

EMPLOYMENT LAW CONFERENCE 2019

PAPER 11.1

The Right to Disconnect: The Darker Side of Mis-Managed Flexible Working Arrangements

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THE RIGHT TO DISCONNECT: THE DARKER SIDE OF MIS-MANAGED FLEXIBLE WORKING ARRANGEMENTS

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I. Introduction

The development of new mobile communication technologies has benefited the modern workplace in many ways, but most of all in how they have allowed workers the flexibility to stay connected and complete their work in locations other than traditional places of business. Workers can attend meetings and conference calls through Skype or other video conferencing tools, and they can access their emails through their smartphones, tablets, and laptops from anywhere with an internet connection. Some companies have implemented messaging applications for their workers, such as Slack or Chatwork, which can be utilized from any electronic device. Employers can also set up secure VPNs to allow their employees remote

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access to their workstations, documents, and systems as if they were physically sitting in their offices.

These technologies have made it easier than ever for employers to allow a variety of flexible working arrangements, including allowing workers to work-from-home, to telecommute, or to work variable schedules that simply were not possible under a strict 9-5 business schedule. In some cases, these types of arrangements have been crucial to employers' legal compliance with human rights legislation, specifically with respect to the types of disability and family status accommodations that may be available to employees.

Emerging research also shows that flexible working arrangements have other measurable benefits for employers in terms of increased worker productivity¹ and efficiency², decreased overhead costs³, increased employee engagement⁴, and smaller carbon footprints through reduced employee commutes.⁵

So what's not to love? Plenty. Among some other pitfalls of working from home⁶, one of the most insidious drawbacks of flexible working arrangements is "work creep," or the tendency of work to bleed into an employee's personal time. As one article put it:

When your office is mere steps from where you spend your leisure time, the temptation to "quickly check one thing" or wrap-up a nearly complete project can be awful. Likewise, it's common to feel like you're neglecting your family, housemates or loved ones while you're working, and guilty that your avoiding work when you're with them.⁷

Moreover, the technologies that keep employees connected when they are out of the office can also overwhelm employees. Business journals are rife with articles about how to effectively manage the "time suck" of email, advocating approaches such as "Inbox Zero" (with the ultimate goal of keeping zero emails in your inbox) or "Inbox 100,000" (where the user only opens and interacts with necessary emails)⁸. These articles reflect the real anxiety employees

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- 1 Bloom, N., et al. (2015). Does Working From Home Work? Evidence from a Chinese Experiment. *Harvard Quarterly Journal of Economics*. pp. 165-218. Available at: <https://nbloom.people.stanford.edu/sites/g/files/sbiybj4746/f/wfh.pdf>
 - 2 "Press Release | CoSo Cloud Survey Shows Working Remotely Benefits Employers and Employees." CoSo Cloud | Secure Virtual Training & Collaboration. July 28, 2017. Available at: <http://www.cosocloud.com/press-release/connectsolutions-survey-shows-working-remotely-benefits-employers-and-employees>.
 - 3 Meister, J. "Flexible Workspaces: Employee Perk Or Business Tool To Recruit Top Talent?" *Forbes*. April 01, 2013. Available at: <https://www.forbes.com/sites/jeannemeister/2013/04/01/flexible-workspaces-another-workplace-perk-or-a-must-have-to-attract-top-talent/#6dafd1e12ce7>.
 - 4 Ibid.
 - 5 "Work Remote Day." Work Remote Day. Accessed at: <https://workremoteday.wordpress.com/>
 - 6 For example, feeling of isolation, lack of discipline and motivation.
 - 7 Caolo, D. "Should You Work From Home?" *Medium*. July 06, 2016. Accessed at: <https://medium.com/buysellads-restoring-the-balance/should-you-work-from-home-6fe542487fda>.
 - 8 One writer explained her reasons for utilizing an Inbox 100,000 approach as "you can't let someone's need to send you an email at 2 a.m. dictate how you're going to structure your day." Schulte, B. "Inbox Zero and Email

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feel about how to effectively engage with communication technology while remaining productive and efficient.

Indeed, it appears that for all the flexibility and connectivity that telecommuting and mobile technologies can provide, these benefits can also become their downfall. When employees and employers do not put appropriate parameters on their use, these arrangements and technologies create an “always on” work culture, deteriorating boundaries between work life and home life.

In this paper, we explore the ways in which these flexible working arrangements and mobile communication technologies can have a detrimental impact on the health and family life of employees. We also canvass the variety of approaches that have been taken to combat these effects, both within Canada and across the globe, including through workplace policies, collective agreements, and “right to disconnect” legislation.

In the second half of this paper, we consider the downstream negative impacts mismanaged flexible working arrangements and mobile device use can have on an employer, including increased risks for complaints under human rights, workers’ compensation and employment standards legislation. Finally, we reflect on the related trend towards “Bring Your Own Device” programs, and the ways in which they pose an array of privacy risks for an employer while also providing an opportunity for employers to redefine their organization’s culture or approach when it comes to the pervasive use of mobile devices and communication technology.

II. Flexible Working Arrangements and Mobile Device Usage Impacts on Employee Health and Family Life

In recent years, scientific and academic research has indicated that improperly managed flexible working arrangements, and the “always-on” work culture created by pervasive use of mobile communication technology, can have measurable negative impacts on the health and wellbeing of workers and their families. In this section, we consider a sampling of these studies from France, Germany and North America.

A. France

In September 2015, a report commissioned by the French government by Mr. Bruno Mettling was released, titled *Digital Transformation and Life at Work* (the “Mettling Report”). The Mettling Report studied the impact of digital information and communication technologies on three aspects of the workplace: working conditions, work organization, and management, and offered 36 recommendations to help successfully foster the digital transformation in French workplaces.

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Among other issues, the Mettling Report identified that smartphones have sometimes been used in the workplace abusively, in part because promoting their use can result in tacit encouragement of non-compliance with required daily and weekly rest obligations for employees. The report identified a need to protect workers' health from the potentially negative impacts of the digital transformation of the workplace, including the risks of overloading employees cognitively and emotionally, the feeling of permanent solicitation, the sustained acceleration of interactions, and the feeling of intense competition on employees' time both at home and at work. The report also suggested that digital tools in the workplace can be triggers for what Mettling called "occupational diseases such as burnout or "FOMO" (fear of missing out)", creating a form of social anxiety manifesting as an "obsessive relationship" to professional communication tools.

With respect to employee's ability to "disconnect" from work obligations and mobile communication devices, the Mettling Report discussed in detail the tension between the professional and personal spheres, and the ways in which the digital transformation of the workplace can increase this tension. Mettling suggests it is a co-responsibility of both the employee and the employer to develop a "right to disconnect", in that the employee must "learn the skill" of disconnecting and the employer must support this right through policies and a change in work culture. Mettling also recognized the complexity inherent in the ability of an employee to master the fluidity between the professional and personal sphere, including learning the ability to disconnect and having the power to negotiate the borders between these spheres, as this ability is impacted by numerous immutable characteristics including: socio-professional category, sex, age, variable schedules, family obligations, and habits.

The Mettling Report issued several recommendations to the French government on this issue, including recommending the legislated establishment of a "duty to disconnect", creation of company regulations and policies on the use of digital tools, development of new ways of measuring work performance aside from measuring working hours, and dissemination of good practices on remote work organization.

B. Germany

In 2017, the German Federal Institute for Occupational Health and Safety ("BAuA") released a report titled *Mental Health in the Working World – Determining the current state of scientific evidence*.⁹ The project was aimed at assessing and compiling current scientific knowledge on the issue of mental health in the working world, and developing concrete practice recommendations for designing the workplace to lessen or avoid work-related mental load factors.

With respect to flexible working arrangements, the BAuA study found the mental health impacts of these arrangements vary significantly. For example, on-call and demand-oriented (i.e. employer-determined) working time were associated with worse mental health, while

9 Rothe, I., Lars Adolph, Baete Beermann, Martin Schütte, Armin Windel, Anne Grever, Uwe Lendhardt, Jörg Michel, Birgit Thomson, Maren Formazin. "Mental Health in the Working World: Determining the Current State of Scientific Evidence." *Dortmund: Federal Institute for Occupational Safety and Health*, May 2017. Accessed at: https://www.baua.de/EN/Service/Publications/Report/Mental-Health-2.pdf?__blob=publicationFile&v=6

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arrangements where the employee can influence their working time or has predictable working hours were associated with better mental health. The study recommended employees be given opportunities to influence the design of their working time, and that employees have predictability and the ability to plan working time. The study recognized that business needs may require deviations from these planned working times, but nevertheless recommended that “the work should generally be organised in such a manner that the employee can reliably plan their working times.”

The BAuA study also considered what they termed “work-related permanent availability,” which the researchers defined as “the possible availability of workers for work issues or of work issues for workers due to new information and communication media outside of regular working time and independent of the regular place of work.” Perhaps not surprisingly, the study found that work-related permanent availability was negatively associated with aspects of employee health and private life. By contrast, the study found detachment from work (i.e. “distancing oneself mentally from work issues during rest periods”) and work-life balance were positively associated with health and wellbeing.

The BAuA study emphasized that “the question of to what extent recovery is supported or impaired is central to the long-term health of employees.” The authors identified a number of a factors which can cause a “recovery deficit” to build up, which have negative health effects and can cause detachment from work to fail: high work intensity or emotional labour and interruptions or a shortening of rest periods over a long period of time and/or with high intensity.

The study made a number of recommendations on this front, aimed at “enabling employees to find a balance of and draw a line between work and private life, which ensures sufficient recovery to avoid health consequences due to recovery deficits.” These included reduction of work assignments or tasks which lead to a shortening or interruption of rest periods, avoidance of permanent high intensity work tasks, and avoidance of highly emotional or conflict situations that an employee cannot easily let go of. The report also recommended “further clarification and sensitisation of managerial staff and employees on the associations between work, recovery and health and/or on the healthy design of work (or working times),” which the authors stated was increasingly important in the context of the changing work world.

C. North America

In North America, a number of scientific and academic studies have identified potential negative health impacts of flexible working arrangements, pervasive remote communication technologies and the “always-on” work culture.

While email is the most universal remote communication technology that connects workers and facilitates flexible working arrangements, it is also a measurable source of stress for employees. For example, studies have found some people feel stressed by email in part because others expect them to reply quickly,¹⁰ with some employees being interrupted by email

10 Gillespie, N.A., et al. (2001). Occupational Stress in Universities: Staff Perceptions of the Causes, Consequences, and Moderators of Stress. *International Journal of Work, Health & Organizations*, 15(1), pp. 53-72.

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an average of every five minutes and starting responding within 6 seconds of receiving an email.¹¹ Others have suggested that email reduces well-being because it allows employees to work longer hours, including answering emails from home after work hours.¹²

In 2014, UBC researchers Kostadin Kushlev and Elizabeth Dunn released a report titled *Checking Email Less Frequently Reduces Stress*.¹³ As the title suggests, this study looked at the impact of email use frequency on the user's well-being. The study found that participants experienced significantly lower daily stress when they limited their email-checking frequency to 3 times per day than they did when their email checking frequency was unlimited.

The researchers suggested that this impact on well-being was caused by the frequent interruptions and task-switching caused by tending to the user's email inbox. The study found that lower daily stress was associated with a number of markers of higher well-being, including social connectedness, higher mindfulness, self-perceived productivity, and sleep quality. Relying on the findings of other academic studies, the researchers posited the reduced daily stress could produce broader positive consequences for well-being, including reduced anxiety and symptoms of depression, and improved overall perceived quality of work life.

In 2018, researchers at the Pamplin College of Business, Virginia Tech, went even further with their report *Killing Me Softly: Electronic Communications Monitoring and Employee and Spouse Well-Being*. The report focuses on the "intrapersonal and interpersonal effects of organizational expectations to monitor electronic work communications during non-work hours on employees and their families." The researchers found that regardless of the actual time the employee spent during non-work hours checking email and other work messages, the "mere presence of organizational norms" to monitor work messages after hours had negative impacts on the employee and their family. Specifically, the report found the "micro-role transitions" caused by this after hours communication monitoring had negative intrapersonal consequences (interfering with non-work role fulfillment and producing stress) and interpersonal consequences (spill-over into non-work lives, affecting the employee as well as the employee's family).

Much like the findings of Germany's BAuA report, the Virginia Tech report focuses on how these frequent "micro-transitions" interfere with employee rest and recovery. Specifically, the Virginia Tech report found that although the interruption caused by the constant monitoring of after work communication was brief, its costs were high, as they: "interrupt deep level role fulfillment, break focus and attention, and prevent the individual from truly being present in the non-work domain."

Moreover, the Virginia Tech report posited that the unresolved tension caused by these micro-transitions negatively impacts individual relationship satisfaction and well-being, and can lead to chronic feelings of negative affect, anxiety and chronic stress. The researchers suggest that

11 Jackson, T., Dawson, R. and Wilson, D. (2003). Understanding email interaction increases organizational productivity. *Communications of the ACM*, 46(8), pp.80-84.

12 Renaud, K., Ramsay, J. and Hair, M. (2006). "You've Got E-Mail!" ... Shall I Deal With It Now? Electronic Mail From the Recipient's Perspective. *International Journal of Human-Computer Interaction*, 21(3), pp.313-332.

13 Kushlev, K. and Dunn, E. (n.d.). *Checking Emails Less Frequently Reduces Stress*. Available at: https://www.academia.edu/9182785/Checking_Email_Less_Frequently_Reduces_Stress

greater expectations to monitor work-related electronic communication after hours will negatively impact employee health, in addition to their familial relationships.

III. The “Right to Disconnect”

As the studies reviewed above demonstrate, flexible working arrangements and mobile communication technologies have the potential to blur the line between workers’ professional and personal lives and interrupt recovery rest periods in such a way that causes quantifiable harm to their health and well-being. To combat these harms, employers and governments have taken a myriad of approaches ranging from “right to disconnect” legislation to internal workplace policies. In this section, we consider these approaches, and how the trend may play out across the Canadian landscape.

A. A Global Perspective: Legislation

In response to the concerns arising from the “always-on” work culture and “work creep” phenomenon, the concept of the “right to disconnect” has developed, which provides workers with the ability to disconnect from work, and generally from related communication technologies, outside of defined working hours. In several European countries, this “right” has been codified through legislation.

1. France

In 2016, the French government enacted the El Khomri law, legislation revising France’s labour code to make the country’s labour market more flexible and to allow employers to lay off workers more easily. In 2017, the law was amended to provide for the “right to disconnect”:

(7) The procedures for the full exercise by the employee of his right to disconnect and the establishment by the company of mechanisms for regulating the use of digital tools, with a view to ensuring respect for rest periods and leave as well as personal and family life. Failing agreement, the employer shall draw up a charter, after consultation with the works council or, failing that, with the staff delegates. This charter defines these procedures for the exercise of the right to disconnect and furthermore provides for the implementation, for employees and management and management personnel, of training and awareness-raising activities on the reasonable use of digital tools.¹⁴

The El Khomri law introduces the right to disconnect, but does not define it, which provides employers the flexibility to define the right in such a way that is most practical for the needs of their particular business. For employers with more than 50 employees, the right is to be included in a “charter of good conduct,” negotiated with union representatives. The charter must detail the hours when employees are not expected to be connected to their “digital tools”. In companies with less than 50 employees, employers must publish a policy to employees detailing the rules.¹⁵

14 Code du travail (French Labour Code), Article L. 2242-8, 7°

15 CTVNews. (2019). *Key measures in France's contested labour reform*. Available at: <https://www.ctvnews.ca/business/key-measures-in-france-s-contested-labour-reform-1.2900757>

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The flexibility provided by the *El Khomri law* could also result in rights and obligations being directed at both employees and employers. As described by Matteo Avogaro at page 6 of his article “Right to Disconnect: French and Italian Proposals for a Global Issue”:

At the end of each working day, for example, workers may be obliged to leave in office company devices, and/or employers might have to turn off servers; another tool could be to add, to internal e-mails or messages sent outside the ordinary working time, a disclaimer indicating that an immediate reply is not requested. In addition, the company workforce could be requested to use indicators showing the relevance and urgency of the topic, at least in relation to internal communications.¹⁶

One of the most common criticisms of the French legislation is that it does not provide for any explicit penalty for noncompliance. Rather, it is up to the employer (and union representatives, if applicable) to determine the appropriate penalties.

2. Italy

In Italy, legislation took effect in 2017 governing what is referred to as “smart working,” which encompasses a variety of flexible working arrangements including telecommuting, flexi-time working and “zero-hour” or “on-call” contracts. The 2017 legislation requires flexible working arrangements to be in writing, and must define:

- (1) the duties to be performed outside the company’s premises and any applicable conditions;
- (2) the terms regulating the use of computers and mobile devices, and
- (3) the technological and organizational measures put in place in order to ensure compliance with laws on rest hours – including a “right to disconnect” during which periods the employer may not contact the employee.¹⁷

Much like the French approach, the Italian legislation does not designate specific times which must be free from contact by the employer, or specify certain approaches to ensure the worker receives rest periods. Italy’s law also has a much narrower application than the French law, as it only applies to “smart working” arrangements as defined. As of 2017, only about 7% of the Italian workforce was utilizing smart working arrangements, although this figure jumped 20% in 2018.¹⁸

16 Avogaro, M. (2019). “Right to Disconnect: French and Italian Proposals for a Global Issue.” [online] *Revistabrasileiradeprevidencia.org*. Available at: http://www.revistabrasileiradeprevidencia.org/wp-content/uploads/2018/04/AVOGARO_RIGHT_TO_DISCONNECT.pdf

17 Viale, V. (2018). *Smart Working in Italy: How a new law is introducing flexibility*. [online] *Worklifehub.com*. Available at: <http://worklifehub.com/blog/smartworking-in-italy>; Pavone, A. (2017). *Smart working in Italy*. [online] *Nortonrosefulbright.com*. Available at: <https://www.nortonrosefulbright.com/en/knowledge/video/23932c9d/smart-working-in-italy>

18 *Ibid*; Marie Tecnimont, *Smart Working on the rise in large enterprise*. [online] *Marietecnimont.com*. Available at: <https://www.mairetecnimont.com/en/media/focus-on/smart-working-on-rise-large-enterprise>

B. Internal Approaches: Collective Agreements and Policies

Even in those European countries that have enacted right to disconnect legislation, this right first came about through employer policies and collective agreements.

1. Collective Agreements

In France, the right to disconnect first came to prominence in collective agreements in 2012, with the French insurance company AXA and French renewable energy company Areva.¹⁹ The right was further championed in 2014 by the General Union of Engineers, Manager and Technicians (UGICT) on behalf of engineers, executives and technicians. The UGICT sought to prevent employers from using communication technology to overcome limits imposed by law or collective bargaining to daily and weekly working time limits, and sought to prevent “disconnection” from becoming only an obligation on the part of the worker.²⁰

The UGICT successfully negotiated the right to disconnect into a number of collective agreements in 2015, and was active in lobbying the French government to legislate a more substantial version of the right than what was initially proposed under the El Khomri law. The UGICT has been critical of the final result of the El Khomri law, taking the position that the scope of the right should be defined by law, not the employer, and that specific tools should be used for the automatic erasure of communications sent during the employee’s period of rest.

In 2014, the collective agreement between the General Confederation of Labour and the French Democratic Confederation of Labour (CGT-CFDT) trade unions and the employers’ organization Federation Syntec was amended to include the right to disconnect for workers with *contrat forfait-jours*, i.e. fixed annual number of working days contractual arrangements. Specifically, the agreement introduces an obligation on workers to disconnect from company devices, the possibility for the employer to verify fulfillment of this obligation through monitoring software, and an obligation on employers to introduce policies directed to guarantee the employee the freedom to disconnect. The collective agreement concerned a professional sector of about 910,000 workers in France, of which approximately 76% were office workers, however the right to disconnect obligations only applied to workers with *contrat forfait-jours*.

In Italy, prior to the enactment of legislation, the right to disconnect was negotiated into some collective agreements, primarily in the banking and mechanical engineering sectors. In the manufacturing sector, some collective agreements have made specific reference to smart working, specifying that once the Italian government adopts legislation on this issue, the parties will discuss whether to integrate the legislative provisions into their collective agreements.

2. Employer Policies

Employer policies with respect to the right to disconnect have taken a number of forms. Perhaps the most common form is an employer policy setting a time after which employees cannot send or receive emails. For example, at insurance company Allianz France, managers

19 Toumieux, C. and Picquerey, O. (2017). *The new "right to disconnect" in France* | Lexology. Lexology.com. Available at: <https://www.lexology.com/library/detail.aspx?g=1af6e648-d83f-441d-b111-c426a1979abb>.

20 Avogaro, M., “Right to Disconnect: French and Italian Proposals for a Global Issue.”

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are not permitted to send work emails to employees after 6:00 p.m., or to organize staff meetings in the late afternoon.²¹ Likewise, Germany's Employment Ministry implemented a policy banning managers from contacting staff after working hours. This policy was implemented as part of a larger agreement on remote working.²² Specifically, managers have been instructed to apply a principle of "minimum intervention" into workers' free time, and the policy states staff should not be penalized for disconnecting from communication devices during non-work hours.

Some employers have taken this even further, and installed software programs which prevent email servers from sending emails to mobile phones during certain hours. Volkswagen has taken this tack, turning off the company email server for all smart phones half an hour after work ends for the day and only switching it back on half an hour before work starts the next day.²³ Porsche plans to take a similar approach, shutting off employees' email server from 7:00 p.m. to 6:00 a.m., and automatically deleting emails sent during this window so employees do not have to sort through excessive emails in the morning.²⁴

Other employers have installed software that sends an automatic email letting employees know the email is "out of schedule" and can wait until the next workday begins.²⁵ This was the approach taken by KEDGE Business School in France. Similarly, Daimler in Germany has developed a software called "Mail on Holiday," which automatically deletes incoming emails when an employee is on vacation, and sends an auto-reply to the sender letting them know the recipient is out of the office, the email will be deleted, and the contact information of another employee for urgent matters.²⁶

BMW has taken a more flexible approach, whereby employees may agree with their supervisor on the fixed hours during which they will be available, and mobile activities carried out during off-work time will be credited to their working hours account. However, employees are allowed to insist on their right to inaccessibility during holidays, the weekend and after the end of work.²⁷

Employer policies may even touch on the impact after-hours connectivity can have on the assessment of an employee's performance, such as expressly stating employees cannot be disciplined for failing to respond to messages sent after work hours. Other employers, such as

21 Walt, V. (2017). France's 'Right to Disconnect' Law Isn't all It's Cracked Up to Be. *Time*. Available at: <http://time.com/4622095/france-right-to-disconnect-email-work/>.

22 Vasagar, J. (2013). Out of hours working banned by German labour ministry. *The Telegraph*. Available at: <https://www.telegraph.co.uk/news/worldnews/europe/germany/10276815/Out-of-hours-working-banned-by-German-labour-ministry.html>

23 Froger-Michon, C. and Jordan, D. (n.d.). *Switching on to switching off: Disconnecting Employees in Europe?* | Lexology.com. Available at: <https://www.lexology.com/library/detail.aspx?g=2f2f48c4-9e5b-4a1f-b166-a2b0fec80ce5>.

24 Ibid.

25 Walt, V., France's 'Right to Disconnect' Law Isn't all It's Cracked Up to Be.

26 Gibson, M. (2013). Here's a Radical Way to End Vacation Email Overload. *Time*. Available at: <http://time.com/3116424/daimler-vacation-email-out-of-office/>

27 Froger-Michon, C. and Jordan, D. (n.d.). *Switching on to switching off: Disconnecting Employees in Europe?*

KEDGE Business School, have stated overuse of email can rise to the level of “abuse,” which can be reported to the human resources department.²⁸

While most employer policies are aimed at protecting staff and lower level management employees, some go so far as to cover all employees at the company. For example, Henkel’s right to disconnect policy applies to all employees, and even its CEO does not check any emails on Saturdays. Henkel’s CEO also prohibits all executive board members from contacting him between Christmas and New Year’s Day. This type of “top-down” approach to right to disconnect policies can have a real impact on changing an organization’s work culture in this modern digital era.

C. Status in Canada

Right to disconnect policies and legislation have yet to make their way into the Canadian landscape, although discussions are taking place on a federal level.

In 2016, a report of the Ministry of Employment, Workforce Development and Labour was released which found flexible working arrangements was an important topic in the Canadian workforce. 73% of the report’s respondents had requested flexible working arrangements from their employer in the past 5 years, and 30% of those were denied their request. The report noted that approximately 75% of employers offered flexible working arrangements, whether through informal or formal policies, or through a collective agreement. The report further discussed the many benefits of flexibility, including reduced absenteeism, increased engagement and productivity, improved employee health, better recruitment and retention, and more labour market participation by disabled workers.

Following this report, the federal government amended the Canada Labour Code to include new provisions entitled “Flexible Work Arrangements.”²⁹ These provisions allow an employee to request flexible work arrangements after 6 months of employment, specifically to change his or her work hours (number or schedule of hours), or location of work. Although the employee has the right to request these arrangements, the employer has no corresponding obligation to grant the request. The employer, however, is required to respond to the request within 30 days, and if the request is denied, the employer must include written reasons for denying the request.

On August 30, 2018, Employment and Social Development Canada released its most recent report about modernizing the *Canada Labour Code* “to better reflect the realities of the 21st century workplace.”³⁰ Under the broader category of “Further Supporting Work-Life Balance,” the report addressed the issue of the “right to disconnect.” An overwhelming 93% of respondents stated that employees should have the right to refuse to respond to work-related emails and 79% stated that employers should have policies to limit the use of work-related

28 Walt, V., France’s ‘Right to Disconnect’ Law Isn’t all It’s Cracked Up to Be.

29 Bill 63, A second Act to implement certain provisions of the budget tabled in Parliament on March 22, 2017 and other measures, 1st Sess, 42nd Parl, 2017, (Royal Assent received 2017-12-14).

30 Employment and Social Development Canada (2018). *What We Heard: Modernizing Federal Labour Standards*. Available at: https://www.canada.ca/content/dam/canada/employment-social-development/campaigns/labour-standards/1548-MLS_WWH-Report_EN.pdf

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technologies outside of working hours. For those respondents in favour of the right to disconnect, the following were the primary reasons given for why employees should have this right:

- Checking or answering work-related messages gets in the way of family and personal time (28%)
- Employees need more time to rest outside of working hours (25%)
- Thinking about work at home causes stress (24%)
- All work should be done during the work day (20%)

Certainly, some employers and employer organizations took the position that being available and on-call is sometimes a requirement for continuous operations, and also that workers in flexible working arrangements sometimes choose to remain connected outside of work. For those opposed to the right to disconnect, the following were the primary reasons given for why employees should not have this right:

- Business does not stop at the end of the work day (27%)
- Employers cannot always predict when work will need to be done (27%)
- Employees should be flexible to work whenever necessary (18%)
- Supervisors and managers work more hours and sometimes need answers from employees (17%)

While the report noted an overwhelming majority of respondents said employees should have the right to refuse to respond to work-related communication outside of working hours, the report also noted that they “heard strong arguments that any attempt to establish such a right in legislation would go too far.”

Unlike flexible working arrangements, which made their way into Federal Budget 2017 immediately following the Ministry of Employment’s 2016 report, there are no indications that Federal Budget 2019 will have reference to right to disconnect legislation or related changes to the *Canada Labour Code*. Certainly, even in the event such changes were announced, they would only affect federal workers, who account for approximately 6% of the Canadian workforce.³¹ However, it can be expected that legislation of this type at a federal level would have a trickle-down effect to workers governed by provincial legislation.

Although it appears at this time that legislation on the right to disconnect is not imminently forthcoming in Canada, some related changes to the *Canada Labour Code* are taking effect in September 2019. Among these are changes to the hours of work, including mandatory provisions providing for rest breaks and 8 hour rest periods between work periods or shifts. The *Code* will also be amended to require employees be provided with 96 hours advance written notice of their work schedule, although no implementation date is yet set. These

31 Government of Canada. *Federally Regulated Businesses and Industries*. Available at: <https://www.canada.ca/en/employment-social-development/programs/employment-equity/regulated-industries.html>

changes demonstrate the Canadian government is recognizing the importance of employee hours, rest and recovery from work, and the importance of predictability of work.

As the government's report and recent amendments to the Code demonstrate, the issues surrounding the right to disconnect are certainly at the forefront of the minds of Canadian workers and employers. As occurred in Europe, employers can expect this issue may be championed further by unions through the collective bargaining process. Alternatively, employers may find they want to address this issue proactively through their own policies first, especially to address the legal risks associated with the potential consequences of flexible work arrangements and mobile devices as discussed below.

IV. Risks to Employers of Flexible Work Arrangements and Mobile Device Usage

Although no "right to disconnect" legislation is on the horizon for Canadian employers, organizations should nevertheless be putting their minds towards whether their current flexible work arrangement and mobile device usage practices are putting them at risk for violations of existing workplace legislation. In this part, we consider the ways in which an "always-on" work culture and the lack of appropriate boundaries between professional and personal obligations can create serious liabilities for employers.

A. Human Rights

As the scientific and academic research above suggests, unmanaged flexible working arrangements and the unrelenting use of mobile communication technology are having a quantifiable impact on the well-being of employees' health and home lives. In this section, we consider the potential of an employer's liability for these impacts, from the perspective of human rights legislation.

1. Mental and Physical Disabilities

It is well-established that "stress" in and of itself is not a disability. Generally "stress," on its own, is treated as a symptom that many people commonly experience and would not qualify for accommodation under human rights legislation.³²

However, if an employee is affected by stress to such an extreme degree that it creates ongoing mental or physical symptoms, then it may qualify as a disability and trigger the duty to

32 *Crowley v. Liquor Control Board of Ontario*, 2011 HRTO 1429 (at para 62: "A bare assertion of 'stress' and other symptoms by an applicant is not sufficient to establish a mental disability within the meaning and protection of the Code. Rather, consistent with the decision in *Skytrain*, *supra*, I agree that in order to meet the definition of mental disability within the meaning and protection of the Code, where the case does not involve an allegation of discrimination on the basis of perceived disability, there needs to be a diagnosis of some recognized mental disability, or at least a working diagnosis or articulation of clinically-significant symptoms, from a health professional in a report or other source of evidence that has specificity and substance."); see also *Matheson v. School District No. 53 (Okanagan Similkameen)*, 2009 BCHRT 112 (BC Human Rights Tribunal dismissed a claim where a person revealed to her employer that she experienced "stress" when seeking an accommodation. The claimant did not disclose enough information to enable her employer to fulfill its duty to accommodate)

accommodate.³³ As the studies outlined above suggest, the stress caused by improperly managed flexible working arrangements and lack of detachment from work can manifest itself psychologically as anxiety, depression, and obsessive behaviors, and physiologically as fatigue, exhaustion, cardiovascular illnesses and back pain or other muscular-skeletal issues.

No Canadian human rights tribunals appear to have considered this issue directly in the context of stress or other disabilities arising from flexible work arrangements and pervasive use of mobile devices. However, depending on the circumstances, it is not uncommon for tribunals to find modifications such as variable work hours and light duties to be squarely within the duty to accommodate.

Considered in the right to disconnect context, these types of accommodations may translate into a way to inject “predictability” into an employee’s work schedule, or to reduce “high intensity” work tasks to better enable an employee to detach from work during non-working hours. Indeed, arbitrators have ordered accommodations for employees with mental health disabilities to include “work predictable and routine shifts and avoid night shifts, avoid excessive overtime,”³⁴ and there is no reason such accommodations could not transfer to this context if supported by the proper medical documentation.

It is also not unusual for employers to accommodate employees who suffer from anxiety caused by working for a particular manager by transferring that employee to work for another manager. As a corollary, employers may consider implementing practices that limit employee contact with working stressors unique to remote working, such as after-hours email communication. This could take the form of broader “no-contact” policies that prohibit employees from engaging in work-related communication during non-work hours. Alternatively, employers can install “delayed reply” software which permits managers to send after-hours emails, but delays their delivery to the employee’s inbox until the start of the next working day. These are viable accommodations for employees suffering from stress-related disabilities that may reduce the stress caused by what the German BAuA study termed “work-related permanent availability”.

Employers should remain alert to the possibility that flexible working arrangements and mobile technology, although intended to benefit employees and improve efficiency, could also lead to the development or exacerbation of a disability which the employer is obligated to accommodate. Employers should be thinking outside the box to determine the types of job modifications which can best address the barriers posed by mental or physical disabilities in these circumstances.

2. Family Status

As emerging research shows, constant connection to work through mobile devices and in particular employer expectations that employees constantly monitor their email messages can result in a negative impact on the well-being of both the employee and his or her family. Employers should be cognizant of the ways in which the impact of this type of workplace

³³ See, e.g., *Boucher v. Canada (Correctional Service)*, (1988) 9 C.H.R.R. D/4910

³⁴ *Shuswap Lake General Hospital v. BCNU (Lockie Grievance)*, [2002] B.C.C.A.A.A. No. 439.

culture could create the potential for a family status discrimination claim, or a duty to accommodate an employee's family status request, despite the strictness of the test for family status discrimination that currently applies in British Columbia.

As reflected in the Virginia Tech study, the expectation to monitor email – regardless of the frequency email is actually reviewed – has a measurable impact on the employee's ability to fulfill their non-work obligations, including preventing the employee from being authentically present outside of work and breaking focus and attention. It is conceivable that as the test for family status discrimination evolves in British Columbia, the impacts of such a work culture could rise to the level of significantly interfering with an employee's family caretaking obligations and thereby trigger a duty to accommodate that employee.

Similarly, the lack of predictability which can occur in some flexible working arrangements could substantially interfere with an employee's ability to properly schedule and plan for childcare or other caretaking responsibilities. This could also trigger a duty to accommodate under family status.

As discussed with disabilities above, employers must be cognizant of the ways in which their work culture and policies can impact an employee's family status requirements, and when required, should consider accommodations which address the ways in which this culture creates conflict with the employee's family obligations. This could include more structured work hours to create predictability of schedule, even when the employee is already utilizing a flexible working arrangement, or developing some form of a "duty to disconnect" policy.

B. Workers' Compensation

Under workers' compensation and occupational health and safety legislation, employers are required to ensure the health and safety of their workers. This includes obligations to remedy hazardous workplace conditions, establish occupational health and safety policies, and ensure employees are made aware of all known or reasonably foreseeable health or safety hazards they are likely to be exposed to by their work.

In July 2018, the British Columbia *Worker's Compensation Act* was amended to expand workers' compensation coverage for mental stress conditions. In an April 2018 report recommending changes to the Claims Manual, the report found the definition of a "traumatic event" used workplace norms as an objective standard – i.e., was an event unusual for that worker's employment. As a result, the report found under the Claims Manual, "normal work is effectively exempted from compensation for mental stress." The report recommended that this "barrier" to compensation be eliminated by instead asking whether, in all of the circumstances, the conditions were reasonably likely to have traumatized the worker. This recommendation was accepted in part, modifying the definition of a "traumatic event" to remove reference to the event being "unusual" was removed. Language stating the event must be "distinct from the duties and interpersonal relations of a worker's employment" remained.

Given the ubiquity of mobile devices and the "always-on" work culture, it will likely be difficult for an employee to demonstrate this type of culture alone qualifies as a "traumatic event" sufficient to trigger compensation for a mental stress disorder. However, should this type of work culture be coupled with technology usage patterns by a supervisor or manager that

qualify as obsessive or abusive – as anticipated by KEDGE Business School, *supra* – the possibly exists that this could rise to the level of a compensable injury.

The French Mettling Report also identified concerns about the liability for workplace injuries occurring at remote working locations or even in an employee's home as part of a telecommuting arrangement. Workers' compensation legislation in British Columbia has an extremely broad definition of "workplace," which covers "any place" where a worker is or is likely to be engaged in work. Certainly, this would cover an employee's home or other remote working location as part of a flexible working arrangement.

As a result, employers should put their mind to the types of occupational health and safety risks inherent in different flexible working arrangements. Depending upon the arrangements in place, it may be prudent to develop procedures to conduct regular inspections of its employees' remote working arrangements to ensure compliance with health and safety regulations, as an employer would do with any other workplace.

C. Overtime

All Canadian jurisdictions have employment legislation in place governing hours of work and overtime for employees. However, the application of these laws becomes more challenging in the context of a work culture where employees are always connected through their mobile devices and can work from anywhere at anytime.

This issue was explored in depth at last year's Employment Law Conference by Richard Press, and in his associated CLE paper *The Overtime Game: Select Issues in Working Past the Clock – Part II*. His paper supports the argument that the utilization of flexible working arrangements and mobile devices, when left unchecked, runs serious risks for employer liability in the context of hours of work and overtime claims for employees subject to the overtime provisions of the *Employment Standards Act*. One passage from Mr. Press' paper bears repeating here, discussing the BC Employment Standards Branch's Interpretation Manual with respect to the issue of on-call work and mobile work:

The Interpretation Manual issued by the Employment Standards Branch states that if an employer requires an employee to wait at a specific location (except for the employee's home) then the employee is considered to be at work. If an employee is at home and must only be available in case the phone rings, the waiting time is not considered to be work. The policy reads:

In general, employees' time that is controlled by the employer is paid time. The exception to this rule is when employees are required to remain on call at home.

The policy rationale for why an employee is not at work when at home is unclear. The author suggests as telecommuting becomes more mainstream, the Branch may reconsider this policy.

The Branch continues with respect to mobile work:

An employee is designated as being "on-call" when the employer provides the employee with a pager, cell phone or other form of electronic communication which allows the employee a range of mobility so the employee can be away from their residence and continue to be an on-call employee.

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Since the employee is not at a place designated by the employer, the employee is not considered to be at work.

The exception, however, would be when the employer places restrictions on the activities of the employee that were so severe so as to have the same effect as specifying a place. For example, an employee whose employer expects a response within a hour of being paged is not considered to be at work, however, one who must report to the workplace within five minutes of being paged is, since the employee would have to be within blocks of the workplace in order to meet this expectation.

An employee can be "on-call" virtually anywhere and need not be at a specific location designated by the employer. When that employee responds to a page, or a cellular call, the employee has in effect, "reported" to work and is entitled to minimum daily pay under s.34 of the Act. This has the effect of "reporting to work" and is not limited to physically reporting to the workplace.

The author suggests that the Branch is trying to create a balance as was implemented by the US courts and Canadian arbitrators. Not every minimal work related activity that is, at best, tangential to the employee's job functions can be considered "work" and compensable. The author suggests that this is the Branch adopting its own "common sense" policy and is not necessarily grounded in the legislation; the ESA does not carve out such exceptions from its definition of work.

As far as we are aware, no case in British Columbia has tested this rule in the specific context of working from home or mobile device usage, and responding to an email "after hours" in those circumstances. However, a recent federal case under the *Canada Labour Code* reiterated the principle that an employer can be liable for overtime even in circumstances where that overtime was not expressly authorized. In *Ruckaber v. Big Rig Towing & Recovery Ltd.*, [2016] CLAD No. 65, the complainant often came to work early and left late, in full view of the owners of the company, and at times attended to email after work hours. The employer had no policy for paying overtime or regarding hours of work. After her lay off, the employee sought payment of overtime for the hours she worked in excess of 8 per day.

In finding the employer liable for overtime, the panel stated that by allowing the complainant to remain in the office without directing her to leave or discussing her delayed presence amounted to a failure to exercise the employer's right of control over its employee's work hours. Specifically, the panel stated "an 'employer cannot avoid its statutory obligations by knowingly permitting employees to work overtime and then later taking the position the overtime was not authorized'" (quoting *Fresco v. Canadian Imperial Bank of Commerce* (2009 CLLC 210-032)).

Certainly, it is not much of a leap to apply this reasoning to the position of the British Columbia Employment Standards Branch Interpretation Manual outlined above, such that an employer cannot knowingly permit employees to work overtime by sending after hours emails to employee's connected mobile devices, and then take the position that overtime was not authorized in responding to that email.

As a global example, in August 2018, an Irish Labour Court awarded an employee €7,500 to an employee who exceeded her maximum working hours under applicable legislation by sending and receiving work-related emails outside normal working hours.³⁵ Although the employer argued that the employee should have “comfortably completed” her work within her contracted 40 hours of work per week, the court nevertheless found the employer “permitted” the employee to work in excess of an average of 48 hours per week, in violation of relevant legislation.

Specifically, the court found that by failing to monitor and curtail the employee’s working pattern, and failing to keep proper records of her working hours, the employer had permitted the employee to exceed her maximum working hours. This case emphasizes the importance of an employer developing an effective hours of work and overtime policy, and following a proper record keeping practice, particularly with respect to the use of mobile devices and work performed after normal working hours.

V. “Bring-Your-Own-Device” Policies

As part of our evolving digital work landscape, more and more employees are utilizing mobile devices, including tablet and smartphones. As a result, it is a growing trend for employers to develop “Bring Your Own Device” (“BYOD”) policies, whereby an employer authorizes its employees to use personal mobile devices for both personal and business purposes, instead of requiring employees to use company-owned devices. Indeed, one study showed that as of 2016, 59% of American organizations had a formal BYOD policy in place, and the remainder without policies allowed employees to use their personal devices for work purposes if they chose.³⁶

Although such policies are often favoured by employees and seen as a cost saving strategy for employers, they also carry substantial risks for employers, their employees and customers. However, BYOD programs can also present an opportunity for employers to better define their organization’s culture with respect to mobile device usage, and even to place limits on the pervasive after hours usage of email and other communication technologies. In this section, we consider both the risks and opportunities inherent in a BYOD program.

A. Ownership Issues

By the inherent nature of a BYOD policy, the employee owns the mobile device being used. However, employment standard legislation prohibits employers from passing business costs on to their employees. Therefore, if the employee is required to use the mobile device in the course of his or her employment, the employer must pay for the commensurate cost of

35 Dennehy, A. *The Right to Disconnect—A Significant Decision from the Labour Court on ‘Out of Hours’ Emails* | Lexology.com. Available at: <https://www.lexology.com/library/detail.aspx?g=39389f92-8de4-4a4e-9689-174d7d923bb9>

36 Syntonic 2016 Employer Report: *BYOD Usage in the Enterprise*. Available at: <https://syntonic.com/wp-content/uploads/2016/09/Syntonic-2016-BYOD-Usage-in-the-Enterprise.pdf>

operating the device.³⁷ Employers should also ensure their BYOD policies address the issue of device payment, including that employees who require mobile devices for their work can opt-out of the BYOD program and instead utilize a company owned mobile device instead. It is prudent for an employer to address the issue of payment for repair, maintenance or replacement of the device in the event of damage, loss or theft.

Employers should also be cognizant of ownership issues with respect to documents, information and work product that may be created or stored on the employee's device. Employers should ensure their BYOD policies clearly delineate that the employer retains ownership of its documents, financial and client information (including client contact information) and work product, and of the email system or any other proprietary applications installed onto the device. Relatedly, such policies should also clearly set out the employer's right and ability to access the devices for legitimate work-related purposes, including to retrieve these types of documents and information.

B. Privacy Concerns

BYOD policies carry with them significant privacy implications for employers, so much so that the Office of the Privacy Commissioner of Canada has issued a guidance booklet for employers titled *Is a Bring Your Own Device (BYOD) Program the Right Choice for Your Organization?* This booklet advises employers that before implementing a BYOD policy, they should conduct a privacy impact assessment (PIA) and a threat risk assessment (TRA) to identify and address risks associated with the collection, use, disclosure, storage and retention of personal information, particularly as associated with the employer's communication technology and the potential BYOD program. The result of these assessments may be that the use of certain apps should be prohibited if they pose substantial security risks, or that BYOD devices should only be limited to certain job positions.

From a privacy and security standpoint, the Office of the Privacy Commissioner recommends that BYOD policies address the following:

- user responsibilities;
- how personal information in an organization's control may be subject to reasonable and acceptable corporate monitoring on a BYOD device, and how BYOD users are informed of these monitoring practices;
- whether geo-tracking information generated by the mobile device will be tracked by an organization;
- the privacy practices an organization has adopted in respect of the employee's personal use of a BYOD device;
- training for BYOD users;
- acceptable and unacceptable uses of BYOD devices;

³⁷ For example, if the employer only requires the employee to make domestic calls but the employee chooses to obtain an international calling plan on the device, the employer should only be required to pay the operating costs of a domestic calling plan.

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- sharing of devices with family members or friends;
- application (app) management;
- data/voice plan responsibility;
- device and information security requirements; and
- access requests

Employers should also ensure the privacy elements of their BYOD policy can be enforced. For example, since many devices are backed up in the “cloud,” this can mean personal information is being stored outside Canada in violation of privacy legislation. Additionally, some apps installed on devices can access personal information on that device – for example, the “fitbit” app can access smartphone contacts to suggest other fitbit users to connect with, which may involve the access to personal information the employer and employee are obligated to protect. This underscores the need for employers to carefully curate a list of apps that cannot be installed on BYOD devices.

Certainly, employers should also put into place robust policies with respect to security, including password protections, encryption technology, and malware. This would also include installing reconfiguration or remote-wiping software to utilize in the event the device is lost or stolen. Policies should also establish procedures for addressing privacy obligations upon the employee resigning or being terminated, possibly including a requirement that the employer physically confirm all personal information has been securely removed from the device.

C. Usage Considerations

As discussed in detail herein, unmanaged mobile device usage can result in hours of work and overtime violations, and could even manifest stress-related mental and physical disabilities requiring accommodations. Employers should ensure their BYOD policies are structured to address these potential risks.

For example, for employees who are eligible for overtime, employers should develop a procedure for tracking employee work on their mobile devices to ensure they are being properly compensated for all their working hours. This could take the approach of a written procedure, or of a software program to track the employee’s usage. Additionally, the employer’s BYOD policy should clearly state the company’s overtime policy, including whether or not overtime must be authorized in advance.

Utilizing a BYOD policy can also be an opportunity for employers to implement some of the “right to disconnect” elements discussed above. For example, the policy may state that mobile device usage on work-related matters is prohibited during certain times, such as evenings, weekends, or holidays. Or employers can take a more substantial step of disabling access to work-related functions on the device during non-work hours, as Volkswagen and other German companies have done.

On a more general note, this is an opportunity for the employer to spell out the work culture it is trying to achieve, perhaps by stating if there is an expectation that employees with mobile devices will continually monitor their emails or alternatively if the device is intended to be used to contact the employee in urgent situations only.

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Finally, employers should always remain aware of how the scope of the workplace expands with this digital technology, and so must policies governing workplace behavior. Prohibitions against discrimination, and bullying and harassment, apply to communications and behavior taking place through these mobile devices, and it is prudent to remind employees of this in a BYOD policy. Moreover, it is an important reminder to ensure the employer's discrimination and bullying and harassment policies are drafted in such a way to cover behavior taking place on digital technologies, even when remote from the physical workplace.

VI. Conclusion

Developments in mobile communication technologies has made it easier than ever for employees to stay connected with their employers, and for employers to consider and approve a wide variety of flexible working arrangements. However, without the appropriate culture and policies in place, the boundaries between professional and personal obligations become blurred, and employers are at increased risk for a host of workplace violations. Employers should be considering the ways in which these potential risks impact their workplaces, and consider taking proactive steps to alleviate these risks in a way that is appropriate for their organization and its culture.