

Employee Relations LAW JOURNAL

From the Editor –
The Right to Disconnect

Steven A. Meyerowitz

On the Grid 24/7/365 and the Right to Disconnect

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and Trevor L. Proctor*

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The Right to Disconnect

With so many ways employees can be reached after hours, one of the hot topics in employee relations is just how accessible employees should be? The lead article in this issue of *Employee Relations Law Journal* tackles domestic and international right to disconnect practices. We also have articles and columns covering a broad range of other topics!

ON THE GRID 24/7/365

Technological developments over the past few decades in laptop computers, smartphones, wifi connectivity, and other digital communication approaches have made it easier for people to work remotely. While many appreciate the flexibility and increased productivity these technological advancements provide, some lament that the ability to work anywhere, anytime has transformed into the expectation to work everywhere, all the time. C.W. Von Bergen, Martin S. Bressler, and Trevor L. Proctor, of Southeastern Oklahoma State University, discuss the issue and examine domestic and international right to disconnect practices in our lead article, "On the Grid 24/7/365 and the Right to Disconnect."

LAWYERS AS STRATEGISTS

In order to create sustainable competitive advantage, lawyers need to frame legal developments not only as threats but also as opportunities. Joint employment is rarely a threat to franchisors and can sometimes pose an opportunity. However, published legal advice almost without exception portrays joint employment as a threat to franchisors. In their article, "Lawyers as Strategists: The Case of Franchisors as Joint Employers," Kimble Byrd and Joel Rudin, of Rowan University, discuss the topic and conclude that lawyers may have work to do before they are ready to maximize their value as corporate legal strategists.

"NO POACH" CASES

The Department of Justice has shined a spotlight on the potential antitrust risks associated with employers' use of "no-poach" agreements in which companies agree not to hire or solicit each other's employees. Edward B. Schwartz, Michelle A. Mantine, and Jennifer M. Thompson, attorneys at Reed Smith LLP, discuss the Justice Department's statements of interest in "no poach" cases in their article, "DOJ Files Statements of Interest in 'No Poach' Cases: Policy Shift or Trap for the Unwary?"

WORKING TIME IN THE PHILIPPINES

In our next article, “Regulating Working Time in the Philippines: The Role of Statutory Regulations, Collective Bargaining, and Employee-Oriented Flexibilization,” Melisa R. Serrano, an associate professor at the University of the Philippines-Diliman, examines the differential impacts of statutory and non-statutory regulations and arrangements on working time in the Philippines, and highlights the existence of a “working-time divide” between and across industries, between the formal and informal sectors, between and across categories of workers, and between unionized and non-unionized enterprises. Some policy measures are proposed that aim at addressing the working-time divide.

UNITED STATES AND LEBANESE LABOR LAWS

Many countries have suffered from an increase in the rate of unemployment. This has been the result of several factors, including the competition from foreign workers and the lack of protection of the national labor force. For example, the United States and Lebanon have both accepted Syrian refugees since the beginning of the Syrian conflict. However, Lebanon experienced a severe impact on its economy compared to the United States, which had minor economic impact. This is because about 1.5 million Syrian refugees have entered Lebanon compared to only a few thousands who have entered the United States. Khodr Fakih, Abdul Nasser Kassar, and Nassif Al Hakim discuss foreign employment under United States and Lebanese labor laws in their article, “The United States and Lebanese Labor Laws: Foreign Employment and Protection of National Labor.”

AND MUCH MORE...

In addition, this issue contains our “Employee Benefits” column by Mark E. Bokert and Alan Hahn and our “ERISA Litigation” by Craig C. Martin and Amanda S. Amert. We also have a “From the Courts” column by Ian S. Linker and a “401(k) Review” column by Lori Welding Jones.

Enjoy the issue!

Steven A. Meyerowitz
Editor-in-Chief

On the Grid 24/7/365 and the Right to Disconnect

C. W. Von Bergen, Martin S. Bressler, and Trevor L. Proctor

Technological developments over the past few decades in laptop computers, smartphones, wifi connectivity, and other digital communication approaches have made it easier for people to work remotely. While many appreciate the flexibility and increased productivity these technological advancements provide, some lament that the ability to work anywhere, anytime has transformed into the expectation to work everywhere, all the time. The authors of this article discuss the issue and examine domestic and international right to disconnect practices.

“Employees physically leave the office, but they do not leave their work. They remain attached by a kind of electronic leash—like a dog. The texts, the messages, the emails—they colonize the life of the individual to the point where he or she eventually breaks down.”¹

Just a few decades ago individuals would leave the office, go home, and leave their work behind. In most cases, the workplace and work hours were clearly defined and there was a sharp divide between employment and non-job activities for most office workers. People took vacations without their laptops or smartphones. Nowadays, for many employees, work is not limited to the office but virtually wherever employees carry their laptop or smartphone, enabling them to continue working nights, weekends, or on vacation. The traditional thinking that employees only work within the established 9 to 5 model is today considered obsolete and in many nations there is now a “Digitally yours, 24/7/365” work culture.² Vognar³ humorously points out that the onslaught of “out-of-office” email responses flooding individuals’ inboxes has decreased significantly suggesting that people are always connected and have little need for creating those automatic replies.

This change has evolved over the years as companies strive to please employees by offering personal work flexibility and greater choice, while

C. W. Von Bergen is the John Massey Professor of Management at Southeastern Oklahoma State University in Durant, Oklahoma. He may be contacted at cvonbergen@se.edu. Martin S. Bressler is the John Massey Professor of Entrepreneurship also at Southeastern Oklahoma State University and can be contacted at mbressler@se.edu. Trevor L. Proctor is an M.B.A. student at Southeastern Oklahoma State University and can be contacted at tproctor27@student.se.edu.

at the same time responding to customer demands for immediate service. Marcum, Cameron, and Versweyveld⁴ argue that this has created a “double-edged sword” regarding work-life balance. On the one hand, portable laptop computers and cellphones provide greater work flexibility but on the other hand these devices result in employees becoming incapable of escaping work.⁵ Smartphone technology is practically tethered to and seldom separated from the user and ready to use at any time.⁶ Technology has made it possible for employees to continue working in the increasingly global and physically separated work environment⁷ but it has also produced 24/7/365 jobs where employees are expected to be available all the time.⁸

Employees are often contacted by text message, email, or smartphone at all hours to perform a task, work on a project, or complete an assignment. Challenger et al.⁹ conducted a survey of 150 managers that found 82.9 percent of supervisors indicated they would contact employees after regular work hours, usually (80 percent) by text message or email, with 42 percent of managers revealing they would call their subordinates, while almost 25 percent would use social media or chat software to connect with their employees. 28.6 percent of respondents expected to get a response from their employees in a few hours or less.

While the above analysis focuses on firms, it is important to note that an “always-on” culture can be self-imposed by employees themselves. Staying electronically connected all the time is often an implied expectation for employees looking to impress their manager and climb the corporate ladder.¹⁰ Additionally, it appears that some workers express an obsession with continually looking for work-related messages.¹¹ This may occur because cell phones are addictive by nature. According to Tristan Harris, previously a product philosopher at Google, smartphones are much like a “Slot Machine in Your Pocket.”¹² Comparable to a substance addiction, compulsive and excessive technology use has been found to be linked with risky behaviors including disregarding important personal and professional responsibilities. Additionally, the latest findings in neurobiology findings reveal analogous neural mechanisms correlated with substance addiction and technology-related addiction.¹³

Removing those connections often results in anxiety as well as other negative effects consistent with an addicted person going through stages of withdrawal. As reported by Matusik and Mickel,¹⁴ some employees experienced such an intense need to remain in communication with work that they regularly read work-related emails in the bathroom. In addition, Jackson, Dawson, and Wilson¹⁵ reported 70 percent of the employees read email messages in six seconds or less, and 85 percent of email messages in less than two minutes of receiving the message. It seems that some employees do not recognize when they should “turn off” work. Considerations such as these contribute to penetrable boundaries between an employee’s personal and professional time. This situation has produced problematic effects.

DIFFICULTIES WITH AN ALWAYS-ON CONDITION

The simple expectation of availability for work creates tension for employees and their families—even when they do not actually work during nonwork time.¹⁶ Becker reports that “Such expectations—whether real or imagined—cause more problems, including burnout and work-life balance problems, than the actual time it takes to read and respond to after hours’ emails.”¹⁷ The expectation that all employees be available by their cell phone or computer to answer even minor inquiries places employees on a perpetual state of alert that often results in workers “Sleeping with Your [Their] Smartphone.”¹⁸

Amazon can be considered a prime example of a work culture that fosters and urges continuous work. Company employees are consistently encouraged to “toil long and late” and the firm brags that its excessively high standards have created a super-intense work environment and a key contributor to its success.¹⁹ Former Amazon employee, Nichole Gracely,²⁰ authored “Being homeless is better than working for Amazon,” confirmed the intensive corporate culture.

Workplace dynamics like those at Amazon often result in problems for both employees and employers. In today’s modern society, struggle in balancing stress from home and work demands is common and may be one of the most significant challenges employees face.²¹

Such work-family conflict, known as work-life (im)balance, work interference with family, work-life fit, work-life integration, work-life interface, and work-to-family spillover is “a form of inter-role conflict in which the role pressures from the work and family domains are mutually incompatible in some respect.”²² These terms imply that fulfilling work demands interfere with the employees’ personal life which makes it difficult to meet expectations of both work and personal life. In addition, the work-life (im)balance appears to be especially significant to younger adults,²³ including millennials (individuals born between 1982 and 2004²⁴) the age group that many companies focus on attracting and retaining, and who indicate are the most dissatisfied and frustrated regarding work-family (im)balance.²⁵

Such conflict has also led to increased health and safety concerns of employees who work excessive numbers of hours. Research consistently finds that fatigued, stressed-out employees are more likely to become injured, sick, or be absent from work²⁶ and employers observe lower productivity from overtaxed employees because at some point more work does not necessarily result in better work.²⁷ Constant workplace contact, or even anticipation of such communication, can be harmful to employee health.²⁸ Overextended employees also face higher levels of personal and professional life conflict which results in higher rates of family violence and divorce.²⁹ It is also correlated with higher levels of difficulties in child-parent relationships and problems in child development.³⁰

The always-on work culture regularly drains employee initiative and morale, causes mental distractions, and makes it difficult for employees to assume responsibility for their projects and prioritize their work. In addition, research indicates working long hours results in productivity decreases.³¹ According to researchers,³² Japan's well-known extensive work hours has not benefitted their economy very much. For much of the previous 25 years, Japan's economy scarcely increased and the typical employee productivity is only two-thirds of the average American employee, a difference that has remained consistent. Also, consider Germany's shorter work hours. German employees receive four weeks of vacation per year, along with some of the briefest work weeks in Europe. The standard work week in the manufacturing sector is only 35 hours each week. Notwithstanding Germans working fewer hours, their work productivity helps them to be the industrial powerhouse of Europe and the principal manufacturer of export goods to developing Asian nations.³³ In this instance it seems that less is more.

This cultural shift to an always-on condition with its accompanying problematic consequences is happening globally and both organizations and governments are responding. We now first briefly discuss organizational initiatives to combat work-life conflict and then more comprehensively governmental schemes in the form of the "right to disconnect" movement.

ORGANIZATIONAL RESPONSES TO WORK-LIFE CONFLICT

Many companies are assisting employees in maintaining a good personal-professional balance by developing practices and policies that address changing employee needs and demands that enable them to succeed in attaining an enhanced work-life balance.³⁴ Interventions are characteristically expressed through family-friendly programs or work-life benefits and programs (WLBP) that enable employees to more easily balance conflicting work and family life.³⁵ WLBP, or human resource initiatives, are categorized into three main categories: policies, services, and benefits.³⁶ Policies include both the informal and formal methods in managing employees' work and leave schedules, flexible work hours, telecommuting, job sharing and also includes part-time work as well as parental and family leave. Services generally comprise items such as nearby or on-site childcare centers, counseling, and medical facilities. Some firms such as SAP, Google, Aetna, and IBM have hired Mindfulness Officers to assist in helping employees unwind and clear their minds.³⁷ Benefits typically take in various compensation-related areas that safeguard against earnings loss, medical expense payments, and paid vacation. WLBP also incorporate government required policies including maternity leave and maternity benefits in addition to discretionary company benefits and policies.³⁸

In Germany, for example, some employers are moving to remove employees' technological tethers. Because of labor council decisions to ban using communication devices after work hours for job-related issues, Volkswagen (in 2012) and BMW (in 2014) began placing all mail to the company server after office hours to be put on hold or deleted. Furthermore, company cell phones would be placed out-of-service beginning at the end of the work day until the start of the next work day.³⁹ Similarly, Daimler-Benz workers can enable the company email software to delete incoming emails while employees are away on vacation (already prohibited by German law), an action affecting approximately 100,000 employees. The computer program, "Mail on Holiday," issues the sender a reply indicating that the employee is away from the office and that the software deletes the email and then provides the sender with contact information of another employee who can handle important matters.⁴⁰

In America, the accounting and consulting firm Deloitte & Touche substantially improved the 33 percent employee turnover rate for women after revising the implied requirement that employees work 80-hours per week.⁴¹ Likewise, Perlow reported that the Boston Consulting Group attempted to change its always-available culture by providing every employee one evening per week when they could be off-line.⁴² This practice required reviews and reminders to persuade employees to use that time off. After this small change in company culture, both the organization and the employees observed significant positive effects including improved approaches to solving all kinds of problems that were previously ignored. Employees reported increased engagement and more energy in addition to significantly improved employee retention rates. In addition, Vynamic, the Philadelphia-based healthcare management consulting firm encourages healthy public and private lives by barring emails later than 10 p.m. or on weekends.⁴³

RIGHT TO DISCONNECT

Politicians and governments in many nations, urged by their constituents, are likewise pushing back on such always-on cultures and have begun investigating, and in sometimes enacting, statutes and regulations allowing employees the freedom to disengage from work activities beyond the official work hours (labeled "right to disconnect" codes). Some might argue that the right to disconnect from work and not engage in electronic communications such as emails or messages after assigned work hours is a human right⁴⁴ and in harmony with the definition of a human right established by The Equality and Human Rights Commission: "basic rights and freedoms that belong to every person in the world...."⁴⁵ Enacting legislation that grants employees the right to disconnect from work appears to be part of a new social movement. These laws assist in defining specific boundaries between work expectations and family

needs by establishing after-hours electronic communication schedules detailing when employees are accessible and can respond. These laws typically compel employers to implement an after-work hour's communication policy indicating that workers should be able to separate from their work day and not engage in job-related communication after work hours.⁴⁶ Regulations granting employees the right to disconnect appear to be gaining acceptance in several countries after France implemented their rule in 2017. We now offer a brief review of after work electronic communication practices in several different countries.

France

France has taken the initiative in establishing legal structures that protect workers' right to disconnect. In 2001, the concept was deliberated when Supreme Court of France determined that employees cannot be required to take work home, and since that time the Court continued updated its ruling as technology increased. In 2004, the Supreme Court of France further held that if an employee is not reachable outside of work hours by smartphone, it could not be considered misconduct.⁴⁷

On January 1, 2017 France implemented the right to disconnect and established what is now known as the El Khomri Law, named after the French Labor Secretary Myriam El Khomri.⁴⁸ The law applies only to companies with more than fifty employees and requires annual negotiation meetings between the employer and the employees' representative to discuss concerns related to employees' right to disconnect. Additionally, these consultations consider the establishment of company regulations on digital devices and tools that ensure respect for rest, personal life, and family leave periods. In the absence of agreement, the employer shall draw up a charter, after advice from the enterprise committee, or alternatively, from the staff delegates. The charter defines the ways in which employees may exercise their right to disconnect.⁴⁹

The employee-employer agreement includes a charter that defines the "modalities for the exercise of the right to disconnect."⁵⁰ The charter also details governing rules to guarantee "a reasonable use of digital tools."⁵¹ The French legislation is intended to provide employers and employees' representatives some degree of flexibility, taking into consideration the differences that could impact employees using electronic communication. It was developed from the idea that it is much better for employees to not be working all the time, and that the employees can determine when employer's work demands encroach upon evenings at home for rest and relaxation, or time with family and friends.⁵² The law is somewhat unclear and does not limit work communication after regular work hours but instead compels companies to clearly discuss these terms with employees. Although the law requires large companies to negotiate with employees, they are not required to come up with

an agreement; therefore, if an agreement is not arrived at between the company and employees, the right to disconnect cannot be enforced. Additionally, the law does not provide for assessing fines when a firm ignores the rules.

Nevertheless, the French subsidiary of the British company, Rentokil Initial, was forced to compensate a former employee €60,000 because the company did not affirm the employees' right to disconnect from cell phone and computer communications after assigned office hours.⁵³ This was the first ruling on this subject. In a July 12, 2018 decision, France's Court de Cassation (the Supreme Court of France), ruled it unfair that a former regional director of the company to always keep his telephone switched on and be able to respond to communication from customers or subordinates in the event any problems arose at work. The company did not regard the employee as officially on call and therefore did not compensate him for after-hours work. The court however, ruled the employee was indeed on call as the details of his employment contract were explicitly listed as the contact person in the event of an emergency and that the employee should be compensated for his work time. The French *droit à la déconnexion* regulation is now considered legally affirmed and laying the foundation for consideration in other countries—including the United States.⁵⁴

United States

In many instances, ideas originating in Europe eventually make it to the United States, so it should not be surprising to find that the right to disconnect is attracting attention in America. Recently, New York City council members drafted and introduced a bill on the issue. This proposal would be the first local regulation in the United States that would make it illegal for employers to require employees to be available by email after assigned work hours.⁵⁵ The proposed legislation would be considerably more restrictive than the French legislation and would not allow employers to force employees to be available by electronic communication after regularly assigned paid work. There are some exceptions in the legislation, including companies with less than 10 employees and an exception for emergency situations.

Generally, the legislation forbids employers from taking hostile employment actions against employees who fail to answer work-related texts and emails following their regularly assigned work hours. Employers will also be compelled to develop a written policy on employee use of electronic communication devices for work after hours. The legislation recommends penalties for companies that do not comply the provisions, that include: (i) a \$50 fine for each employee who does not receive proper notice of their right to disconnect; (ii) a \$250 fine for each instance of requiring an employee to check electronic communications after work hours; and (iii) fines ranging between \$500 and \$2,500 for

retaliating against employees for asserting their rights under the bill.⁵⁶ The regulation is still under consideration by the New York City Council and has not yet been passed, but the mayor's office has yet to endorse the initiative and noted that currently, nonexempt employees (there was no mention of exempt workers) who address work-related communications outside of their usual work hours are generally required to be paid under the U.S. Fair Labor Standards Act and New York law, thus rendering a blanket ban unnecessary. In fact, the *New York Post* reported that a spokesperson for the mayor's office indicated that "[w]hile bosses should, of course, be mindful of workers' schedules, legislating e-mail hours is not our focus."⁵⁷

Canada

Canada is another nation considering the after-hours communication from phones and computers outside office hours. As part of new labor code regulations, the Canadian government is considering a law that would grant workers the right to disconnect: that is, working without compensation while commuting or when at home.⁵⁸ Recently, the Canadian government concluded a 10-month examination of the working conditions in Canada⁵⁹ and an issue that emerged was determining how many employees are obligated or feel obligated to work beyond normal work hours on their phones or computers. It is interesting to note that 93 percent of those responding indicated that employees should have the right to not respond to communication beyond regular work hours. The subject of the right to disconnect was included as part of a year-long process discussing work-life balance issues, in addition to other topics including minimum-wage guidelines, and other issues such as contract flipping. The law under consideration in Canada would mainly affect federal employees in the transportation, banking, and telecommunications industries, though soon could include provincial workers and eventually the private sector.

Canadian Liberals are calling for a closer investigation of the issue and there is currently a division between employers and employees regarding whether there should be further consideration of right to disconnect regulations.⁶⁰ In March 2018, Gabriel Nadeau-Dubois of Quebec Solidaire tabled a private member's bill (otherwise known as the "Right to Disconnect Act") in the Quebec national assembly that would aim to "ensure that employee rest periods are respected by requiring employers to adopt an after-hours disconnection policy."⁶¹ The legislative proposal includes fines ranging from \$1,000 to \$30,000 for employers that fail to develop a policy or fail to annually review the policy in order to ensure it continues to be up to date and effective. Should the regulation pass at some time in the future, Québec would be the first Canadian province to pass legislation inspired largely by French law. The proposed bill also includes penalties, including fines for employers who fail to comply with

the law.⁶² It is also reported that Canadian right to disconnect regulation could come about in 2019 as part of a federal level labor code update.⁶³

Germany

Consider also Germany. In 2013, the German labor ministry barred managers from answering emails after regular work hours (except for an emergency). The Ministry implemented the policy in to prevent work burnout and to protect employee mental health.⁶⁴ The Ministry guidelines state that employees should not be disciplined for turning off their cell phones or ignoring messages after regular work hours. Aware of the risk for professional burn-out and negatively impacting private lives, the national works councils agreed with employees on right to disconnect rules. German Labor Minister Andrea Nahles called for an “anti-stress regulation” in 2014, that compelled companies to lower workplace stress. The regulation would also forbid contacting employees after work hours and under German law had already prohibited contacting employees while on vacation.⁶⁵ Despite these initiatives, there is not a proposed regulation on the right to disconnect. Moreover, Chancellor Angela Merkel has opposed a right to disconnect law and seems to support the German business self-regulation approach.

South Korea

In the last 10 years South Korea has worked to address work-life balance.⁶⁶ In 2010, officials at the South Korean Ministry of Health introduced monthly Family Day, where the Ministry office turned off lights at 7:00 p.m. to encourage workers to spend that time with their families and/or to produce offspring, another way to address the country’s low birth rate. In addition, companies were asked to refrain from requesting their employees to provide written requests why the worker was asking for annual leave. The Metropolitan Government in Seoul posted a regulation suggesting that their supervisors not contact subordinates using mobile messenger apps after regular work hours.⁶⁷ In 2016, South Korea (considered hyper-wired because more than 80 percent of South Koreans have smartphones—one of the highest percentages in the world) contemplated legislation that would have restricted employers from contacting employees at home.⁶⁸ Cyberstress due to continual contact from work supervisors has developed into an increasingly important social issue in South Korea, a nation afflicted with a mix of its infamous workaholic culture and highly developed digital technology. The legislation seeks to ban companies from delivering work-related messages to their employees by telephone, text, social media, or mobile messaging after regular work hours. The legislation is currently tabled, but proponents are expecting that the legislation will soon be reconsidered.

Ireland

Currently, nothing on the agenda of the Irish parliament is comparable to a right to disconnect law, however, Connolly⁶⁹ considers the Irish Organisation of Working Time Act of 1997 (the Act)⁷⁰ as providing a comparable duty by requiring employers to ensure their employees take time away from the office and to ensure workers are provided with adequate time for rest and relaxation. During these time periods, employers should not require employees to work, respond to emails, or engage in business-related phone calls. In 2018, a company executive employed at a subsidiary of the meat producer Kepak Convenience Foods Unlimited Company, was awarded €7,500 by the Labour Court after she argued successfully that she was required to respond to after-hours work emails, some of which were after midnight and after the 48 hours per week written in the Act.⁷¹ The executive provided copies of emails of numerous occasions during her employment to and from her employers before the regular work start time and after the usual finish work time. It looks as though the Act addresses technology issues and is consistent with other country's regulations regarding an employees' right to disconnect.

Other Countries

Workers in other countries have voiced concern regarding work-life balance problems and governments in these nations are contemplating enacting some version of employee right to disconnect legislation. A brief listing includes Japan, Spain, Philippines, Belgium, Luxembourg, The Netherlands, and Italy.

CONCERNS REGARDING LEGISLATING THE CULTURE OF CONNECTIVITY

News media often report that people today in many countries around the world are working more hours, seemingly attached to their cell phones and computers, overworked, stressed, burned out, and suffering with work-family conflict. Although there seems to be greater awareness of the dangers surrounding workplace technology, the ease of solving some of these problems—for example, banning after work hours' email—do not adequately address the complexity of the problem. Determining the right balance between work and personal life is a deeply personal decision that differs from one employee to the next. Technology can be a “leash” for some workers but for others it can provide a great deal of work flexibility. Requiring all employees to “disconnect” could hurt those employees who thrive using digital technology. For many employees, the option of working after regular work hours has provided much-needed flexibility during regular work hours. Research by the Eurofound and the

International Labour Office⁷² recently found that workers who regularly work after hours are more likely comfortable in taking time off during the regular workday to handle personal or family matters. It should also be mentioned that there are times when disconnecting from work causes stress, anxiety, and worry over unfinished business and the fear of missing out (FOMO), “a pervasive apprehension that others might be having rewarding experiences from which one is absent ... and is characterized by a desire to stay continually connected with what others are doing.”⁷³ Measures that require workers to “disconnect” can be overly restrictive when assuming a fixed work schedule. The danger is that in the effort to reject the 24/7/365 work culture, employers, and employees might return to a rigid 9-to-5 work structure.⁷⁴

However, some organizations believe legislating the right to disconnect goes too far.⁷⁵ Many customer-driven businesses consider banning workers from accessing their email or communicating with clients after work hours is neither practical nor realistic. Generally speaking, businesses are not open to more governmental regulations limiting their independence while labor unions are more likely to support right to disconnect initiatives. Governmental officials should therefore anticipate disagreement and discord between business and trade unions on the topic of after work hours’ connectivity. The clash will include determining which employees would be covered by the law. In some instances, employees are legitimately required to be available on call. For example, senior executives, key maintenance and IT workers, medical staff, and first responders must be accessible when needed. It would not make sense for such employees to be included in regulations prohibiting after hours work communication.

Should a right to disconnect law be passed and implemented, then organizations will need to develop policies that comply with the statute and in addition, managers and supervisors will need to be trained on applying the regulation. Commentators⁷⁶ provide a more in-depth legal analysis of the right to disconnect and note that it is especially important to have a complete understanding of what comprises working off-the-clock.⁷⁷ Furthermore, to avoid off-the-clock litigation companies may want to track actual work hours of employees to ensure they comply with the work-time rules. There are numerous time-tracking software programs in which all emails and phone calls are time and date stamped. As an example, Delve Analytics from Office 365 is a data analytics program that tracks the time spent writing and answering emails, including after work hours.⁷⁸ A work productivity audit will report to the employer which employees are working after normal hours and will provide information for supervisors to clarify for covered workers after-hours work rules found in the firm’s policy manual.

Whenever a new right or requirement is legislated, a government entity will need to enforce that right and a court needs to interpret it. This will certainly lead to additional litigation. Especially for off-site employees, questions defining a work day will need to be addressed. Complaints

will be filed with greater frequency challenging each employer's definition of "emergency." Other legal concerns could involve overtime work payments to employees and issues related to on-call compensation. Even the definition of an employee will likely need to be addressed and organizations may instead choose to hire contract workers (individuals retained by a company for a predetermined time, for a predetermined price and for which a company is not responsible for providing a variety of traditional employer benefits) who many not be covered by the regulations. This adds up to substantial monitoring and implementation costs to organizations. In their effort to support and strengthen work and life boundaries, regulators, and employers should be careful not to overly define those boundaries, and instead leave workers with the flexibility to determine that balance on their own. More important than the right to disconnect, workers need the right to decide for themselves.

SUMMARY AND CONCLUSION

Technological developments over the past few decades in laptop computers, smartphones, and wifi connectivity, and other digital communication approaches have made it easier for people to work remotely. While many appreciate the flexibility and increased productivity these technological advancements provide, some lament that the ability to work anywhere, anytime has transformed into the expectation to work everywhere, all the time. Whether at home or while traveling, employers are requesting or requiring employees to work beyond regular working hours. This swiftly developing trend has chained employees to their jobs long after the end of the work day and collapsed the border between employees' work and personal life. This condition is having a negative impact on employee privacy and autonomy, employee morale, safety and health, productivity, compensation, rest and leisure, and work-family conflict.

Enforced work-life balance regulations, such as the right to disconnect, are often positioned as a human right and part of a larger movement addressing toxic workplace cultures and growing demands for better integration of work and family lives. Moreover, recent work by Unger, Niessen, Sonnentag, and Neff⁷⁹ on allocating time between work life and home life stress the importance of employees being able to freely allocate time to private life during evening hours. The researchers advocate that employees should not have to feel guilty when they spend less time meeting family and relationship demands, because there will be also be days that they allocate more time to work.

There appear to be two paradigms for addressing problems associated with enhanced communication technology involving connectivity and immediacy. One approach, which Secunda refers to as the "French Legislative Model,"⁸⁰ attempts to regulate after-hours' electronic communication between employer and employee through statutes and

lawmaking. This approach has, by far, gained the most publicity. The second approach, what Secunda refers to as the “German Self-Regularity Model,”⁸¹ involves voluntary self-determination in which private firms adopt policies that fit their individual or industrial needs. This tactic comes from the belief that any government action is a legislative overstep. These employers seek to balance the interests of their employees with their own business needs in a manner more appropriate than what legislation alone could formulate through independent workplace regulation. Regardless of which option is followed, many believe that something must be done to address after work hours’ connectivity.

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