflict, it must be decided which law shall be given priority.").

57 *See generally* William Dodge, *Extraterritoriality and Conflicts-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L. L.J. 101, 104, 135 (1998).

58 Kramer, *supra* note 55, at 280.

59 Dodge, *supra* note 57, at 104.

60 Dodge, *supra* note 53, at 1429 ("[S]ome courts see choice of law as a two-step process and apply a presumption against extraterritoriality in determining the scope of a statute before considering which state's law should be given priority under a conflicts analysis. Some courts bizarrely reverse the order of these steps, applying a presumption against extraterritoriality after the conflicts analysis. Some courts view conflicts rules as a substitute for the presumption against

In some respects, this question may be comparable to the statutory construction work performed on the international level.[61] In *Kiobel v. Royal Dutch Petroleum*,[62] for example, the Supreme Court analyzed the scope of the federal Alien Tort Statute ("ATS")[63] to find that it was not intended to apply to conduct that occurs outside of the United States.[64] The Court did not ask *which* state was better positioned to address the matter, taking on a comparative analysis as between two competing laws; instead, it questioned whether a plaintiff's claim under the ATS "may reach conduct occurring in the territory of a foreign sovereign."[65] The Court looked to the "text, history, and purposes" of the statute, and applied the canon of the presumption against extraterritoriality to conclude that the ATS did not apply to out-of-state conduct.[66] The Court used traditional statutory interpretation tools—not a specific conflicts canon—to reach its conclusion.

Courts dealing with the applicability of a statutory worker protection to a remote teleworker most often enter this conversation at step one and ask whether the *substantive statute by its own terms* may permissibly apply to the dispute at hand.[67] In a unilateral analysis,

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extraterritoriality and other principles that might determine questions of scope. And some courts view the presumption against extraterritoriality as a substitute for conflicts rules, making it unnecessary to consider whether another state's law should be applied.").

61 *But see* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1232 (1992) (arguing that federal extraterritoriality and interstate choice of law conflicts are treated differently, in part because state choice of law takes a multistate approach whereas federal extraterritoriality is unilateral). Where a plaintiff attempts to state a claim under a state worker protection statute, however, this Note demonstrates that such an analysis is often unilateral in nature and in that sense may be comparable to a federal international conflicts analysis. *See supra* notes 56–60 and accompanying text.

62 569 U.S. 108 (2013).

63 28 U.S.C. § 1350.

64 *Kiobel*, 569 U.S. at 108.

65 *Id.* at 115.

66 *Id.* at 117.

67 *See, e.g.*, Munenzon v. Peters Advisors, LLC, 553 F. Supp. 3d 187, 199–200 (D.N.J. 2021) ("Defendants maintain that there is no 'conflict' of laws as such; rather, *substantive New Jersey law provides* that out-of-state employees are not protected by the [New Jersey Wage Theft Act] or [New Jersey wage and hour laws]. In other words, even assuming that New Jersey law governs, that law itself provides that New Jersey's wage and hour laws do not apply extraterritorially. . . . Defendants have the better argument here." (citations omitted)); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1059, 1061 (N.D. Cal. 2014) (holding that California wage and hour laws asserted in plaintiff's complaint do not create a cause of action for people who perform work entirely in another state); Lincoln-Odumu v. Med. Fac. Assocs., Inc., No. CV 15-1306, 2016 WL 6427645, at *4 (D.D.C. July 8, 2016) (defining the issue as "whether the plaintiff qualifies as a covered employee" under the D.C. Wage Payment and Collections Law); Sexton v. Spirit Airlines, Inc., No. 21-CV-00898, 2023 WL 1823487, at *3 (E.D. Cal. Feb. 8, 2023) ("Defendant argues 'Plaintiff's employment and the actions forming the basis of Plaintiff's disability accommodation and retaliation claim under [ ] FEHA and [ ] [the California Family Rights Act] occurred in Florida' and 'Plaintiff has no legal grounds to apply these [California] laws extraterritorially or bring such claims against Defendant

where a court finds that its own statute does not permit it to reach an out-of-state teleworker, a court will not apply the law of another interested state, as in a multistate analysis, but will instead dismiss the case altogether for failure to state a claim. Thus, each potentially interested state may separately decline to extend its protections to the worker, leaving the worker with only federal protections.[68] The statutory interpretation exercise conducted where a teleworker brings a claim under an employer's state statute is therefore exceptionally important. The below analysis focuses on this statutory interpretation step, arguing that a court should not dismiss a teleworker's claim brought under an employer's state law.

II. Securing a Teleworker Cause of Action

The "teleworker question" asks whether a teleworker-plaintiff suing their employer may claim the protections of their employer's state worker protection statute. Courts of the internet age are repeatedly asked to fit nonterritorial ideas into a distinctly territorial system,[69] and remote workers are the next iteration in a long line of factual scenarios that test the logical integrity of our federalist scheme.[70] Internet-place

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in California.' The question, then, is whether Plaintiff has pleaded sufficient facts to sustain these California causes of action." (omissions in original)); Sullivan v. Oracle Corp., 254 P.3d 237, 240 (Cal. 2011) ("The question whether California's overtime law applies to work performed here by nonresidents entails two distinct inquiries: first, whether the relevant provisions of the Labor Code apply as a matter of statutory construction, and second, whether conflict-of-laws principles direct us to apply California law in the event another state also purports to regulate work performed here."). For an incomplete list of multijurisdictional employment cases analyzed to reach this conclusion, not including teleworker cases, see Deborah F. Bruckman, Annotation, *Extraterritorial Application of State Wage and Hour Laws*, 29th A.L.R.7th Art. 7 (2017); Robert Fitzpatrick, *Which State Law Applies? Multijurisdictional Conduct and State Employment Law Statutes*, Fitzpatrick on Emp. L. (May 28, 2010), http://robertfitzpatrick.blogspot.com/2010/05/which-state-law-applies.html [https://perma.cc/64TS-HX85].

68 Certainly, any worker in the United States can turn to the Fair Labor Standards Act, which guarantees a federal minimum wage at $7.25, and overtime pay at a rate of 1.5 times the rate of regular pay. 29 U.S.C. § 203. They may also turn to federal antidiscrimination laws. *See, e.g.*, 29 U.S.C. § 206(a), 207(a)(1); 42 U.S.C. §§ 2000e to 2000e-17. But state statutes almost always create more plaintiff rights than a federal cause of action.

69 *See, e.g.*, Johnson & Post, *supra* note 40, at 1370; Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 Berkeley Tech. L.J. 1345, 1352 (2001); Lemley, *supra* note 40, at 529; Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 804–06 (2001); Matthew R. Burnstein, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 Vand. J. Transnat'l L. 75, 92–95 (1996); Erin Ann O'Hara, *Choice of Law for Internet Transactions: The Uneasy Case for Online Consumer Protection*, 153 U. Pa. L. Rev. 1883, 1885 (2005); Jenny Bagger, Note, *Dropping the Other Shoe: Personal Jurisdiction and Remote Technology in the Post-Pandemic World*, 73 Hastings L.J. 861, 861 (2022).

70 *See, e.g.*, Young Ran (Christine) Kim, *Taxing Teleworkers*, 55 U.C. Davis L. Rev. 1149, 1195–214 (2021); Joan T. A. Gabel & Nancy Mansfield, *On the Increasing Presence of Remote Employees: An Analysis of the Internet's Impact on Employment Law as it Relates to Teleworkers*, 2001 U. Ill.

theory arises in the personal jurisdiction, conflict of laws, and internet regulation fields, and several approaches have emerged.[71] Yet this question is easier than internet jurisdiction questions of the past, such as the issue of internet regulation. Telework is not *non*territorial, like internet regulation,[72] but *quasi-territorial*. At least one party—the employer—is clearly tethered to the ground. A court should therefore consistently find that a remote teleworker states a claim under at least an employer's state worker protection statute. And although another state statute may also provide a cause of action for an aggrieved plaintiff, at a minimum the employer's state statute should offer up its protections because of its consistent and grounded physical location.

To make this argument, this Note surfaces some existing methods for making a statutory scope determination that courts have used in examining teleworker cases. Those are (1) statutory text, (2) precedent, (3) state contacts, (4) governmental interests, and (5) presumptions against extraterritoriality. These factors draw from both traditional choice of law principles and traditional statutory interpretation tools and canons, as courts tend to borrow from both context when determining the scope of its statutes. This Note argues that under each consideration, a teleworker should fall within the legislative reach of an employer's state statute.

A. Statutory Text

A court confronting the teleworker question might find itself analyzing statutory text that indicates that the statute applies to workers "in the state." Although a court might look into this language to find legislative intent, there is widespread agreement that statutes are usually silent as to their geographical scope.[73] In general, legislatures do not

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J.L. Tech. & Pol'y 233, 264–66 (examining whether a teleworker working from home creates sufficient minimum contacts to establish personal jurisdiction over an employer-defendant).

71 In the personal jurisdiction sphere, see Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (developing a "sliding scale" test that conferred jurisdiction on defendants with interactive websites wherever the site was viewed, but not for defendants with passive sites); Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, May 22, 2000, No. 00/05308 (Fr.) (conferring jurisdiction over Yahoo! in France and ordering the company to remove Nazi paraphernalia being sold to people in France); Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1207 (9th Cir. 2006) (using the "effects test" to assess the interim orders from the French court); Geist, *supra* note 69, at 1352 (arguing that the effects-based test promotes overregulation and instead courts should adopt a "targeting test" that considers "contract, technology, and knowledge" as the standard for assessing Internet jurisdiction cases).

72 *See* Johnson & Post, *supra* note 40, at 1370 (arguing that cyberspace creates a separate "place" for jurisdictional purposes).

73 Restatement (Second) Conflict of Ls. § 6, cmt. b. (Am. L. Inst. 1971) ("A court will rarely find that a question of choice of law is explicitly covered by statute. That is to say, a court will

directly address the scope of a statute's reach.[74] This is no less true of worker protection statutes.[75] The absence of legislative direction opens the door to tremendous judicial discretion.[76] Indeed, in the conflicts field, statutory interpretation is most often a task for the courts.[77]

Courts have expressed willingness to interpret the popular statutory language, allowing coverage for employers and employees "in the state," to include teleworkers. In one nonteleworker case where a Maryland statute defined an employer as "any person who employs an individual in the State," the District of Maryland in *Poudel v. Mid Atlantic Professionals, Inc.*[78] noted, "particularly in light of the recent advent of remote telework, . . . there may be examples of work by individuals physically located outside of Maryland that could arguably be considered to be work within the state."[79] In *Kuklenski v. Medtronic*,[80] the District of Minnesota looked at the statutory language of the Minnesota Human Rights Act,[81] which extended to workers who "work[] in this state."[82] The Court concluded that, as applied to the teleworker plaintiff, "[p]retty clearly, the [statute's] 'works in this state' requirement is ambiguous."[83] A court's interpretation of this language may depend

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rarely be directed by statute to apply the local law of one state, rather than the local law of another state, in the decision of a particular issue.").

74 Kramer, *supra* note 55, at 294 ("Since the legislature's failure to specify the statute's extraterritorial reach is an oversight, the court must infer what limits-if any-there ought to be on the extraterritorial reach of the law."); O'Hara & Ribstein, *supra* note 15, at 1170 ("Since legislators rarely contemplate this issue, courts must resort to an exploration of constructive intent: What would the legislature have preferred if it had thought about the problem? Unfortunately, however, constructive intent proves no more fruitful than actual intent because it is not clear what principles should guide the construction.").

75 *See, e.g.*, Pestell v. CytoDyn, No. 19-cv-1563, 2020 WL 6392820, at *3 (D. Del., Nov. 2, 2020) ("The statute, however, does not define 'employee' for the purposes of geographical inclusion under the act."); Munenzon v. Peters Advisors, LLC, 553 F. Supp. 3d 187, 200 (D.N.J 2021) ("[N]either party really stresses the plain language of the statutes, which are silent as to extraterritorial application."); Wexelberg v. Project Brokers LLC, No. 13 Civ. 7904, 2014 WL 2624761, at *10 (S.D.N.Y. 2014) ("[N]either [the New York City Human Rights Law nor the New York State Human Rights Law] directly defines the geographic scope of its coverage."). *But see* Border v. Nat'l Real Est. Advisors, LLC, 453 F. Supp. 3d 249, 252 (D.D.C. 2020) (interpreting title 4, section 1603.1 of the D.C. Municipal Regulations, which defined what it means to "work[] within the District").

76 *See* Leflar, *supra* note 52, at 951 (1977) ("The bulk of American conflicts law in the choice-of-law area is and always has been judge-made law."); *see also* Lindsay Traylor Braunig, Note, *Statutory Interpretation in a Choice of Law Context*, 80 N.Y.U. L. Rev. 1050, 1050 (2005).

77 Willis L.M. Reese, *Statutes in Choice of Law*, 35 Am. J. Compar. L. 395, 395 (1987) ("Most statutes do not contain any legislative directive with respect to their extraterritorial application and leave the entire problem to the judgment of the courts.").

78 No. 21-1124, 2022 WL 345515 (D. Md. Feb. 4, 2022).

79 *Id.* at *4–5.

80 635 F. Supp. 3d 726 (D. Minn. 2022).

81 Minn. Stat. § 363A.03.

82 *Kuklenski*, 635 F. Supp. 3d at 734 (quoting Minn. Stat. § 363A.03).

83 *Id.*

on dictionary definitions or on definitions found in other areas of the state's code. But often, a court leans on tools outside of the language itself to find statutory meaning, such as the factors below.

B. Examining Precedent

In the absence of a clear expression of a statute's geographic scope, a court is likely to turn to precedent to determine the scope of a statute's reach.[84] Multistate employment cases have historically occurred in two main settings. First, where the worker is *inherently mobile*, by virtue of the type of work that they do. These include truck drivers,[85] rideshare drivers,[86] flight attendants,[87] or salespeople.[88] The second batch are those where an employee is *sent out* to a *single location* to conduct work on behalf of the in-state company.[89]

Relying on precedent that denies a cause of action for a teleworker under an employer's state statute is misplaced—telework presents a novel factual framework heretofore insufficiently addressed by American courts.[90] One example of a court relying on inapplicable precedent

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84 Sometimes precedent interprets the statutory text at issue—usually language that reads that an employee must "work in the state" to state a claim under the statute. Other times, a court will find that the precedent establishes the scope of the statute without assistance from the text of the statute itself. *Compare Kuklenski*, 635 F. Supp. 3d at 734 (interpreting the text itself in light of precedent), *with* Loza v. Intel Ams. Inc., No. C 20-06705, 2020 WL 7625480, at *4 (N.D. Cal. 2020) (concluding that the California Fair Employment Practices Act does not apply to an out-of-state teleworker and citing to case law discussing the general scope of all California statutes for the proposition that the relevant inquiry is "whether 'the conduct which gives rise to liability . . . occurs in California'" (quoting Leibman v. Prupes, No. 14–CV–09003,2015 WL 3823954, at *7 (C.D. Cal. June 18, 2015))).

85 *See, e.g.*, Portillo v. Nat'l Freight Inc., 323 F. Supp. 3d. 646, 663 (D.N.J. 2018) (finding that the transitory nature of truckers made it such that the workers had no significant relationship with any other state, and that therefore New Jersey law should apply to the dispute); Woods v. Mitchell Bros. Truck Line, Inc., 143 Wash. App. 1016, 1017 (2008) (Washington state law applies to wage dispute brought by an interstate truck driver working for a Washington-based company).

86 *See, e.g.*, Cotter v. Lyft, Inc., 60 F. Supp. 3d 1059, 1061 (N.D. Cal. 2014) (Lyft drivers failed to state a claim for misclassification against California-based company under California law).

87 *See, e.g.*, Oman v. Delta Air Lines, Inc., 230 F. Supp. 3d 986, 989 (N.D. Cal. 2017); Ward v. United Airlines, Inc., 466 P.3d 309, 311 (Cal. 2020); Bernstein v. Virgin Am. Airlines, Inc., 3 F.4th 1127, 1133 (9th Cir. 2021).

88 *See, e.g.*, Dow v. Casale, 989 N.E.2d 909, 914–15 (Mass. App. Ct. 2013); Rao v. St. Jude Med. S.C., Inc., No. 19-923, 2020 WL 4060670, at *2 (D. Minn. 2020) (sales representative worked for a Minnesota company in Florida); Sullivan v. Oracle, 254 P.3d 237 (Cal. 2011) (Oracle instructors were required to travel to destinations within the United States away from their city of domicile for the purpose of performing work for Oracle).

89 *See, e.g.*, Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 151 (1932) (electrical work performed in New Hampshire for a Vermont based company); Alaska Packers Ass'n v. Indus. Acct. Comm'n, 294 U.S. 532 (1935) (salmon farming in Alaska for California-based company).

90 *See* Fitzpatrick, *supra* note 67 (organizing a collection of multistate employment cases and stating that, on the issue of whether to apply "state human rights and other employment law statutes" to an out-of-state plaintiff, "authority on point is split").

to determine the scope of a worker protection statute is *Munenzon v. Peters Advisors, LLC*.[91] In that case, a teleworker in Connecticut sought protection under New Jersey wage laws.[92] The employee worked remotely for a New Jersey company from the outset of his employment, and was not required to travel to New Jersey on any occasion.[93] The District Court of New Jersey held that New Jersey law does not extend to out-of-state workers, relying on three cases to support this conclusion.[94] The first case was an action brought against a New Jersey corporation by cross-country delivery truck drivers.[95] The second and third were cases brought against a New Jersey corporation by a salesperson operating in their respective sales districts outside of New Jersey.[96]

The defining feature of this precedent, however, is that the location of the work was so essential to the job that the employee *had* to physically be present in the place to perform it. Selling products in-person in Virginia can only be done while in Virginia, and driving across country to deliver goods can only be done by physically crossing state lines to reach the destination. Telework presents the exact opposite scenario: the location of where the work is conducted is so *nonessential* that it can be conducted from *anywhere*.[97] Additionally, because of the significance of an employee's physical contacts in other states in the nonteleworker context, a court in those states may be more likely to apply *their* law to a dispute.[98] But because a teleworker is not tethered to any other state, it is possible that a teleworker's *only* mode of recovery is under an

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91 553 F. Supp. 3d 187, 200 (D.N.J. 2021).

92 *Id.* at 191–92.

93 *Id.*

94 *Id.* at 200–01.

95 *Id.* at 200 (citing Lupian v. Joseph Cory Holdings, LLC, 240 F. Supp. 3d 309, 313–14 (D.N.J. 2017)) (finding that multistate delivery workers could not state a claim under the New Jersey Wage Payment Law and the New Jersey Wage and Hour Law).

96 *Id.* at 200–01 (citing Ortiz v. Goya Foods, No. 19-19003, 2020 WL 1650577, at *4 (D.N.J. Apr. 3, 2020)) (declining to extend New Jersey Wage Payment Law or New Jersey Wage and Hour Law to sales representatives based all over the country but working for a New Jersey corporation); *see also id.* at 201 (citing Overton v. Sanofi-Aventis U.S., LLC, No. 13-5535, 2014 WL 5410653, at *6 (D.N.J. Oct. 23, 2014)) (declining to extend New Jersey wage payment law to sales representatives based in the Virginia, Wisconsin, and Louisiana sales territories for the New Jersey corporation).

97 *Cf.* Banko, *supra* note 32, at 116 (2020) ("In the case of mobile telework, there is no permanent, fixed workplace, it is a means of work made possible by portable IT and telecommunications devices."); *see also* Burnstein, *supra* note 69, at 92–95 (discussing why conventional choice of law regimes are insufficient in the cyberspace context).

98 *See, e.g.*, Runyon v. Kubota Tractor Corp., 653 N.W.2d 582, 586 (Iowa 2002) (holding there was no error in applying Iowa Law in a dispute between an employee who resided in Missouri because the employee "transacted substantial business and routinely performed services on behalf of [the corporation] within Iowa's borders").

employer's state statute.[99] Analogies to these historical cases, therefore, are inappropriate.

It is natural for a court to cleave to the (facially) familiar when presented with a novel fact pattern.[100] But where a court analogizes a teleworker to other types of out-of-state work, it misunderstands the novel facets of this type of employment arrangement—therefore possibly depriving a plaintiff from recovery in any state.[101] Remote work as conducted over the internet may be performed anywhere and have effects anywhere.[102] A court can therefore distinguish a teleworker fact pattern from historical multistate employment cases which may hold that an out-of-state worker cannot recover under an in-state statute.[103]

C. State Contacts

In deciding the scope of an employer's state statute, courts that have addressed the teleworker question have considered the relationship between a plaintiff and the state.[104] As the District of Minnesota observed in a teleworker case, a "contacts-based approach to the issue may fairly be criticized because it 'treat[s] the question almost as one of personal jurisdiction rather than as one of statutory interpretation.'"[105]

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99 *See* Steinke v. P5 Sols., Inc., No. 2018 CA 004445 B, 2019 WL 9606798, at *3 (D.C. Super. Ct. July 3, 2019) (declining to apply a teleworker-state's law to an employment dispute with an out-of-state corporation).

100 *Cf.* Lawrence M. Solan, *Precedent in Statutory Interpretation*, 94 N.C. L. Rev. 1165, 1185–88 (2016) (discussing circumstances in which referencing precedent to interpret statutes may be inappropriate).

101 *See* Banko, *supra* note 32, at 124 ("[E]very manifestation of telework will also necessarily require thinking beyond the employment relationship framework for labour law legislation."); *see also, e.g.*, *Steinke*, 2019 WL 9606798, at *3 (declining to apply a teleworker's state's law to an out-of-state corporation).

102 *See* Johnson & Post, *supra* note 40, at 1370. To be sure, the remote worker phenomenon predated the ubiquitous adaptation of the internet. *See* Kelli L. Dutrow, *Working at Home at Your Own Risk: Employer Liability for Teleworkers Under the Occupational Safety and Health Act of 1970*, 18 Ga. St. U. L. Rev. 955, 977–79 (2002) (discussing the rise in teleworking in the aftermath of 9/11).

103 *See supra* notes 84–89 and accompanying text.

104 *See, e.g.*, Loza v. Intel Ams., Inc., No. C 20-06705, 2020 WL 7625480, at *2–4 (N.D. Cal. Dec. 22, 2020) (examining the facts to determine whether the tortious act took place in California); Hearn v. Edgy Bees, Inc., No. 21-2259, 2022 U.S. Dist. LEXIS 94745, at *4 (D. Md. May 26, 2022) (examining the facts to determine whether defendant employed plaintiff in Maryland or if the facts surrounding plaintiff's employment "sufficiently connect [his] work to Maryland such that the presumption against extraterritoriality does not apply" (quoting Poudel v. Mid Atl. Pros., Inc., No. 21-1124, 2022 WL 345515, at *3 (D. Md. Feb. 4, 2022))); Munenzon v. Peters Advisors, LLC, 553 F. Supp. 3d 187, 202 (D.N.J. 2021) (using the most significant relationship test to track the contacts between the Connecticut remote worker and the New Jersey employer).

105 Kuklenski v. Medtronic USA, Inc., 635 F. Supp. 3d 726, 734 (D. Minn. 2022) (quoting Walton v. Medtronic USA, Inc., No. 22-CV-0050, 2022 WL 3108026, at *2 (D. Minn. Aug. 4, 2022)).

Nonetheless, the extent of a plaintiff's contacts with the state is often a factor in a court's statutory interpretation analysis.[106]

Contacts—a highly physical and territorial phenomenon[107]—are a poor conceptual fit for telework, which is, at best, quasi-territorial, and at worst, completely nonterritorial.[108] To allow recovery under the employer's state statute, a court may attempt to determine the extent of the out-of-state plaintiff's contacts with the employer's state.[109] Courts embarking on this intellectual exercise are prone to performing nonsensical backflips to try to fit this cyberspace-based idea into the physical world.[110] The frequency of a plaintiff's physical presence in the state is an often-used metric.[111] For example, in *Desiderio v. Hudson Technologies, Inc.*,[112] the Southern District of New York did not dismiss Staryl Desiderio's gender-based discrimination claim under the New York Human Rights Law, but only because the gender-based discrimination occurred at an isolated in-person meeting during the pandemic.[113] Regarding her disability-based discrimination claim, however, the court dismissed because the impact of the disability-based discrimination was felt while the plaintiff was working remotely from her home in Florida.[114] And in *McPherson v. EF Intercultural Foundation Inc.*,[115] when a teleworker

106 *See infra* notes 109–31 and accompanying text.

107 *But see* Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 322 (2002) (offering a "cosmopolitan pluralist conception of jurisdiction" which "allows us to think of community not as a geographically determined territory circumscribed by fixed boundaries, but as 'articulated moments in networks of social relations and understandings'" (quoting DOREEN MASSEY, SPACE, PLACE, AND GENDER 154 (1994))).

108 *See supra* notes 28–43.

109 *See, e.g.*, Lincoln-Odumu v. Med. Fac. Assocs., Inc., No. CV 15-1306, 2016 WL 6427645, at *11 (D.D.C. July 8, 2016) (citing McGoldrick v. TruePosition, Inc., 623 F. Supp. 2d 619, 631 (E.D. Pa. 2009)) (considering "(1) the location of the employer's headquarters; (2) the employee's physical presence working in the state; (3) the extent of employee's contact with the in-state employer (i.e., reporting, direction, supervision, hiring, assignment, termination); (4) the location of the employee's residence; and (5) the employee's ability to bring a claim in another forum").

110 *Cf.* YOCHAI BENKLER, RULES OF THE ROAD FOR THE INFORMATION SUPERHIGHWAY: ELECTRONIC COMMUNICATIONS AND THE LAW § 30.3, at 625 (1996) ("Courts applying traditional doctrines . . . will find themselves entangled in a variety of questions for which their physical-space-based conceptual framework will leave them unprepared.").

111 *See, e.g.*, Hearn v. Edgy Bees, Inc., No. 21-2259, 2022 U.S. Dist. LEXIS 94745, at *10 (S.D. Md., May 26, 2022) ("[T]he Complaint contains no allegations that Plaintiff actually traveled to or worked in Maryland—even on one occasion."); Shiber v. Centerview Partners LLC, No. 21 Civ. 3649, 2022 WL 1173433, at *6 (S.D.N.Y. Apr. 20, 2022) (finding the plaintiff "never stepped foot inside Centerview's New York City office and instead worked exclusively from her home in New Jersey"); McPherson v. EF Intercultural Found., Inc., 260 Cal. Rptr. 3d 640, 662–64 (Ct. App. 2020) (considering a plaintiff's annual trips into California for her job's summer program to decide whether California law applies to the dispute).

112 No. 22 Civ. 541, 2023 WL 185497 (S.D.N.Y. Jan 13, 2023).

113 *Id.* at *6.

114 *Id.* at *7.

115 260 Cal. Rptr. 3d 640 (Ct. App. 2020).

attempted to state a claim under California's labor code, the court considered the fact that she had only performed 25 percent of her work in-person in California, and the rest remotely from her home in Virginia.[116] Yet, this physical-contacts analysis does not appreciate the real "location" of telework—jurisdictionless cyberspace.[117] Especially given the rise of digital nomads, a teleworker's geographic location has little, if any, connection to the substance of the work.

To accommodate for the apparent nonphysical nature of telework, a handful of courts have expanded the definition of "contacts" to include "electronic" or "virtual" contacts. In *Trevejo v. Legal Cost Control Inc.*,[118] a Massachusetts-based teleworker brought an age-based discrimination action against his New Jersey-based employer under the New Jersey Law Against Discrimination.[119] The Superior Court of New Jersey Appellate Division reversed the order, granting summary judgment in favor of the defendant and requested additional discovery on the type of software used by the remote employees, the location of the server that connected the teleworkers to the employer's state, and the location of the internet provider.[120] Similarly, in *Hull v. ConvergeOne*,[121] a remote worker based in Utah working in sales for a Minnesota-based company brought a claim under the Minnesota Payment of Wages Act.[122] The District of Minnesota denied the defendant's motion to dismiss, citing to plaintiff's virtual interactions through WebEx, daily Zoom meetings, and quarterly corporate conference calls with people based in the employer's state.[123] Finally, in *Pestell v. CytoDyn Inc.*,[124] despite holding for the defendant, the District of Delaware considered plaintiff's argument that he had "thrice-weekly meetings with laboratory staff via

116 *See id.* at 661 ("Most of Heimann's work may have been to support programs in California, but as a Virginia resident she did not perform most of her work in California. Based on the record, at most Heimann worked in California for about 12 to 13 weeks per year—about two months or so in the summer and additional days, or perhaps a week at a time, in January or February and in April or September. She thus spent at least 75 percent of her time performing work in Virginia from June 2005 to October 2014." (emphasis omitted)).

117 *See supra* notes 28–43.

118 No. A-1377-16T4, 2018 WL 1569640 (N.J. Super. Ct. App. Div. 2018).

119 N.J. STAT. ANN. § 10:5 (West); *Trevejo*, 2018 WL 1569640, at *1.

120 *Trevejo*, 2018 WL 1569640, at *4.

121 570 F. Supp. 3d 681 (D. Minn. 2021).

122 MINN. STAT. § 181.01–181.27; *Hull*, 570 F. Supp. 3d at 686.

123 *See Hull*, 570 F. Supp. 3d at 687. The court distinguished on the facts from previous cases that held that the MPWA does not apply extraterritorially, where plaintiff never once entered the state, because here, the plaintiff also attended trainings in person in Minnesota and carried Minnesota health insurance. This indicates that perhaps the case might have gone the other way were electronic contacts the only contact considered. *Id.* at 692.

124 No. 19-cv-1563, 2020 WL 6392820 (D. Del. Nov. 2, 2020).

videoconference or teleconference, maintaining near-daily contact with laboratory staff."[125]

While the "electronic contacts" concept is useful as a first step that better grasps the realities of telework, this analytical microleap does not address the central problem. Because workers and employers alike are now based anywhere and everywhere, the "electronic contacts" will float between two meaningless locations, unconnected to the central location of the employer-employee relationship.[126] A system that considers only the physical locations of each of the participants in a dispute is bad for workers and bad for business.[127] The District of Minnesota in *Kuklenski* recognized this incongruity, rejecting a territorial approach altogether:

> What if that Wisconsin resident worked only remotely for a Minnesota-based corporation performing job duties that—prior to the proliferation of remote work—were performed by an employee located at the company's Minnesota offices? In other words, might purely electronic contacts with Minnesota-based co-workers be enough in some cases to show that an employee works in Minnesota? Does the location of the person or persons responsible for the alleged discrimination matter? Must the impact of the alleged discrimination occur in Minnesota? Pretty clearly, the [Minnesota Human Rights Act]'s "works in this state" requirement is ambiguous.[128]

As the court in *Kuklenski* correctly understood, telework is a quasi-territorial form of work that is not meaningfully tied to *any* specific jurisdiction.[129]

But to the extent telework can be said to be tied anywhere, it must at the very least be tied to the employer's state.[130] The employer's state centralizes all the relevant parties into one tangible location.[131] Any teleworker—wherever she may happen to rest her head at night—should be able to state a claim in the employer's state. A court should always find that there is a sufficient nexus between a teleworker and the employer's state such that a teleworker falls within the state's legislative jurisdiction. The court in *Munenzon*—despite holding to the contrary—grasped the connection between a teleworker and her employer's state:

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125 *Id.* at *1.

126 *But cf. id.* at *5 (granting defendant's motion to dismiss where plaintiff brought a claim, under a third state's statute, different from the company's principal place of business or place of incorporation, since both employer and employee were working remotely).

127 *See, e.g.*, Burnstein, *supra* note 69, at 92–95.

128 Kuklenski v. Medtronic USA, Inc., 635 F. Supp. 3d 726, 734 (D. Minn. 2022).

129 *See id.*

130 *See* Goldsmith, *supra* note 47, at 1129.

131 *See id.*

> Working remotely for a New Jersey company is concededly different from working for, say, a branch office of a New Jersey company. Such a stay-at-home employee is directly linked to the New Jersey employer, and is not "anchored" in the same manner to a local brick-and-mortar office of the employer.[132]

In other words, a teleworker remains tethered to the employer's primary or original location, while a worker at a branch office—perhaps like mobile workers sent out to a single location[133]—is likely to come within another controlling jurisdiction.

To find a nexus to the employer's state, courts have looked to criteria such as the location from which a teleworker receives official correspondence such as pay stubs, where a teleworker was originally hired, where the teleworker is taxed, where a teleworker reports, where the teleworker may have periodic in-person meetings, where the employer treated as the teleworker's "base," and whether the employer had a physical presence in the teleworker's state.[134] Although these contacts may support many teleworkers in stating a claim under an employer's state statute, a court should find that the employer's state laws may permissibly govern an employment dispute *as a categorical rule*. The alternative may create a lawless circumstance for the teleworker, who may be untethered to any other specific geographical location, since each state's statute is analyzed in isolation. And even if a teleworker-state allows for recovery, it's likely that those state's protections are not as strong as the employer's state protections.[135]

A teleworker's nexus to an employer's state is also prevalent in the tax arena, where the employer's state routinely subjects out-of-state

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132 Munenzon v. Peters Advisors, LLC, 553 F. Supp. 3d 187, 202 (D.N.J. 2021).

133 *See supra* note 89 and accompanying text.

134 *See, e.g.*, Lincoln-Odumu v. Med. Fac. Assocs., Inc., No. CV 15-1306, 2016 WL 6427645, at *11 (D.D.C. July 8, 2016) (finding teleworker based in Virginia could state a claim under the District of Columbia Wage Payment and Collection Law in part because she "(1) was hired in the District of Columbia; (2) was supervised and received directions from her employer in the District of Columbia, which maintains no facility in the state in which the plaintiff performed her work duties; (3) was issued pay statements from a District of Columbia address to an address in the District; (4) received correspondence from her employer expressly recognizing the plaintiff's eligibility for relief under District of Columbia worker protection laws; and (5) since the initiation of the present action, has worked periodically at her employer's office in the District of Columbia" (citations omitted)); Wexelberg v. Project Brokers LLC, No. 13 CIV. 7904, 2014 WL 2624761, at *10 (S.D.N.Y. 2014) (finding where plaintiff worked remotely from his home in New Jersey for the last five weeks of employment, he was able to state a claim under the New York Human Rights Law against his employer in part because "defendants consistently treated him as an employee in their New York office, as they withheld a portion of his pay to account for New York State income taxes").

135 *See supra* note 24.

teleworkers to the employer's state tax code.[136] Numerous states have developed a "convenience of the employer" rule which treats teleworking labor as in-state employment, therefore subjecting a teleworker's income to employer's state taxation.[137] Although the standard for imposing tax liability is somewhat different from the standard involved in stating a claim under an employer's state statute, both consider a "nexus" to the employer's state.[138] In the absence of express legislative directive from a worker protection statute, it is nonsensical that a state may extend its tax laws to out-of-state teleworkers, and yet refuse the same generosity for its worker protections.[139]

D. Government Interests Analysis

When a court considers the scope of only a single statute—as in teleworker cases—it may inquire into the purpose of the act and ask whether it is compatible with an extraterritorial application. This inquiry into legislative purpose involves a Currie-like exploration into the interests of the forum. Professor Brainerd Currie—father of modern interest analysis—suggests that when conducting a multistate interest analysis, the court "determine[s] the governmental policy expressed in the law of the forum" and then "inquire[s] whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy."[140] Currie suggests that the process of multistate interest analysis "is essentially the familiar one of construction or interpretation."[141] The difference is that in a multistate interest analysis, a court assesses the interests underlying two

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136 *See, e.g.*, Brief in Opposition to Motion for Leave to File Complaint at 36, New Hampshire v. Massachusetts, 141 S. Ct. 2848 (2021) (No. 22-154) (noting that Massachusetts Law subjected out-of-state teleworkers to Massachusetts's tax where employer was based in Massachusetts). *See generally* Edward Zelinsky, *Taxing Interstate Remote Workers after* New Hampshire v. Massachusetts*: The Current Status of the Debate*, 25 FLA. TAX REV. 767 (2022).

137 Mark Klein, Joseph Endres & Katherine Piazza, *Tax Implications of COVID-19 Telecommunication and Beyond*, CPA J. (July 2020) ("Under the 'convenience of the employer' rule, if the employer or the employee's principal office is located in one of those states, then the employee's compensation earned while telecommuting will be treated as if earned in the employer's location, and not in the state from which the employee is telecommuting, if the employee is working remotely for their own convenience and not the employer's necessity.").

138 *See* Kim, *supra* note 70, at 1195–214 (discussing the nexus between teleworkers and employer's states for tax purposes).

139 *See, e.g.*, Buckeye Inst. v. Kilgore, No. 20CV004301, 2021 Ohio Misc. LEXIS 37, at *13 (Ct. Com. Pl. 2021) (finding that a remote teleworker could be considered working in the employer's state for tax purposes). Some, however, have argued that these tax schemes are unconstitutional. *See, e.g.*, Kim, *supra* note 70, at 1170; Nathan Sauers, Comment, *Remote Control: State Taxation of Remote Employees*, 60 HOUS. L. REV. 175, 185–94 (2022).

140 Currie, *supra* note 51, at 178.

141 *Id.* ("[The process of interest analysis] is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it

comparative state's statutes, and then applies the law of the state with the greater interest.[142] In a unilateral interest analysis, in step one of the conflicts analysis, a court will look only to a single state's statute to determine whether the legislative purpose would *permit* the statute to extend to a party outside of the state. The court dismisses the case altogether in the absence of such extraterritorial legislative intent.

A court inquiring into the legislative purpose to determine the scope of a statute should always conclude that the employer state has a strong interest in regulating the employer-teleworker relationship. First, the employer's state has interest in regulating *in-state conduct.* Worker protection statutes are, by their nature, designed to regulate conduct by *employers*, not *employees*.[143] An antidiscrimination statute, for example, is designed to prevent an *employer's* discriminatory actions.[144] An anti-wage theft statute might require an *employer* to pay their workers a certain rate on a regular basis.[145] Some courts addressing the teleworker problem have recognized that regulating in-state employer conduct is an essential purpose of a worker-protection statute. In *Lincoln-Odumu v. Medical Faculty Associates, Inc.*,[146] a plaintiff-teleworker based out of her home in Virginia and working for a Washington, D.C., company claimed that she was instructed to underreport the hours she worked and was not fully compensated for the overtime wages she was owed.[147] The plaintiff brought a claim under the D.C. Wage Payment and Collection Law ("WPCL").[148] Contrary to the defendant's assertion that "the District '[c]ertainly . . . has no interest in whether or not individuals working . . . outside the District are paid their wages,'" the D.C. District Court found that the District has an interest in preventing wage theft initiated by employers within their borders, "regardless of the physical location of their employees"[149] because, as the plaintiff contended, "the 'focus of the []WPCL is on the actions of an employer,' and not the location of the employee."[150] Similarly, in *Trevejo v. Legal Cost Control*

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applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.").

142 *Id.* (describing the steps involved in the conflicts analysis).

143 *See, e.g.*, Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 159 ("[T]he purpose of that Act, as of the workmen's compensation laws of most other States, is to provide, in respect to persons residing and businesses located in the State, not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate.").

144 *See, e.g.*, N.Y. Exec. § 296 (2021).

145 *See, e.g.*, Lincoln-Odumu v. Med. Fac. Assocs., Inc., No. CV 15-1306, 2016 WL 6427645, at *4 (D.D.C. July 8, 2016).

146 No. CV 15-1306, 2016 WL 6427645 (D.D.C. July 8, 2016).

147 D.C. Code § 32-1308.

148 *Lincoln-Odumu*, 2016 WL 6427645, at *2.

149 *Id.* at *10 (alterations and omissions in original).

150 *Id.* at *6 (alteration in original).

Inc., the New Jersey Superior Court, Appellate Division found that the purpose of the New York statute "'is nothing less than the eradication of the cancer of discrimination in the workplace,'"[151] and that the statute has been "broadly construed to protect not only 'aggrieved employees but also to protect the public's strong interest in a discrimination-free workplace.'"[152] Additional discovery was required to decide whether the plaintiff could state a claim for relief.[153] And in *Poudel v. Mid Atlantic Professionals, Inc.*, despite ultimately holding for the defendant, the District Court of Maryland noted that "the 'purpose' of the [Maryland wage payment law] . . . is to provide 'an incentive for *employers* to pay . . . back wages.'"[154]

States also have an interest in preventing in-state employers from manipulating their employees. If courts do not extend teleworkers' employer's state statutory protections, employers may quickly realize that they may hire out-of-state workers to avoid abiding by in-state legislation. For example, in *Wexelberg v. Project Brokers, LLC*,[155] the plaintiff who started out working in-person in New York and then later began working remotely from his home in New Jersey alleged he was fired due to his severe physical disability that required special accommodations.[156] He brought a claim under the New York Human Rights Act.[157] The Southern District of New York stated,

> By the simple stratagem of directing a targeted employee to do his work at home rather than at the New York office where he normally works, and then terminating him a few days or weeks later, the employer would immunize itself from liability under both State and City statutes. It can scarcely be the case that the State Legislature intended to allow this form of victimization of the very employees whom the Court of Appeals deemed "those who are meant to be protected."[158]

Thus, courts and employers have recognized this legal loophole in the teleworker arena, and a state has an interest in guarding against it.

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151 2018 WL 1569640, at *3 (quoting Garnes v. Passaic County, 100 A.3d 557, 564 (N.J. App. Div. 2014)).

152 *Id.* at *3 (quoting Hoag v. Brown, 397 N.J. Super. 34, 47 (App. Div. 2007)).

153 *Id.* at *4.

154 Poudel v. Mid Atl. Pros., Inc., No. 21-1124, 2022 WL 345515, at *4 (D. Md. Feb. 4, 2022) (second omission in original) (emphasis added) (quoting Battaglia v. Clinical Perfusionists, Inc., 658 A.2d 680, 686 (Md. 1995)).

155 No. 13 CIV. 7904, 2014 WL 2624761, at *1 (S.D.N.Y. 2014).

156 *Id.* at *1.

157 N.Y. Exec. L. § 290 (McKinney); *Wexelberg*, 2014 WL 2624761, at *1.

158 *Wexelberg*, 2014 WL 2624761, at *35 (quoting Hoffman v. Parade Publ'ns, 933 N.E.2d 744, 747 (N.Y. 2010)).

Similarly, in *Rinksy v. Cushman and Wakefield Inc.*,[159] an employee had previously commuted into New York for twenty-seven years from his home in Massachusetts.[160] Rinsky's employer allowed him to begin working from his home in Massachusetts, only to fire him three months later.[161] In effect, the defendant "allowed [Rinsky] to believe that he would be able to transfer to Massachusetts, but never officially authorized or intended to authorize the transfer, thus creating a pretext to fire him after he moved."[162] The employer then filed a motion to dismiss when plaintiff attempted to file suit under the New York City Human Rights Law,[163] arguing that the statute did not apply extraterritorially to a remote worker in Massachusetts.[164] But the First Circuit held for the plaintiff, citing *Wexelberg*, and recognizing that "[i]t would create a significant loophole in the statutory protection" were the court to allow the defendants' ill-intentioned actions to prevent the plaintiff from filing suit under the New York law.[165]

Finally, granting a defendant's motion to dismiss a teleworker claim brought under an employer's state statute enables an employer to override the legitimate expectations of their workers.[166] Professor Robert Leflar's article *Choice-Influencing Considerations* emphasizes the "predictability of results" as one of the most frequently addressed metrics that a court will use to determine a choice of law problem.[167] During the pandemic, millions were required to work from home across state lines with the expectation of one day returning to in-person work.[168] Where an employer enabled the reasonable expectation—such as by promising a return to in-person work and continuing to deduct the employer's state taxes from a teleworkers' paycheck—an employer's in-state conduct is at issue. This was the case in *Shiber*, where plaintiff "understood her remote work to be temporary and expected to work in person from Centerview's New York City offices once those offices reopened," in

159 918 F.3d 8 (1st Cir. 2019).

160 *Id.* at 12.

161 *Id.* at 13.

162 *Id.* at 20 (alteration in original) (citation omitted).

163 N.Y.C. Admin. Code §§ 8-101 to 8-134.

164 *Rinksy*, 918 F.3d at 14.

165 *Id.*

166 Reidenberg, *supra* note 37, at 1953 ("[T]he initial wave of cases seeking to deny jurisdiction, choice of law, and enforcement to states where users and victims are located constitutes a type of 'denial-of-service' attack against the legal system.").

167 Leflar, *supra* note 52, at 282; *accord* Robert A. Leflar, *Choice of Law Statutes*, 44 Tenn. L. Rev. 951, 967 (1977); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 Calif. L. Rev. 1584, 1586 (1966); Robert A. Leflar, American Conflicts of Law 240 (3d ed. 1977).

168 *The Number of People Primarily Working from Home Tripled Between 2019 and 2021*, U.S. Census Bureau (Sept. 15, 2022), https://www.census.gov/newsroom/press-releases/2022/people-working-from-home.html [https://perma.cc/YBV5-KE9M].

part because Centerview indicated that it would "continue to provide updates as [the company] got 'closer to . . . office re-openings'" and because Centerview continued to deduct New York State taxes from Shiber's paycheck.[169] Centerview's actions should therefore be subject to in-state regulation under the statute.

Problematically, some courts have found that an employer's state does not have an interest in regulating teleworker relationship.[170] Those courts suggest that "[t]he states where the[] plaintiffs lived and worked would have the greatest interest in their treatment as employees."[171] This view presents several challenges. First, this view overstates the significance of the place in which a teleworker may incidentally open her laptop. Because remote work is inherently nonlocational and not meaningfully connected to any state other than that of the employer,[172] the state where the teleworker resides has a limited interest in applying its law to a dispute between the worker and the employer.[173] Indeed, the state might not even be aware that a remote worker is within its borders, conducting business for an out-of-state company.[174] Relatedly, this view presupposes that the state where a teleworker physically lives and works is *willing* to rope an employer into its legislative jurisdiction. Courts have been unwilling to construe the teleworker's state's statute in that way. In *Steinke v. P5 Solutions*,[175] the D.C. Superior Court found that a teleworker working in D.C. could not state a claim under the D.C. WPCL against their Virginia-based employer.[176] The court reasoned that "[o]ne employee's decision to work from home should not qualify the entire company as operating in the District of Columbia nor as 'employing' any person in the District of Columbia" under the WPCL.[177] This case demonstrates that the teleworker-state may not provide an adequate forum for enforcing antidiscrimination statutes or wage and hour statutes. The onus must therefore fall to the employer's state to enforce its own law against its own in-state companies.

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169 Shiber v. Centerview Partners LLC, No. 21 Civ. 3649, 2022 WL 1173433, at *1 (S.D.N.Y. Apr. 20, 2022).

170 Munenzon v. Peters Advisors, LLC, 553 F. Supp. 3d 187, 201 (D.N.J. 2021).

171 *Id.* (alteration in original) (citation omitted).

172 *See supra* notes 29–35.

173 *See, e.g.*, Steinke v. P5 Sols., Inc., No. 2018 CA 004445 B, 2019 WL 9606798, at *3–5 (D.C. Super. Ct. July 3, 2019).

174 This Author has not found any state that requires a teleworker to "register" his presence in the state as a teleworker or otherwise inform the state that he is working from home in the state.

175 No. 2018 CA 004445 B, 2019 WL 9606798 (D.C. Super. Ct. July 3, 2019).

176 *See id.* at *5 (D.C. Super. Ct. July 3, 2019). To be clear, this holding is consistent with *Lincoln-Odumu*, in which the court found that an out-of-state teleworker employed by a D.C. corporation could recover under the D.C. WPCL. Therefore, D.C.'s approach is harmonious. *See* Lincoln-Odumu v. Med. Fac. Assocs., Inc., No. CV 15-1306, 2016 WL 6427645, at *13 (D.D.C. July 8, 2016).

177 *Steinke*, 2019 WL 9606798, at *3.

E. Presumptions Against Extraterritoriality

Courts routinely deny out-of-state teleworkers protection pursuant to a canon of statutory construction known as the "presumption against extraterritoriality"[178]—that is, the assumption that the legislature only intended for the statute to apply within the state.[179] This presumption is designed to protect against dormant Commerce Clause violations.[180] In turn, the strand of the dormant Commerce Clause that addresses the extraterritoriality principle "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[181] With the exception of one case,[182] the Supreme Court has only struck down statutes under the extraterritoriality principle where the Court "faced (1) a price control or price affirmation regulation, (2) linking in-state prices to those charged elsewhere, with (3) the effect of raising costs for out-of-state consumers or rival businesses."[183]

Broadly speaking, presumptions against extraterritoriality as an interpretive canon are waning in popularity. Scholars have argued that these presumptions are not genuine concerns of constitutional violations.[184] Professor Larry Kramer notes that the presumption is not based

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178 *See, e.g.*, Pestell v. CytoDyn, No. 19-cv-1563, 2020 WL 6392820, at *3 (D. Del. Nov. 2, 2020) ("[P]rotections contained in [Pennsylvania Wage Payment and Protection Law] extend only to those employees based in Pennsylvania." (quoting Killian v. McCulloch, 873 F. Supp. 938, 942 (E.D. Pa. 1995)); Munenzon v. Peters Advisors, LLC, 553 F. Supp. 3d 187, 202 (D.N.J. 2021) ("[Case law] is fairly uniform in suggesting or holding that New Jersey's wage and hour law does not apply to out-of-state workers."); Loza v. Intel Ams., Inc., No. C 20-06705, 2020 WL 7625480, at *4 (N.D. Cal. Dec. 22, 2020) (plaintiff-teleworkers' claim under California state law "must be dismissed pursuant to the presumption against extraterritoriality"); See, e.g., Hearn v. Edgy Bees, Inc., No. 21-2259, 2022 U.S. Dist. LEXIS 94745, at *4 (S.D. Md., May 26, 2022) (finding that the facts of the case—that the employee did not work even one day in Maryland despite the firm being headquartered in Maryland—were not sufficient to overcome the presumption against extraterritoriality).

179 *See* Dodge, *supra* note 53, at 1408, 1420, 1433 (finding that twenty states apply presumptions against extraterritoriality in their choice of law rules to prevent dormant Commerce Clause violations).

180 *See* U.S. Const. art. I, § 8; *see also* Dodge, *supra* note 53, at 1433.

181 Healy v. Beer Inst., 491 U.S. 324, 336 (1989) (quoting Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982) (plurality opinion)).

182 *Edgar*, 457 U.S. at 626–27 (plurality opinion) (striking down a statute that required "any takeover offer for the shares of a target company [to] be registered with the Secretary of State").

183 Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1173 (10th Cir. 2015) (extrapolating principles from *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986), and *Healy*, 491 U.S. 324).

184 *See* Dodge, *supra* note 53, at 1392 ("[A]s a practical matter, the most significant constraints on the extraterritorial application of state law are [not constitutional constraints, but] state conflict-of-laws rules."); Goldsmith & Sykes, *supra* note 69, at 804–06; Brannan P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 La. L. Rev. 979, 979 (2013) ("At this point, the extraterritoriality principle looks to be quite moribund.").

on evidence of actual legislative intent.[185] Courts have also characterized the extraterritoriality principle as "the most dormant" of dormant Commerce Clause jurisprudence.[186] The draft of the Third Restatement of Conflict of Laws recommends that states should not have presumptions against extraterritoriality.[187] Even if the dormant Commerce Clause was genuinely implicated, Professors Goldsmith and Sykes argue that, in relation to internet regulations, some out-of-state impacts from state regulations "are commonplace and often desirable from the efficiency perspective that informs the meaning and scope of the dormant Commerce Clause."[188] To the extent that a presumption against extraterritoriality is designed to protect against dormant Commerce Clause violations, it is far from clear that *some* extrastate regulation in a teleworker case would give rise to such a violation.[189]

Nonetheless, when a presumption against extraterritorially is applied to a teleworker's claim, a court is likely to hold that a teleworker cannot recover under an employer's state statute.[190] This presumption is a poor match for the teleworker context. First, worker protection statutes are unlike price-regulating statutes that the Court previously struck down under the extraterritoriality principal.[191] These statutes do not directly or indirectly regulate prices on goods sold out of state.[192] Second, the dormant Commerce Clause is not implicated on these facts because the statute does not—neither de jure nor de facto—regulate conduct that occurs "*wholly*" outside the state.[193] In cases where the teleworker problem arises, at least one very key participant in the transaction—the employer—*is* located within the state. And even

185 Kramer, *supra* note 55, at 295.

186 Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 680–81 (4th Cir. 2018) (Wynn, J., dissenting) (quoting *Energy & Env't Legal Inst.*, 793 F.3d at 1172).

187 *See* RESTATEMENT (THIRD) OF CONFLICT OF LS. § 5.01 cmt. c (AM. L. INST., Tentative Draft No. 3, 2022) ("This Restatement does not adopt a presumption against extraterritoriality with respect to the laws of States of the United States, although some States have done so.").

188 Goldsmith & Sykes, *supra* note 69, at 827.

189 *Cf.* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1134 (1990) (arguing for a "public values" approach to statutory construction in the international context and suggesting that this approach applies especially well to "those canons that preserve scope for multiple sources of law"). *But see* Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 MARQ. L. REV. 497, 526 (2016).

190 *See supra* note 178.

191 *See, e.g.*, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 519 (1935) (statute regulating milk prices sold by out-of-state producers to out-of-state dealers); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 575 (1986) (statute requiring manufacturers not to sell product in other states for less than the New York price); Healy v. Beer Inst., 491 U.S. 324, 326 (1989) (statute requiring beer producers to affirm that their in-state prices were "no higher than the prices at which those products are sold in the bordering states").

192 *See Baldwin*, 294 U.S. at 511.

193 *See Healy*, 491 U.S. at 326.

where the supervisor who may have caused the harm is also teleworking from outside the employer's state, basic principles of agency law apply: the corporation itself is based in one location, even as its agents may be located elsewhere.[194] A more expansive reading, moreover, might consider that a teleworker *is* working "within the state" within the meaning of a statute, and a court applying the presumption to exclude a teleworker necessarily assumes that the teleworker is not working within the state.[195] At the very least, whether a teleworker works in the state for the purpose of the statute, is in question.[196] A blanket bar to recovery under a presumption against extraterritoriality is therefore inapplicable as applied to this quasi-territorial fact pattern.

III. A "Remote Worker" Classification

An elegant solution is readily available: a court, in the absence of an express legislative statement to the contrary, should find that a teleworker may state a prima facie claim under an employer's state worker protection statute. An "employer's state," for this purpose, can be defined as an employer's principal place of business, its place of incorporation, the location of its headquarters, and any state with an employer-sponsored branch or satellite office within its borders.[197] A "teleworker" may be defined as:

> [A] worker who performs work that is: (a) conducted entirely through virtual means; and (b) has no physical connection with the place in which it is performed.[198]

Under this test, Kathryn Shiber's claim in *Shiber v. Centerview Partners LLC* would not be dismissed for failure to state a claim under the New York State Human Rights Law.[199] Kathryn was employed by an in-state employer; Centerview Partners had physical offices in New York City, and Kathryn brought the claim under the New York State Human Rights Law and New York City Human Rights Law.[200] Because of the COVID-19 pandemic, Kathryn performed all of her work remotely, using Zoom calls to perform her job-related duties.[201] As such, her work had no necessary physical correlation with the place in which

194 *See* Restatement (Third) of Agency § 1.01 cmt. c (Am. L. Inst. 2006).

195 *See* Section II.A.

196 *See* Section II.A.

197 *See* Restatement (Second) of Conflict of Ls. § 188(e) (Am. L. Inst. 1971).

198 At least one court has attempted to establish a test to define a teleworker, though the context was somewhat different. *See* Malloy v. Superior Ct. of L.A. Cnty., 83 Cal. App. 5th 543, 546–48 (App. Ct. 2022).

199 No. 21 Civ. 364, 2022 WL 1173433, at *1 (S.D.N.Y. Apr. 20, 2022).

200 *Id.*

201 *Id.*

it was performed—New Jersey—even though she physically lived and worked in New Jersey from the outset of her employment.[202]

Notably, this simple solution can be implemented by the parties themselves. An employment contract will often include a choice-of-law clause naming the employer's state law as the law.[203] These choice-of-law clauses, however, are usually interpreted as governing only the interpretation of *the contract itself*, and not the entirety of the employment relationship.[204] Where a choice-of-law provision lists the employer's state law in the teleworker context, these should be interpreted as governing the entirety of the employment relationship.[205] Certainly where the parties selected the employer's state to govern one element of their relationship, it will come as no surprise that the clause is interpreted to govern other aspects of the relationship as well.

To address one counter perspective. Some courts have commented that allowing recovery under the employer's state statute would create a "free-for-all," such that employees with any virtual connection with the state would be able to recover.[206] This definition of "teleworker" articulated above, however, is narrowly proscribed. Only those employees of an in-state entity with no meaningful work-related ties to any other state can take advantage of this teleworker rule and the relevant state statute. While a corporation may employ thousands of teleworkers across all fifty states, this arrangement is limited by an employer's own discretion: an employer can require teleworkers to show up to work in-person at any time.[207] Therefore, under this scheme, an employer's liability is "limited and determinate."[208]

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202 *Id.*

203 *Cf.* John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631, 707 (2017) (finding that while some canons of construction of choice-of-law clauses produce the results desired by the contracting parties, others do not).

204 *See, e.g.*, Poudel v. Mid Atl. Pros., Inc., No. 21-1124, 2022 WL 345515, at *5 (D. Md. Feb. 4, 2022) ("[B]ecause that provision does not explicitly state that the parties agree to the applicability of the Maryland wage laws as a term of the contract, the Court declines to interpret it as having done so by implication."); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1059, 1064–65 (N.D. Cal. 2014) (declining to apply a California choice-of-law clause to a statutory wage claim because doing so "conflates statutory claims that exist independent of the contract with claims that arise from the agreement itself").

205 *See* Goldsmith, *supra* note 47, at 1208 ("Most contractual choice-of-law clauses govern the contracts within which they are embedded. But the scope of this private legal control is not limited to traditional contractual issues. In many circumstances, parties can agree to a governing law for torts and related actions that arise from their contractual relations.").

206 *See, e.g.*, Munenzon v. Peters Advisors, LLC, 553 F. Supp. 3d 187, 202 (D.N.J. 2021); *Poudel*, 2022 WL 345515, at *5.

207 *See, e.g.*, Tobey v. U.S. Gen. Servs. Admin., 480 F. Supp. 3d 155, 168 (D.D.C. 2020) (employer requiring employee with disabilities to show up in person and denying telework as a reasonable accommodation does not rise to the level of a hostile work environment claim).

208 Bradford Electric Light Co. v. Clapper, 286 U.S. 145, 159 (1932) (citations omitted).

To that end, this solution creates no "unfair surprise" under the Due Process Clause: "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[209] This standard is understood to impose a very modest limit on a state's choice of law.[210] Here, it would hardly be surprising to either party that a statute in the employer's state law would apply to an employment-related dispute if both parties were on notice as to an employer's primary location.

Conclusion

The COVID-19 pandemic has permanently altered the American "workplace." Yet our legal system is slow to update its approach. A court should take a generous view of an employer's state statute to mend this gap, thereby tethering a teleworker to at least one state's jurisdiction—the employer's jurisdiction. While teleworkers facing mistreatment wait for Congress to pass better worker protections on the federal level, state statutes are their main hope for finding justice against mistreatment. Courts should allow plaintiffs to state these claims.

209 Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981).

210 *See* Sullivan v. Oracle, 662 F.3d 1265, 1271 (9th Cir. 2011) ("A state court is rarely forbidden by the Constitution to apply its own state's law." (citing Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 814–23 (1985); *Allstate*, 449 U.S. at 304–20)).