

DISCONNECTING PEOPLE: EXAMINING THE INCIPIENT WORKPLACE RIGHT THAT AMERICANS HAVE NEVER HEARD OF

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INTRODUCTION

On March 15, 2022, the European Parliament, together with the European Commission, hosted a day-long conference titled “The Right to Disconnect and Telework: A Perspective from the EU Institutions, Member States, and Social Partners.”¹ In his opening remarks, Mr. Dragoș Pîslaru, the Chair of the European Parliament Committee on Employment and Social Affairs, made a simple request of those in attendance: “I want everyone in the room today who has ever answered, sent, [or] drafted an e-mail, a text message, a message on WhatsApp, Signal, Telegram, or Slack, or Discord, or any other platform—a message that was work related—after 10 pm, to raise your hand in the air.”² As Mr. Pîslaru raised his own hand, he looked around the group assembled in the Hemicycle in Brussels and chuckled in response to what online viewers were left to assume was a considerable number of similarly raised hands.³

Mr. Pîslaru’s comments touched on what he called “the obligation to be connected all the time.”⁴ This obligation is rooted in the proliferation of digital tools—smart phones, tablets, laptops, and other devices collectively identified as “new ICTs.”⁵ The purpose of the conference was to introduce and discuss possible

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1. *Conference on the Right to Disconnect and Telework: A Perspective from the EU Institutions, Member States, and Social Partners*, EUR. PARL. (Mar. 15, 2022), <https://www.right2disconnect.eu>.

2. *Conference on the Right to Disconnect and Telework: Opening & Discussion on Main Challenges and Opportunities*, EUR. PARL., at 09:07:05 (Mar. 15, 2022), <https://www.right2disconnect.eu/streaming>.

3. *Id.*

4. *Id.* at 09:10:15.

5. ICT, or Information Communication Technology, is a term used to identify various electronic means that assist users with the organization, storage, and use of information. The term has been used in the academy since the 1980s. See WILLIAM H. MELODY & ROBIN E. MANSSELL, INFORMATION AND COMMUNICATION TECHNOLOGIES: SOCIAL SCIENCE RESEARCH AND TRAINING:

responses to this perceived obligation, with a specific focus on one proposal: the employee right to disconnect.

As will be discussed in detail below, the concept of an employee right to disconnect has been recognized and, to varying degrees, formalized by the legislatures of various nations since the mid-2010s.⁶ The earliest development of the right was often tied to a concept of “regulating the use of digital tools,”⁷ effectively linking the right to be disconnected from the ICTs that tied employees to their employment. In this context, the right to disconnect, as initially conceived, appeared to be limited in scope to those employees whose work was heavily reliant upon ICTs.

When, in early 2020, the global COVID-19 pandemic changed how millions of people around the world went to work, the initially limited scope of this right began to irreversibly expand. Jurisdictions with telework legislation already in force began to explore how a right to disconnect might be viewed as implicit within that existing regulatory framework.⁸ Other jurisdictions began to adopt robust teleworking regulations for the first time, often including some expression of the right to disconnect in those new laws.⁹ Today, the right to disconnect is being recognized around the world—codified in some jurisdictions and negotiated between management and employees in others. The connection between workplace and employee—supported by the ubiquity of new ICTs—is being actively tempered by a global recognition of an employee’s right to be unreachable during non-working hours.

VOLUME I AN OVER-VIEW OF RESEARCH 2 (1986). In a 2007 article, Annis Golden and Cheryl Geisler introduced the concept of “new ICTs” when examining the proliferation of personal digital assistants. See Annis G. Golden & Cheryl Geisler, *Work-Life Boundary Management and the Personal Digital Assistant*, 60 HUMAN RELATIONS 519, 520 (2007). The scope of what constitutes a “new ICT” was subsequently extended to encompass smart phones and tablet computers. Jon C. Messenger & Lutz Gschwind, *Three Generations of Telework: New ICTs and the (R)evolution From Home Office to Virtual Office*, 31 NEW TECH., WORK & EMP. 195, 196 (2016) [hereinafter *Three Generations*].

6. See *infra* Section I(C).

7. Loi 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels, Chapitre II, Article 55 [Law 2016-1088 of August 8, 2016 Relating to Work, the Modernization of Social Dialogue and the Securing of Professional Careers, Chapter II, Article 55], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFF. GAZETTE OF FRANCE] Aug. 9, 2016 (Fr.); Code du Travail, Article L2242-17 [Labor Code, Article L2242-17], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFF. GAZETTE OF FRANCE] Mar. 31, 2022 (Fr.) (“7° Les modalités du plein exercice par le salarié de son droit à la déconnexion et la mise en place par l’entreprise de dispositifs de régulation de l’utilisation des outils numériques...” [“(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...”]).

8. For example, the European Trade Union Confederation established a generalized agreement on telework nearly two decades before the 2020 global pandemic. During the pandemic, the European Parliament passed a resolution that brought the idea of the right to disconnect into concert with that earlier framework. See generally *Framework Agreement on Telework*, EUR. TRADE UNION CONFEDERATION (July 16, 2002), https://resourcecentre.etuc.org/sites/default/files/2020-09/Telework%202002_Framework%20Agreement%20-%20EN.pdf; Resolution of 21 January 2021 with Recommendations to the Commission on the Right to Disconnect, EUR. PARL. DOC. P9 TA (2021) [hereinafter *EU Parliament Resolution*].

9. See *infra* Section II(B).

The United States, however, has seemingly chosen not to address or even recognize this issue. Only two legislative bodies in the country have even attempted to enact an applicable regulatory scheme.¹⁰ Even the North American legal academy is curiously lean on scholarship in this area.¹¹ Therefore, this Comment will examine the essential points of development that shaped the employee right to disconnect, noting its foundation in, and continued association with, legislation and regulations regarding telework. By addressing the various iterations of the right to disconnect from around the world, examples that could shape an American attempt to institute the right will be highlighted and analyzed.

This Comment will proceed in four overarching parts, generally following a chronology that turns on the occurrence of the global COVID-19 pandemic. Part I examines the parallel development of new workplace technologies alongside telework regulations in various European jurisdictions. The development of these regulations laid the groundwork for a concomitant evolution of the right to disconnect. The concept of a right to disconnect finds its roots in France¹² and its early development in the member states of the European Union.¹³ Part II addresses the years 2020-2021, as the incidence of the global pandemic necessitated an immediate pivot for many workers to a “work from home” modality. Nations that had not yet considered regulating telework or the right to disconnect found

10. On April 1, 2024—two days before this Comment was delivered to the printer—California’s “AB 2751” was publicly announced by its author, Assemblymember Matt Haney. *See* Press Release, Assemb. Matt Haney, California Introduces Bill to Give Workers the Right-to-Disconnect from Non-Emergency Business Calls and Texts After Hours (Apr. 1, 2024), <https://a17.asmdc.org/press-releases/20240401-california-introduces-bill-give-workers-right-disconnect-non-emergency>. This proposal became only the second right to disconnect bill introduced by a legislative body in the United States, following a 2018 introduction by the New York City Council. *See* Int. No. 0726-2018, *A Local Law to Amend the New York City Charter and the Administrative Code of the City of New York, in Relation to Private Employees Disconnecting from Electronic Communications During Non-Work Hours*, N.Y.C. COUNCIL (Mar. 22, 2018), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3458217&GUID=8930D471-5788-4AF4-B960-54620B2535F7> [hereinafter *N.Y.C. Local Law*].

11. Paul Secunda, Tammy Katsabian, and Tyler Jochman are among the few doing yeoman’s work in this field by introducing an American audience to what has thus far been a foreign solution to a universal problem. *See generally* Paul M. Secunda, *The Employee Right to Disconnect*, 9 NOTRE DAME J. INT’L COMP. L. 1, 2-3 (2019) [hereinafter *The Employee Right to Disconnect*]; Paul M. Secunda, *Hybrid Federalism and the Employee Right to Disconnect*, 46 PEPP. L. REV. 873, 876 (2019) [hereinafter *Hybrid Federalism*]; Tammy Katsabian, *It’s the End of Working Time as We Know It: New Challenges to the Concept of Working Time in the Digital Reality*, 65 MCGILL L. J. 379, 381 (2020); Tyler Jochman, *Effects on Employees’ Compensation Under the Right to Disconnect*, 22 MARQ. BENEFITS & SOC. WELFARE REV. 209, 210 (2021).

12. Loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels, Chapitre II, Article 55 [Law No. 2016-1088 of Aug. 8, 2016 Relating to Work, the Modernization of Social Dialogue and the Securing of Professional Careers, Chapter II, Article 55], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFF. GAZETTE OF FRANCE] Aug. 9, 2016 (Fr.).

13. *See* OSCAR VARGAS-LLAVE ET AL., RIGHT TO DISCONNECT IN THE 27 EU MEMBER STATES 18 (Eurofound, 2020), <https://cooperante.uni.lodz.pl/wp-content/uploads/2020/08/wpef20019.pdf>.

themselves needing to institute emergency measures to cover the gaps—bringing the consideration of these issues beyond their initial European borders.¹⁴

Part III discusses the current state of the right to disconnect, as expressed in various legislative, and regulatory iterations around the world. The conversation around work environments is shifting yet again, and post-pandemic questions are focused upon how to negotiate the process of returning to work.¹⁵ Those nations that rode the wave of pandemic regulation with existing telework (and, in some cases, right to disconnect) legislation, are using this post-pandemic time to refine and expand their approaches.¹⁶ Many nations that first addressed telework in the context of pandemic regulations are now addressing the question of disconnection for the first time.¹⁷ Regardless of the impetus, the shift of employees from the traditional workplace to some expression of a teleworking modality has brought with it a groundswell of new regulation and, to varying degrees, a discussion of the employee right to disconnect.

Part IV analyzes the varied examples of the right to disconnect from around the world, noting those versions, or merely elements therefrom, that would be most easily transplanted into the United States. There is no single obvious solution, as the variety of worldwide regulations clearly illustrates. While developing an American expression of the right to disconnect may be fraught with political and constitutional hurdles,¹⁸ it is irresponsible to continue developing an increasingly digitized workforce without taking notice, in good faith, of the examples being set

14. See, e.g., Ley 27,555: Régimen legal del contrato de teletrabajo [Law 27-555: Legal Regime of the Telework Contract], CONGRESO DE LA NACION ARG. [NAT'L CONGRESS OF ARG.] Aug. 14, 2020 (Arg.); Decreto de Urgencia N° 127-2020: Decreto de urgencia que establece el otorgamiento de subsidios para la recuperación del empleo formal en el sector privado y establece otras disposiciones [Emergency Decree No. 127-2020: Emergency Decree that Establishes the Granting of Subsidies for the Recovery of Formal Employment in the Private Sector and Establishes Other Provisions] Nov. 1, 2020 (Peru).

15. See generally Ian Prasad Philbrick, *Office Drama: Labor Day has Become a Flash Point for Big Companies Who Want Workers to Return to the Office*, N.Y. TIMES (Sept. 4, 2022), <https://www.nytimes.com/2022/09/04/briefing/return-to-office-labor-day.html>.

16. For example, Belgium, which legislated a version of the right to disconnect for private-sector employees in 2018 (Loi relative au renforcement de la croissance économique et de la cohésion sociale [Reinforcement Law, Economic Growth, and Social Cohesion], BELGISCH STAATSBLED [OFF. GAZETTE OF BELGIUM] Mar. 26, 2018 (Belg.)), expanded the right to cover civil servants with a law that took effect in early 2022 (Arrêté royal modifiant l'arrêté royal du 2 octobre 1937 portant le statut des agents de l'État concernant le droit à la déconnexion [Royal Decree Modifying the Royal Decree of Oct. 2, 1937 Establishing the Status of State Agents Concerning the Right to Disconnection] Dec. 2, 2021 (Belg.)).

17. See, e.g., Ley N° 2191-2022 Ley de desconexión laboral [Law No. 2191-2022 Labor Disconnection Law], CONGRESO DE LA REPUBLICA DE COLOM. [CONG. OF COLOM.] Jan. 6, 2022 (Colom.).

18. Addressing specific questions regarding any prospective impact and implementation of the right to disconnect in the United States is, however, beyond the scope of this work. For example, the question of how, within the specific structure of the U.S. Constitution and its implicit federalism, a right to disconnect would be ideally expressed is one of a limited number of issues on this topic to have been previously examined. See *The Employee Right to Disconnect*, *supra* note 11, at 33-37 (2019) (arguing that a disconnection right could be regulated in a manner similar to the prevention of workplace violence—using a combination of OSHA regulations and state-mandated standards). See also *Hybrid Federalism*, *supra* note 11, at 897-901.

by an ever-growing number of nations who are choosing to face this issue head-on.

I. PRE-PANDEMIC: THE GROWTH OF ICTS, EARLY REGULATIONS, AND THE FIRST EXPRESSIONS OF THE EMPLOYEE RIGHT TO DISCONNECT

According to a 2022 study by the ADP Research Institute, “[m]ore than two thirds of workers in the US (68%) and Canada (66%) would consider looking for a new job if their employer insisted they return to the workplace full-time.”¹⁹ A similar result was found amongst employees in Europe²⁰ and South America.²¹ While the timing of this ADP workforce study may suggest that employee preference for telework is a direct result of the COVID-19 pandemic, an examination of telework regulation recognizes that this particular modality may offer more fundamental benefits to both the employee and the economy in general.²² Indeed, legislative recognition of and regulatory promulgation within the world of telework predates not only the global pandemic, but also the recent, rapid proliferation of highly-sophisticated ICTs.²³

A. *Technological Development Leading to the Evolution of “Telework”*

The concept of teleworking gained its name from the research of American analyst Jack Nilles, whose work in the 1970s focused on the developing information industry in California.²⁴ In the following decades, the evolution of how teleworking was understood and defined was linked by researchers to the tools

19. NELA RICHARDSON & MARIE ANTONELLO, PEOPLE AT WORK 2022: A GLOBAL WORKFORCE VIEW 46 (2022), https://www.adpri.org/wp-content/uploads/2022/04/PaW_Global_2022_GLB_US-310322_MA.pdf.

20. *Id.* at 38 (“The proportion of workers... ranges from six in 10 (60%) in Spain to around seven in 10 in Poland and the UK (72% and 71%).”).

21. *Id.* at 42 (stating that 62% of respondents in Argentina would so consider, 67% in Chile, while only 50% in Brazil).

22. *See, e.g.*, Ley 10/2021, de 9 de julio, de trabajo a distancia [Law 10/2021, of July 9, on Remote Work] (Spain) (“La exposición de motivos de dicha ley reconocía el teletrabajo como una particular forma de organización del trabajo que encaja perfectamente en el modelo productivo y económico, al favorecer la flexibilidad de las empresas en la organización del trabajo, incrementar las oportunidades de empleo y optimizar la relación entre tiempo de trabajo y vida personal y familiar.” [“The statement of reasons for said law recognized teleworking as a particular form of work organization that fits perfectly into the productive and economic model, by favoring the flexibility of companies in the organization of work, increasing employment opportunities, and optimizing the relationship between work time and personal and family life.”]).

23. *See generally, e.g.*, *Framework Agreement on Telework*, *supra* note 8. Évi XXVIII. Törvény a foglalkoztatással összefüggő egyes törvények [Law XXVIII of 2004: Certain Laws Related to Employment] (Hung.), <https://magyarkozlony.hu/hivatalos-lapok/f242e0a9414d5fe52c65c0a9ec188e27141db05a/dokumentumok/6d18f2a345225c5226cecf1daab5a4a4f480554b/letoltes>; Accord du 6 octobre 2006 relatif au télétravail [Agreement of Oct. 6, 2006 Relative to Telework], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFF. GAZETTE OF FRANCE] Oct. 6, 2006 (Fr.), https://www.legifrance.gouv.fr/conv_coll/article/KALIARTI000005848470.

24. *Three Generations*, *supra* note 5, at 197 (citing Jack M. Nilles, *Telecommunications and Organizational Decentralization*, 23 IEEE TRANSACTIONS ON COMM. 1142 (Oct. 1975)).

being used to achieve the work at hand.²⁵ International Labour Office (ILO) Senior Researcher, Jon C. Messenger, used this approach to organize the development of teleworking into three phases: Home Office, Mobile Office, and Virtual Office.²⁶

The earliest efforts towards teleworking were aimed at reducing an employee's commuting time, resulting in a situation where "[t]he workplace was relocated entirely or in part outside the employer's premises and close to or into the employee's home[.]"²⁷ It was during this phase when "personal computers and fixed telephones replaced long commuting hours between home and the office[.]"²⁸ As technology advanced and the tools being used became more mobile, so too did the teleworking space. "[L]aptop computers and mobile phones enabled wireless, portable work 'on the move' from locations other than home or the office[.]"²⁹ This shift from Home Office to Mobile Office also brought with it a shift in the types of workers taking advantage of the opportunities afforded by teleworking. While early teleworkers were mainly those involved in clerical tasks, "the Mobile Office of the 1990s instead tended to be mainly adopted by managers and professionals in marketing and finance."³⁰

The most recent development of teleworking once again grew out of significant improvements to the technological tools associated with the workplace. The proliferation of the latest generation of new ICTs (e.g., tablet computers, smartphones) has allowed workers to link with each other and their workplace over wireless internet connections.³¹ As Messenger stated in a 2017 report, "New ICTs enabled the mobile, virtual connection of workers to the 'office' from almost anywhere at any time[.]"³²

As the integration of ICTs into the employee's experience deepened, two inter-connected questions began to arise: how best can these new workspaces be utilized by employers, and what is the resulting impact upon employees who may not need to come to the office to be at work? Initially, Home Office teleworkers found themselves teleworking "as one's total and thus only work arrangement."³³ The ability for an employer, therefore, to manage their teleworking employee's workflow was relatively high. With the shift to the Mobile Office, options regarding workplace arrangements increased, "including [flexibility with] working hours in the evenings and on weekends."³⁴ This fluidity has expanded to its current iteration: where Virtual Offices have moved into "intermediate spaces," including such places as parks, sidewalks, and elevators, thus "complet[ing] the coverage of

25. Jon C. Messenger, *Working Anytime, Anywhere: The Evolution of Telework and Its Effects on the World of Work*, 3/2017 IUSLABOR 301, 303 (2017) (Spain) [hereinafter *Working Anytime*].

26. Jon C. Messenger, *Introduction: Telework in the 21st Century – an Evolutionary Perspective*, in *TELEWORK IN THE 21ST CENTURY* 1, 3-8 (Jon C. Messenger ed., 2019).

27. *Three Generations*, *supra* note 5, at 197.

28. *Working Anytime*, *supra* note 25, at 303.

29. *Id.*

30. *Three Generations*, *supra* note 5, at 199.

31. *Working Anytime*, *supra* note 25, at 303.

32. *Id.* (emphasis omitted) (citation omitted).

33. *Three Generations*, *supra* note 5, at 204.

34. *Id.*

workplaces made available by ICTs to basically anywhere one can imagine[.]”³⁵ and similarly broadening the employer’s reach far beyond their traditional offices.

B. Early Approaches to Regulation: Industry Agreements and Legislation

Well before the world of teleworking entered Messenger’s “Virtual Office” generation, discussions considering how the evolving concept of “workplace” could be, or needed to be, regulated had already begun. An early step into the regulation of telework occurred in 2002, resulting from collaboration between representatives of management, labor, and government entities in the European Union—collectively referred to as “social partners.”³⁶ The “Framework Agreement on Telework” set some of the most basic boundaries for the future of teleworking.³⁷ The Agreement recognized at the outset that teleworking could not only help employers, but it could serve “as a way for workers to reconcile work and social life and giv[e] them greater autonomy in the accomplishment of their tasks.”³⁸ Beyond this recognition, the Agreement laid out a broad definition of “telework” and provided, among other things, that “teleworkers benefit from the same rights, guaranteed by applicable legislation and collective agreements, as comparable workers at the employers’ premises.”³⁹

Two years after the adoption of the Framework Agreement on Telework, Hungary became the first nation to include language and concepts from that agreement in its own legislation.⁴⁰ This legislation provided, among other things, for the clear communication between employer and employee⁴¹ and equal treatment by the employer of both on-site and teleworking employees⁴² that was first envisioned by the Framework Agreement. Not long after the passage of Hungary’s Act XXVIII, France enacted legislation that specified certain aspects of any collective agreement on teleworking in the *Accord du 6 octobre 2006 relatif au télétravail*.⁴³ This agreement, along with requiring specificity with conditions of compensation and travel when contracting with a teleworker, laid out a single line that would indicate an important direction for labor and employment law, first in France and eventually around the world: “the employment contract upon hiring,

35. *Id.*

36. *Social Partners*, EUROFOUND (Aug. 31, 2023), <https://www.eurofound.europa.eu/en/topic/social-partners>.

37. See *Framework Agreement on Telework*, *supra* note 8.

38. *Id.*

39. *Id.*

40. JON MESSENGER, ET AL., *WORKING ANYTIME, ANYWHERE: THE EFFECTS ON THE WORLD OF WORK* 46 (2017).

41. 2004. évi XXVIII. Törvény a foglalkoztatással összefüggő egyes törvények (Law XXVIII of 2004: Certain Laws Related to Employment), § 4, 192/E (Hung.), <https://magyarkozlony.hu/hivatalos-lapok/f242e0a9414d5fe52c65c0a9ec188e27141db05a/dokumentumok/6d18f2a345225c5226cecf1daab5a4a4f480554b/letoltes>.

42. *Id.* § 4, 192/F.

43. *Accord du 6 octobre 2006 relatif au télétravail* [Agreement of Oct. 6, 2006 Relative to Telework] (Fr.), https://www.legifrance.gouv.fr/conv_coll/article/KALIARTI000005848470.

or the addendum establishing the transition to telework... must specify... the time slot(s) during which the employee may be contacted.”⁴⁴

In the United States, the concept of teleworking also appeared in legislative language from the early 21st Century. In 2000, the United States Congress passed Public Law 106-346, an appropriations bill “for the Department of Transportation and related agencies.”⁴⁵ Section 359 of this bill stated that “[e]ach executive agency shall establish a policy under which eligible employees of the agency may participate in telecommuting to the maximum extent possible without diminished employee performance.”⁴⁶ A decade later, Congress expanded this directive by passing the Telework Enhancement Act of 2010.⁴⁷ Similar to the telework regimes that would follow around the world, this act defined telework,⁴⁸ provided for equal treatment between teleworking and non-teleworking employees,⁴⁹ and set information security standards.⁵⁰ A key difference between the United States’ expression of telework regulation and its European contemporaries is the population of employees to which it applied. While American teleworking regulations were limited to the ambit of certain governmental employees, the developments in Europe sought to protect workers across public and private industries.

C. *Early Approaches to the Employee Right to Disconnect*

1. *Legislature-Driven: France, Belgium, and Spain*

Two years before the passage of France’s telecommunications Accord, the Social Chamber of the French Court of Cassation handed down a critical judgment in a wrongful termination case.⁵¹ Jean-Bernard Raze⁵² was working as a paramedic for an ambulance company when he refused to answer multiple phone calls from his employer.⁵³ The calls, which were made to Mr. Raze’s personal mobile phone,

44. *Id.* (“[L]e contrat de travail à l’embauche, ou l’avenant instaurant le passage au télétravail... devra préciser... la ou les plages horaires pendant lesquelles le salarié pourra être joint”).

45. An Act Making Appropriations for the Dep’t of Transp. & Related Agencies for the Fiscal Year Ending Sept. 30, 2001, & for Other Purposes, Pub. L. No. 106-346, 114 Stat. 1356 (2000).

46. § 359, 114 Stat. at 1356A-36.

47. Telework Enhancement Act of 2010, Pub. L. No. 111-192, 124 Stat. 3165 (2010) (codified as amended at 5 U.S.C. §§ 6501-6506).

48. 5 U.S.C. § 6501(3).

49. 5 U.S.C. § 6503(a)(3).

50. 5 U.S.C. § 6504(c).

51. Cour de Cassation, Chambre sociale, du 17 février 2004, 01-45.889, Inédit [Court of Cassation, Social Chamber, of Feb. 17, 2004, No. 01-45.889, unpublished] (Fr.), https://www.legifrance.gouv.fr/juri/id/JURITEXT000007473856?init=true&page=1&query=01-45889&searchField=ALL&tab_selection=all [hereinafter Court of Cassation].

52. Pascal Alix, *La télédisponibilité à l’heure du d’jeuner (limite)* [Teleavailability at Lunchtime (limited)] VIRTUALEGIS: LE DROIT DE L’ENTREPRISE [VIRTUALEGIS: BUSINESS LAW] Oct. 16, 2004 (Fr.), <http://www.droit-internet.fr/bulletins/document.php?ref=187>. Monsieur Raze is referred to as “M. Jean-Bernard X” in the official opinion made available through Legifrance.fr. However, his last name was published in a version of the opinion that accompanies this short commentary.

53. Court of Cassation, *supra* note 51.

arrived while he was off-duty.⁵⁴ Mr. Raze was terminated for his inaction, and the appeals court in Aix-en-Provence held that, by not answering his employer's calls, he "knowingly ran the risk of neglecting an emergency and endangering a patient."⁵⁵ The Court of Cassation, however, held that being contacted in this way, outside of working hours, released Mr. Raze from any fault and "therefore [did] not justify a disciplinary dismissal for serious misconduct."⁵⁶ Seemingly, a line was being drawn by the French courts—one that would be reinforced by the telecommunications Accord of 2006 and fortified ten years after that by way of a controversial bill aimed at various aspects of French labor law.

On August, 9, 2016, the Official Gazette of France published law number 2016-1088: a law "relating to work, the modernization of social dialogue and the securing of professional careers."⁵⁷ The development of this law was the cause of vociferous protests, with elements thereof decried by members of parliament on the right and on the left.⁵⁸ Known popularly as the El Khomri Law, after French Labor Minister Myriam El Khomri, this legislation put numerous provisions in the Labor Code up for debate and amendment.⁵⁹ One provision, which was spared much of the contemporary political ire, appeared in Article 55 of the law and amended Article L. 2242-8 of the French Labor Code by adding a new paragraph:

(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.⁶⁰

54. *Id.*

55. *Id.* ("[L]'arrêt attaqué (Aix-en-Provence, 18 septembre 2001) retient que ce dernier a sciemment couru le risque de négliger une urgence et de mettre en danger un patient[.]").

56. *Id.* ("ne permet donc pas de justifier un licenciement disciplinaire pour faute grave").

57. Loi 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels [Law 2016-1088 of August 8, 2016, Relating to Work, the Modernization of Social Dialogue and the Securing of Professional Careers], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFF. GAZETTE OF FRANCE] Aug. 9, 2016 (Fr.).

58. *French Parliament Debates Hotly Contested Labour Reform*, FRANCE 24 (Mar. 5, 2016, 9:47 AM), <https://www.france24.com/en/20160503-french-parliament-hotly-contested-labour-reform-elkhomri>.

59. *Id.*

60. Loi 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels, Chapitre II, Article 55 [Law 2016-1088 of August 8, 2016 Relating to Work, the Modernization of Social Dialogue and the Securing of Professional Careers, Chapter II, Article 55], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFF. GAZETTE OF FRANCE] Aug. 9, 2016 (Fr.); Code du Travail, Article L2242-17 [Labor Code, Article L2242-17], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFF. GAZETTE OF FRANCE] Mar. 31, 2022 (Fr.) ("7° Les modalités du plein exercice par le salarié de son droit à la déconnexion et la mise en place par l'entreprise de dispositifs de régulation de l'utilisation des outils numériques, en

This amendment, coming under the chapter titled “Adaption of the Labor Law to the Digital Age,”⁶¹ codified the protections found in earlier regulation while signaling the directions that other governments could and would take in the years to come.

While groundbreaking in its novelty, the right to disconnect (*droit à la déconnexion*) as formulated by the French legislature and codified into the Labor Code did not carry much more authority than the earlier Framework Agreement from the various social partners in the European Union. The law neither provided a definition of “disconnection,” nor articulated how it could be achieved. Indeed, the law put much of the onus on employers to create their own company-level agreements regarding the use of digital tools and thereby granting their employees some reliable mechanism to disconnect from work.

One particular company-level agreement was highlighted by the European Foundation for the Improvement of Living and Working Conditions (Eurofound) in their 2020 study on the developments of the right to disconnect throughout the European Union.⁶² With a focus on the agreements on the right to disconnect at Orange (formerly French Telecom), the Eurofound authors noted that the company’s collaborative efforts with its various trade unions on this particular issue predated passage of the El Khomri law: “The company and the trade unions had signed an arrangement on work-life balance with the unions, encouraging workers not to send emails during evening[s], weekends and holidays, before the agreement on [the right to disconnect].”⁶³ Agreements like the one made between Orange and its unions helped to drive the debate over the right to disconnect, which eventually led to the 2016 legislation. Ultimately, Eurofound noted that French legislative efforts on the right to disconnect were aimed at “enshrin[ing] this principle in law, but leaving the modalities of implementation to be agreed by social partners at [the] company level.”⁶⁴

A similar approach was adopted in Belgium. The right to disconnect, which was first codified there in 2018, called for a dialogue between management and employees with respect to striking a balance between work and life.⁶⁵ However, as

vue d’assurer le respect des temps de repos et de congé ainsi que de la vie personnelle et familiale. A défaut d’accord, l’employeur élabore une charte, après avis du comité d’entreprise ou, à défaut, des délégués du personnel. Cette charte définit ces modalités de l’exercice du droit à la déconnexion et prévoit en outre la mise en oeuvre, à destination des salariés et du personnel d’encadrement et de direction, d’actions de formation et de sensibilisation à un usage raisonnable des outils numériques.”).

61. Loi 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels, Chapitre II: Adaptation du droit du travail à l’ère du numérique [Law 2016-1088 of August 8, 2016 Relating to Work, the Modernization of Social Dialogue and the Securing of Professional Careers, Chapter II: Adapting the Labor Law to the Digital Age], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFF. GAZETTE OF FRANCE] Aug. 10, 2016 (Fr.).

62. VARGAS-LLAVE ET AL., *supra* note 13, at 38-39.

63. *Id.* at 38.

64. *Id.* at 39.

65. Loi du 26 mars 2018 relative au renforcement de la croissance économique et de la cohésion sociale [Law of Mar. 26, 2018 Relating to the Strengthening of Economic Growth and Social Cohesion: Economic Growth Act] art. 16 [M.B.] Mar. 30, 2018 (Belg.).

noted by the same 2020 Eurofound report, the framework through which negotiations on the right to disconnect were made differed considerably between these pioneering nations. While in France the right to disconnect arose from “collective negotiations on gender equality between women and men and quality of life at work,”⁶⁶ the negotiations in Belgium “must be developed in the framework of the health and safety committees[.]”⁶⁷ Because the Belgian approach to the right to disconnect was linked to a company’s health and safety committee (*Comité pour la Prévention et al Protection au Travail*), “medium and small businesses, with 50 employees or less,” which are not compelled to provide these committees, could avoid negotiating over the right to disconnect completely.⁶⁸ Thus, the implementation of this law in Belgium was subject to an immediate and considerable gap.

A third European nation leveraged yet another background principle when codifying its version of the right to disconnect. In December of 2018, Spain’s Organic Law 3/2018 went into effect which ostensibly sought to protect personal data and guarantee so-called digital rights.⁶⁹ There were several hallmarks to the Spanish version of the right to disconnect, as codified in Article 88 of the law, that brought something new to the conversation around disconnection. The first words of the Article conferred the right upon civil servants (*los empleados públicos*) as well as all other employees (*los trabajadores*).⁷⁰ Additionally, and also unlike the predecessor laws in France and Belgium, the Spanish law did not make the right to disconnect a point of negotiation between management and employees or their unions. Rather, the law called for employers to create an internal policy that indicates much of what unions would otherwise be negotiating for (i.e., defining the modalities of exercising the right and implementing training to help with the reasonable use of digital tools).⁷¹

2. Stalled in the Legislature: New York City

A legislative approach to the right to disconnect was also utilized in first (and for many years only) attempt made by any United States jurisdiction to recognize the concept. On March 22, 2018, five members of the New York City Council sponsored the submission of Introduction No. 726, which was a proposed local law

66. VARGAS-LLAVE ET AL., *supra* note 13, at 41.

67. *Id.* at 42.

68. *Id.*

69. Ley Orgánica 3/2018, de 5 de diciembre, de Protección de Datos Personales y garantía de los derechos digitales [Organic Law 3/2018, of December 5, on the Protection of Personal Data and the Guarantee of Digital Rights] BOLETÍN OFICIAL DEL ESTADO (B.O.E. 2018, 16673) (Spain).

70. *Id.* art. 88, ¶ 1.

71. *Id.* (“El empleador ... elaborará una política interna dirigida a trabajadores ... en la que definirán las modalidades de ejercicio del derecho a la desconexión y las acciones de formación y de sensibilización del personal sobre un uso razonable de las herramientas tecnológicas que evita el riesgo de fatiga informática.” [“The employer ... will develop an internal policy aimed at workers ... in which they will define the modalities of exercising the right to disconnection and the training and awareness-raising actions for staff regarding reasonable use of technological tools that avoids the risk of computer fatigue.”]).

that would create a right of disconnection for private employees within the city.⁷² Similar to France's El Khomri law, this proposal focused upon disconnection from "work-related electronic communications[.]"⁷³ The law also resembled the ongoing European development of the right by requiring employers to "adopt a written policy regarding the use by employees of electronic devices[.]"⁷⁴

Additionally, and moving beyond many contemporaneous efforts to codify the right to disconnect, the proposal in New York City called for a penalty of \$250 for every instance of communication in violation of the right, \$500 for every instance of unlawful retaliation, and a \$2,500 fine plus back pay for all instances of wrongful termination in connection with an employee's assertion of their right to disconnect.⁷⁵ This initial American attempt to recognize and codify the right to disconnect was linked not to telework per se, but rather to the ICTs that facilitated work away from the workplace. One can imagine that such a law would have encompassed teleworking more broadly when any distinction between working with ICTs and teleworking was blurred to the point of nonexistence by the COVID-19 pandemic. However, in this case, the proposal did not advance beyond the Council's Committee on Consumer Affairs and Business Licensing, stalling the first attempt to codify the employee right to disconnect in the United States.⁷⁶

3. *Company-Driven: Germany*

The right to disconnect, as discussed and debated in Europe, did not always find its foundation in acts of the legislature. Most prominent among those nations seeking to recognize the right to disconnect in some fashion, but not to immediately enshrine that right in the civil code, was Germany. In 2017, the German Ministry for Labor and Social Affairs published *Weissbuch Arbeiten 4.0*, a white paper focused on the future of work in the ever-expanding digital age.⁷⁷ This report featured insights and policy considerations on a range of workplace-related topics, including data protection,⁷⁸ the challenges of self-employment,⁷⁹

72. *N.Y.C. Local Law*, *supra* note 10.

73. *Id.* § 20-1402(a)(1).

74. *Id.* § 20-1402(a)(2).

75. *Id.* § 20-1406(d).

76. *Id.* (showing that the status of this legislation remains as simply "filed").

77. This white paper was a continuation of the work being done by the Ministry for Labor and Social Affairs to examine the impacts of an increasingly digital economy. The Ministry previously published a green paper which invited the input of academics, business leaders, social partners, and the general public. The later white paper focused upon sharing the insights gained therefrom. *See Weissbuch Arbeiten 4.0*, [White Paper Work 4.0], at 8, (Bundesministerium für Arbeit und Soziales, 2017) [Fed. Ministry of Lab. & Soc. Aff., 2017] (Ger.) ("Die übergeordnete Frage lautete: Wie können wir das Leitbild der „Guten Arbeit“ auch im digitalen und gesellschaftlichen Wandel erhalten oder sogar stärken? Mit dem Grünbuch wurden konkrete Fragen aufgeworfen. Im Weißbuch werden zumindest ersten Antworten auf diese formuliert." ["The overarching question was: how can we preserve or even strengthen our vision of quality jobs and decent work in an era of digital transformation and societal change? The Green Paper raised specific questions. This White Paper offers initial answers."])).

78. *Id.* at 142.

79. *Id.* at 166-69.

and the creation of “healthier” jobs.⁸⁰ Notably, this report shares a finding on working times in the face of increased demands for workplace flexibility.⁸¹ One in four employees reported working in the evenings, while one in ten reported working at night.⁸² Similarly, 26% of employees reported working on Saturdays and 14% on Sundays.⁸³ These figures marked a stark increase from a similar study made in 1992—as much as a 10% difference among those same categories of workers.⁸⁴

Commentary on the findings in *Weissbuch Arbeiten 4.0* noted that the German government, in cooperation with “companies, social partners, civil society, and academia[,]” concluded the best path forward into the increasingly digital working world was one that relied upon collaboration amongst the interested parties within the framework of *existing* labor laws.⁸⁵ “As a result, it has been pointed out that there is no need for further legislative action.”⁸⁶ Indeed, many German firms had begun to implement some version of a disconnection regime before the El Khomri law was passed or *Weissbuch Arbeiten 4.0* was published. For example, pharmaceutical giant Bayer instituted explicit policies stating that employees should not answer work emails during non-work hours.⁸⁷ Similarly, auto manufacturer Volkswagen implemented a pause function on their company email server that would shut down the system thirty minutes after the working day ended and start it back up again only thirty minutes prior to the start of the next day.⁸⁸ Daimler went a step further when setting similar boundaries on their email system: any messages that arrive in the inbox of an employee whose “out-of-office” reply is activated are automatically deleted, forcing the sender to attempt their communication at another time.⁸⁹

4. Operationalization Throughout Europe

In the years leading up to the COVID-19 pandemic, the groundwork for a right to disconnect was being laid throughout Europe. The various forms the right took reflected each nation’s approach to the challenges they identified as being central to the experience of teleworking, and work more generally in an increasingly digital environment. Accordingly, just as the early days of

80. *Id.* at 135-41.

81. *Id.* at 74.

82. *Id.*

83. *Id.*

84. *Id.* at 74-75.

85. Caroline Froger-Michon & Christopher Jordan, *Switching on to Switching off: Disconnecting Employees in Europe?*, CMS L.-Now (May 9, 2018), <https://cms-lawnow.com/en/ealerts/2018/09/switching-on-to-switching-off-disconnecting-employees-in-europe>.

86. *Id.*

87. Matthias Kaufmann, *Deutsche Konzerne kämpfen gegen den Handy-Wahn* [German Firms Fight Against Mobile Phone Madness], DER SPIEGEL: JOB & KARRIERE (Feb. 17, 2014, 5:59 PM), <https://www.spiegel.de/karriere/erreichbar-nach-dienstschluss-massnahmen-der-konzerne-a-954029.html>.

88. *Id.*

89. *Id.*

implementing the right to disconnect varied from nation to nation, so too did the manner in which the right was actually put into operation.

Eurofound identified two distinct approaches to how nations went about putting the right to disconnect into action. “The [right to disconnect] is being operationalised through a variety of hard and soft measures determined primarily in company level agreements[.]”⁹⁰ Hard measures include involuntary shutdowns of systems, akin to the actions taken by the German firms described above.⁹¹ By contrast, soft measures include those that suggest an employee action (or inaction, as the case may be), but do not have any requirements or obligations attached.⁹² The difference between the two is described as the difference between having a “right to be disconnected” and a “right to disconnect.”⁹³

The “softer” methods used by firms in France include employer recommendations regarding when it is or is not appropriate for employees to contact each other using company-issued ICTs.⁹⁴ In some cases, these agreements include assurances that an employee “may not be subject to disciplinary or discriminatory measures for not responding to a request outside their normal working time/during their rest periods.”⁹⁵ Often a feature of these agreements will clearly define the periods of time that fall outside of what is considered working time, and thus, when the right to disconnect would apply.⁹⁶

Companies employing a “hard” method to the right to disconnect may find their employees wishing for more flexibility. However, as one report states, “the Works Council [at Volkswagen] preferred a hard shut down to avoid workers worrying that if they requested the [right to disconnect] they may be considered to be not ‘ambitious.’”⁹⁷ Ultimately, early operationalization of the right to disconnect was centered upon striking a balance—which seems to confirm the wisdom of utilizing collective agreements in nearly every case where the right to disconnect was under consideration during the years leading up to the COVID-19 pandemic.

II. PANDEMIC (2020-2021): REFINEMENT AND EXPANSION

The global pandemic fundamentally changed how people around the world went about the tasks of their daily lives, from the mundane to the complex. It is no surprise, therefore, that the world of work has been undergoing a sea change since the early months of 2020. Telework, in particular, experienced rapid growth, bringing with it growing pains as regulations were just as rapidly crafted to address the threat of mass contagion.

90. VARGAS-LLAVE ET AL., *supra* note 13, at 46.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 47.

95. *Id.* at 48.

96. *Id.*

97. *Id.* at 30.

The continued development of telework regulations and the parallel development of the right to disconnect thus picked up its second phase as the COVID-19 pandemic took hold of more and more of the world. Nations that had previously regulated in this area sought to amend and refine what already existed as workers of all types pivoted to a new reality. Additionally, the regulation of telework made its first appearance in other countries as the sharp increase of workers taking advantage of the modality meant that laws were needed to help employers and employees alike navigate the situation. Emergency conditions brought the regulation of telework to the fore in many countries around the world and expanded the discussion of an employee's right to disconnect from that work at the conclusion of the working day.

A. Europe: Working Within an Existing Structure

Many European nations were at least somewhat prepared, from a regulatory standpoint, for the mass pivot of workers away from the office and into the “work from home” experience. These existing frameworks helped to accommodate the sharp increase of teleworking employees during the first months of 2020. According to Eurofound, “37% of those teleworking in April [of 2020] started working from home for the first time because of the crisis.”⁹⁸

One of the hallmarks of early teleworking regulation, following the lead set out by the 2002 Framework Agreement, was the recognition that the modality was a voluntary option to be exercised by a joint agreement between employer and employee.⁹⁹ The unprecedented virulence of COVID-19 precipitated an ongoing threat of mass-spreading events, resulting in the closure of places where crowds could congregate and close contact between infected persons could result—including offices and other workplaces. These closures meant that teleworking would no longer be a voluntary option reserved for those who could make a good case for its implementation, but rather a lifeboat keeping whole industries afloat.

On March 20, 2020, Decree 2-A/2020 was published in Portugal's *Diário da República*. Among the various aspects of this emergency declaration was Article 6, which, in a single sentence, made the implementation of telework mandatory wherever possible.¹⁰⁰ This marked a departure from the telework regime that had been in Portugal since it was codified as a part of the *Código do Trabalho*.¹⁰¹

98. *Id.* at 56 (citing LIVING, WORKING, AND COVID-19: FIRST FINDINGS – APRIL 2020, 5 (EUROFOUND, 2020), <https://www.eurofound.europa.eu/en/publications/2020/living-working-and-covid-19-first-findings-april-2020>).

99. *Framework Agreement on Telework*, *supra* note 8.

100. Decreto n.º 2-A/2020 de 20 de março [Decree No. 2-A/2020], art. 6, (Port.), <https://dre.pt/dre/detalhe/decreto/2-a-2020-130473161> (“É obrigatória a adoção do regime de teletrabalho, independentemente do vínculo laboral, sempre que as funções em causa o permitam.” [“It is mandatory to adopt the teleworking regime, regardless of the employment relationship, whenever the functions in question allow it.”]).

101. Código do Trabalho [Labor Code], Book I, Title II, Chapter I, Section IX, Subsection V, Article 166(1), Dec. 3, 2019 (Port.), <https://dre.pt/dre/legislacao-consolidada/lei/2009-34546475-46737975> (“Pode exercer a actividade em regime de teletrabalho um trabalhador da empresa ou outro admitido para o efeito, mediante a celebração de contrato para prestação subordinada de teletrabalho.” [“A company employee or another employee hired for the purpose may carry out the

Similar emergency decrees across Europe altered the preexisting nature of telework agreements. For example, Luxembourg also made utilizing the modality obligatory,¹⁰² and France exempted employers and employees from reaching specific contractual agreements on the topic of telework before implementing the switch.¹⁰³

In his 2017 article, Messenger recognized that those employees who telework may be in a situation where they are “working beyond normal/contractual working hours, which often appears to be unpaid.”¹⁰⁴ With this capacity for overwork already identified as a possible side-effect of telework, the pandemic presented an opportunity for this issue to be pressed to the breaking point. Therefore, as global events drove changes to existing regulations, a growing concern was being raised by trade unions and other social partners around Europe: would the gains made with regard to the right to disconnect be lost in the fray of the mounting global emergency?

Countries that had already codified some version of the right to disconnect continued to remind employers that the emergency situation did not permit a reduction in rights. For example, the Spanish government “issued a guide that stress[ed] that the implementation of telework... should not entail a reduction of rights in terms of health and safety or a weakening of labour rights (including the [right to disconnect]).”¹⁰⁵ In countries where the right to disconnect had not yet been codified, the rapid proliferation of teleworking brought renewed efforts to address the issue, either through political pressure or cooperative undertakings.¹⁰⁶

B. *Latin America: Telework Regulation From Whole Cloth*

The pivot to telework in the early months of 2020 was, indeed, a global experience. While regulations and legislation assisted with this change in various European nations, other countries found themselves scrambling to implement their first efforts in real-time as the emergency descended. On March 20, 2020, the legislative assembly of El Salvador passed Decree No. 600, which was, ostensibly, a simple teleworking regulation bill.¹⁰⁷ Article 2 of the decree stated the various objectives of the bill, which included many of the same rationales for teleworking that had been considered for decades (*i.e.*, increased productivity, reduction in

activity under a telework regime, through the conclusion of a contract for the subordinated provision of telework.”)].

102. VARGAS-LLAVE ET AL., *supra* note 13, at 59.

103. *Id.* at 58.

104. *Working Anytime*, *supra* note 25, at 306.

105. VARGAS-LLAVE ET AL., *supra* note 13, at 58.

106. Eurofound noted that, during the early months of the pandemic, members of the government in both Germany and Ireland both publicly announced intentions to propose right to disconnect legislation, while in the Netherlands, a cooperative effort between companies, unions, and the government sought to provide workers with online resources to aid in the transition to teleworking and its knock-on effects. *See* VARGAS-LLAVE ET AL., *supra* note 13, at 59-60.

107. *See* Decreto No. 600 de 20 marzo 2020 [Decree No. 600 of Mar. 20, 2020], art. 2, (D.O. 2020) (El Sal.).

costs, etc.).¹⁰⁸ While this measure had been under consideration for some time prior to the pandemic, according to an International Labour Organization report, the legislation “was enacted as a consequence of increased telecommuting due to the COVID-19 pandemic.”¹⁰⁹ The effects of the pandemic were specifically noted in the text of the decree under Article 24 (titled the “Transitional Provision”), which stated that “[t]his law will not be applicable to the work carried out by workers in their homes in favor of the employer, during the validity of the State of National Emergency of the COVID-19 Pandemic.”¹¹⁰ Among the elements of Decree No. 600 that were placed into effect and immediately suspended were Articles 7 and 19 which, in a manner similar to the European nations examined above, made the use of teleworking a voluntary decision for private-sector and public-sector employees, respectively.¹¹¹ Under the effect of El Salvador’s Transitional Provision, even new regulation passed in the wake of the pandemic was being amended to remove the flexibility inherent in the modality.

In a manner similar to El Salvador, the legislature of Peru enacted an emergency decree in March of 2020 that established various “exceptional” and “temporary” measures to help reduce the risk of the spreading virus.¹¹² Under Title II of this emergency decree, the Peruvian government sought to address the question of remote work, giving the modality a codified definition¹¹³ and extending

108. *Id.* (“Los principales objetivos del teletrabajo son los siguientes: El aprovechamiento de las tecnologías de la información y comunicación en la prestación de los servicios al público y a la población en general, el aumento y medición de la productividad, mayor eficiencia y transparencia en el uso de los fondos públicos, disminución del gasto, reducción del consumo de energía eléctrica, combustible, alquileres y otros.” [“The main objectives of teleworking are the following: The use of information and communication technologies in the provision of services to the public and the population in general, the increase and measurement of productivity, greater efficiency and transparency in the use of public funds, decreased spending, reduced consumption of electricity, fuel, rents and others.”]).

109. INT’L LAB. ORG., TELEWORKING DURING THE COVID-19 PANDEMIC AND BEYOND: A PRACTICAL GUIDE 23 (2020), https://www.ilo.org/travail/info/publications/WCMS_751232/lang--en/index.htm.

110. Decreto No. 600 de 20 marzo 2020 [Decree No. 600 of Mar. 20, 2020], art. 24, (D.O. 2020) (El Sal.) (“La presente ley no será aplicable al trabajo realizado por los trabajadores en sus hogares a favor del empleador, durante la vigencia del Estado de Emergencia Nacional de la Pandemia por COVID-19.”).

111. *Id.* arts. 7 & 19 (“La implementación del teletrabajo es estrictamente voluntaria.... [N]o debe existir forma coercitiva en la implementación del teletrabajo por ninguna de las dos partes.” [“The implementation of teleworking is strictly voluntary.... [T]here should be no coercive form in the implementation of teleworking by either party.”]); (“La incorporación a la modalidad de teletrabajo es voluntaria por parte del servidor público.” [“Incorporation into the teleworking modality is voluntary on the part of the public servant.”]).

112. Decreto de Urgencia N° 026-2020 de 15 de marzo de 2020 que establece diversas medidas excepcionales y temporales para prevenir la propagación de coronavirus (COVID-19) en el territorio nacional [Emergency Decree No. 026-2020 of Mar. 15, 2020 that Establishes Various Exceptional and Temporary Measures for Preventing the Spread of Coronavirus (COVID-19) in the National Territory] (D.O. 2020, 1864948-1) (Peru).

113. *Id.* art. 16 (“El trabajo remoto se caracteriza por la prestación de servicios subordinada con la presencia física del trabajador en su domicilio o lugar de aislamiento domiciliario, utilizando cualquier medio o mecanismo que posibilite realizar las labores fuera del centro de trabajo, siempre que la naturaleza de las labores lo permita.” [“Remote work is characterized by the provision of

it to workers in both the private and public sectors.¹¹⁴ The extension of telework regulation in Peru brought with it an eventual amendment that went beyond what other Latin American nations were contemplating at the time.

Nearly a year after the passage of their COVID-19 emergency decree, the government of Peru passed Supreme Decree No. 004-2021-TR, which sought to amend workplace regulations that had been enacted during the previous year.¹¹⁵ Under Article 9-A of this Supreme Decree, Peru codified its version of the right to disconnect.¹¹⁶ This legislation stated that “the employer cannot require the worker perform tasks, respond to communications[,] or establish coordination of a labor nature, through [digital] media, during the digital disconnection time, except with an agreement with the worker to carry out [the task] through overtime or in the circumstances indicated by [previously enacted legislation].”¹¹⁷ While correlation certainly is not causation, the timing of Peru’s telework legislation and eventual codification of the right to disconnect provides weight to the argument that the continued proliferation of the right to disconnect can be attributed to the marked increase of teleworking that resulted from the COVID-19 crisis.

III. POST-PANDEMIC: GREATER AND LESSER EXAMPLES OF THE RIGHT TO DISCONNECT

On May 5, 2023, the World Health Organization declared COVID-19 to be “an established and ongoing health issue which no longer constitutes a public health emergency of international concern[.]”¹¹⁸ The transition into the post-

subordinate services with the physical presence of the worker at his home or place of home isolation, using any means or mechanism that makes it possible to carry out the work outside the workplace, provided that the nature of the work allows.”)].

114. *Id.* art 17.1 (“Facúltase a los empleadores del sector público y privado a modificar el lugar de la prestación de servicios de todos sus trabajadores para implementar el trabajo remoto[.]” [“Employers in the public and private sectors are empowered to modify the place and provision of services for all their workers to implement remote work[.]”]).

115. *See* Decreto Supremo N° 004-2021-TR de 11 de marzo de 2021 que dicta disposiciones reglamentarias para la aplicación del Decreto de Urgencia N° 127-2020, Decreto de Urgencia que establece el otorgamiento de subsidios para la recuperación del empleo formal en el sector privado y establece otras disposiciones [Supreme Decree No. 004-2021-TR of Mar. 11, 2021 that Dictates Regulatory Provisions for the Application of Emergency Decree No. 127-2020, that Established the Granting of Subsidies for the Recovery of the Formal Employment in the Private Sector and Makes Other Provisions] (D.O. 2021, 1933990-3) (Peru).

116. *Id.* art. 9-A Derecho a la desconexión digital [Right of Digital Disconnection].

117. *Id.* (“[E]l empleador no puede exigir al trabajador realizar tareas, responder comunicaciones o establecer coordinaciones de carácter laboral, a través dichos medios, durante el tiempo de desconexión digital, salvo que acuerde con el trabajador la realización de trabajo en sobretiempo o concurren las circunstancias señaladas en el segundo párrafo del artículo 9 del Decreto Legislativo N° 854, Ley de Jornada de Trabajo, Horario y Trabajo en Sobretiempo, según Texto Unico Ordenado aprobado por Decreto Supremo N° 007-2002-TR.”).

118. *Statement on the Fifteenth Meeting of the IHR (2005) Emergency Committee on the COVID-19 Pandemic*, WHO (May 5, 2023), [https://www.who.int/news/item/05-05-2023-statement-on-the-fifteenth-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-coronavirus-disease-\(covid-19\)-pandemic-briefs](https://www.who.int/news/item/05-05-2023-statement-on-the-fifteenth-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-coronavirus-disease-(covid-19)-pandemic-briefs).

COVID reality, bolstered by more than 13 billion doses¹¹⁹ of vaccine administered around the world, has helped a sense of normalcy return for many people. This return brings with it a reentry to the workplace for many of those who pivoted to a teleworking modality during the peak of the pandemic. However, there is a growing trend amongst that population of employees to eschew a complete return to the office in favor of a continued teleworking arrangement.¹²⁰ The pandemic, it seems, functioned as a successful trial period of teleworking for many employees across various industries.

Just as governments around the world developed, refined, and expanded their teleworking regulatory schemes throughout the pandemic, a similar evolution of regulation, and therefore a parallel development of the right to disconnect, continues as workplaces embrace the post-pandemic reality. In those parts of the world where teleworking has entered an arguable maturity, the debate is shifting towards viewing employee rights as human rights.¹²¹ Countries experiencing a regulatory adolescence for teleworking are beginning to codify the right to disconnect in earnest.¹²² Still other countries are encountering these questions for the first time, in light of a post-pandemic push for a “hybrid” workplace.

A. *Europe: Employee Rights and Human Rights*

In early 2021, the European Parliament passed a resolution “with recommendations to the Commission on the right to disconnect.”¹²³ This resolution stated many of the same advantages examined above with regard to the proliferation of ICTs and teleworking regimes.¹²⁴ Additionally, the European Parliament noted that the COVID-19 pandemic not only “demonstrated the importance of digital solutions, including the use of work-at-home schemes by companies, the self-employed and public administration bodies,” but it resulted in a sharp increase in the number of employees utilizing the modality.¹²⁵ The resolution continued by stating that “the right to disconnect... is an inseparable part of the new working patterns in the new digital era[.]”¹²⁶ Upon adoption of the resolution, the European Parliament sent its recommendation to the European Commission for consideration.¹²⁷

119. *Coronavirus Disease (COVID-19) Pandemic*, WHO, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> (last visited Oct. 31, 2023).

120. According to a longitudinal study of households in the United Kingdom by the Understanding Society, “88% of employees who worked from home in January 2021 would like to work at home at least sometimes” in the future. See Natasha Mutebi & Abbi Hobbs, *The Impact of Remote and Hybrid Working on Workers and Organisations* 14-15 (U.K. Parliament, POSTbrief 49, Oct. 17, 2022), <https://researchbriefings.files.parliament.uk/documents/POST-PB-0049/POST-PB-0049.pdf> [hereinafter Mutebi & Hobbs].

121. See discussion *infra* Section III(A).

122. See discussion *infra* Section III(B).

123. *EU Parliament Resolution*, *supra* note 8.

124. *Id.* ¶ B.

125. *Id.* ¶ F.

126. *Id.* ¶ H.

127. *Id.* ¶ 28.

The work of the European Commission is ongoing, with legislators, commissioners, and social partners all participating in the broad debate on the right to disconnect. In March 2022, the Conference on the Right to Disconnect and Telework¹²⁸ served to bring points of view from around the European community into dialogue with each other regarding both telework legislation and the right to disconnect. During his remarks, Ivailo Kalfin, the Executive Director of Eurofound, stated that “we have, both from [the] workers’ and employers’ side, very good reason to believe that teleworking is here to stay in the future and after the pandemic.”¹²⁹ Mr. Kalfin also noted that, according to Eurofound statistics, as many as one-third of all jobs across Europe could be done remotely, using ICTs within the telework modality.¹³⁰

During the same conference, Joost Korte, the Director-General from the European Commission’s Directorate-General for Employment, Social Affairs, and Inclusion, called the COVID-19 pandemic a “pressure cooker” that accelerated and clarified the development of regulations and rights that were “happening anyway.”¹³¹ The desire to protect workers, in Mr. Korte’s view, was already growing, and the pandemic exposed “the fragility of [Europe’s] social systems.”¹³² This broader view, of the right to disconnect being rooted in the social fabric of the European Union, calls back to the 2021 Parliament resolution, which drew a link between the right to disconnect and Article 24 of the United Nations’ Universal Declaration of Human Rights.¹³³ Article 24 states that “[e]veryone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.”¹³⁴ As the European community seeks solutions for a future that will inevitably involve telework, leaders within those varied jurisdictions are working to recognize the right to disconnect not only as one that protects the productivity of workers, but at its core protects their very humanity.

B. Latin America: Establishing the Right

While the nations of Europe are working to enshrine the right to disconnect across the wider community of Member States, individual nations in Central and South America, which codified teleworking regulations during the height of the pandemic, are now moving to establish their own versions of the right to disconnect. Just as the right to disconnect was a later development in Peru,¹³⁵ the

128. *Conference on the Right to Disconnect and Telework: A Perspective from the EU Institutions, Member States, and Social Partners*, EUR. PARL. (Mar. 15, 2022), <https://www.right2disconnect.eu>.

129. *Conference on the Right to Disconnect and Telework: Presentation by Ivailo Kalfin*, EUR. PARL., at 10:50:25 (Mar. 15, 2022), <https://www.right2disconnect.eu/streaming>.

130. *Id.* at 10:53:25.

131. *Conference on the Right to Disconnect and Telework: Discussion on Main Challenges and Opportunities*, EUR. PARL., at 09:52:20 (Mar. 15, 2022), <https://www.right2disconnect.eu/streaming>.

132. *Id.* at 09:52:32.

133. *EU Parliament Resolution*, *supra* note 8 (“having regard to Article 24 of the Universal Declaration of Human Rights”).

134. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art. 24 (Dec. 10, 1948).

135. *See discussion supra* Section II(B).

right similarly developed in the waning days of the pandemic in other Latin American nations. In Costa Rica, the right to disconnect was added into an existing telework law by way of Law No. 10168, which passed on March 30, 2022.¹³⁶ While not as specific or far-reaching as other codifications, the right to disconnect in Costa Rica protects the time of an employee “outside the established working day or schedule[.]”¹³⁷

Along with establishing the right, nations in Latin America confronted the challenge of how the right would be enforced. This particular issue was a notable feature of an amendment to the Federal Labor Law in Mexico that took effect in January 2021.¹³⁸ This amendment added a “special obligation” for employers with teleworking employees that requires those employers to “[r]espect the right to disconnection of workers... at the end of the working day[.]”¹³⁹ While this obligation did not establish any broader right than had been seen in earlier expressions of the right to disconnect, the Mexican law’s enforcement mechanism added a curious wrinkle. Article 330-K grants the power to “[v]erify due compliance with the special obligations established in this Chapter” to the compliance officers from the Mexican Government’s Secretariat of Labor and Social Welfare.¹⁴⁰ While commentators have noted that this provision means “employers must have physical evidence of compliance” with the right to disconnect, they also note that “the provisions fail to define the precise parameters of the right and do not offer direction as to how employers are to comply with this obligation.”¹⁴¹ The broad-reaching, yet incomplete expression of the right to disconnect is indicative of a right that is still in its legislative adolescence and continuing to develop from the foundation of existing telework laws.

A more robust expression of the right to disconnect in Latin America can be found in Colombia’s Law 2191, passed on January 6, 2022.¹⁴² This law not only defines what “work disconnection” is, it also expands the definition beyond what was previously conceived in much of the world to include any means of contact

136. Ley no. 10168 de 30 de marzo de 2022 reforma del inciso D) del artículo 9 de la ley 9738, ley para regular el teletrabajo, 18 de setiembre de 2019, para garantizar la desconexión laboral de los trabajadores [Law No. 10168 of Mar. 30, 2022: Reform of Subsection D of Article 9 of Law 9738, Law to Regulate Telework of Sept. 18, 2019, to Ensure the Workers’ Disconnection from Work] (P.G.R. 10168, 2022) (Costa Rica).

137. *Id.* (“...fuera de la jornada u horario establecido....”).

138. Ley Federal del Trabajo [Federal Labor Law] art. 31,1 DIARIO OFICIAL DE LA FEDERACIÓN [OFF. J. OF THE FED’N] [DOF] Jan. 11, 2021 (Mex.).

139. *Id.* (“Respetar el derecho a la desconexión de las personas trabajadoras... al término de la jornada laboral[.]”).

140. *Id.* (“Los Inspectores del Trabajo tienen las atribuciones y deberes especiales siguientes... constatar el debido cumplimiento de las obligaciones especiales establecidas en el presente Capítulo.”).

141. Pietro Staulino-Rodriguez, et al., *The Right to Disconnect Under Mexico’s Telework Regulations – What Does It Mean for Employers?*, OGLETREE DEAKINS: CROSS-BORDER (June 14, 2022), <https://ogletree.com/insights/the-right-to-disconnect-under-mexicos-telework-regulations-what-does-it-mean-for-employers/>.

142. L. 2192/22, enero 6, 2022, DIARIO OFICIAL [D.O.] (Colom.).

between the employer and employee.¹⁴³ Additionally, Article 4, Paragraph 2 of Colombia's law introduces an enforcement mechanism for any suspected violation of the employee's right to disconnect, providing that any such violation may constitute workplace harassment as provided for in existing law.¹⁴⁴ Much of the right to disconnect, as codified in Colombia, draws upon various elements of previous efforts from around the world, resulting in a fully-formed, enforceable right.

C. North America: Initial Steps

The concept of a right to disconnect in North America found its first effective foothold in the Canadian province of Ontario on October 25, 2021, when Monte McNaughton, the provincial Minister of Labour, Immigration, Training and Skills Development offered Bill 27 to the Legislative Assembly.¹⁴⁵ This bill, eventually enacted as Chapter 35 of the Statutes of Ontario, called for numerous changes to employment and labor law in the province (e.g., practices surrounding the hiring of foreign nationals,¹⁴⁶ the validity of non-compete agreements,¹⁴⁷ and the accessibility of washrooms).¹⁴⁸ Among the workplace regulations proposed in Bill 27 was an amendment to the Employment Standards Act of 2000, adding Part VII.0.1, titled "Written Policy on Disconnecting from Work."¹⁴⁹

The Ontarian codification of the right to disconnect is similar to many of its European predecessors. The right applies to all employees except for those whose employer is "the Crown, a Crown agency[,] or an authority, board, commission or corporation whose members are all appointed by the Crown[.]"¹⁵⁰ The definition of disconnecting from work, while broadly stated as including "work-related communications," only specifies examples of digital communication.¹⁵¹ Additionally, the only affirmative step that is prescribed by the law requires that the employer "ensure[s] it has a written policy in place for all employees with

143. *Id.* art. 3 ("Entiéndase como el derecho que tienen todos los trabajadores y servidores públicos, a no tener contacto, por cualquier medio o herramienta, bien sea tecnológica o no, para cuestiones relacionadas con su ámbito o actividad laboral, en horarios por fuera de la jornada ordinaria[.]" ["It is understood as the right that all workers and public servants have, not to have contact, by any means or tool, whether technological or not, for issues related to their field or work activity, at times outside the ordinary working day[.]"]).

144. *Id.* art. 4(2) ("La inobservancia del derecho a la desconexión laboral podrá constituir una conducta de acoso laboral, en los términos y de conformidad con lo establecido en la Ley 1010 de 2006." ["Failure to enforce the right to disconnection from work may constitute workplace harassment, under the terms and in accordance with the provisions of Law 1010 of 2006."]).

145. Working for Workers Act, S.O. 2021, c 35 (Can.), https://www.ola.org/sites/default/files/no-de-files/bill/document/pdf/2021/2021-12/b027ra_e.pdf.

146. *Id.* at Schedule 1, § 1.

147. *Id.* at Schedule 2, § 4, Part XV.1 (67.2)(1)-(2).

148. *Id.* at Schedule 5, § 1 (29.1).

149. *Id.* at Schedule 2, § 3, Part VII.0.1 (21.1.2).

150. *Written Policy on Disconnecting from Work*, ONTARIO: YOUR GUIDE TO THE EMP. STANDARDS ACT, <https://www.ontario.ca/document/your-guide-employment-standards-act-0/written-policy-disconnecting-from-work> (last visited Oct. 31, 2023).

151. Working for Workers Act, Schedule 2, § 3, Part VII.0.1 (21.1.1).

respect to disconnecting from work[.]”¹⁵² This relatively simple expression of the right notwithstanding, the right to disconnect was thus codified and went into effect for the first time in North America in late 2021, with employers having until July 1, 2022, to craft and distribute their first disconnection policies.¹⁵³

IV. HOW MIGHT THE UNITED STATES ENTER THIS DEVELOPMENT?

Perhaps it is simply an American impulse to view efforts like those in the El Khomri law and the European Parliament’s 2021 resolution as little more than examples of overreaching by regulation-prone social democrats. One might also ask, what does the United States have in common with Latin American countries who were caught legislatively unprepared by a global emergency and were thus forced to craft telework regulations in the midst of a pandemic? The reply to such insularity is located on the desk, dashboard, and kitchen table of nearly every American adult—the mobile phone.¹⁵⁴

According to a 2022 study of American workplaces, 95% of employers who provide mobile devices to their employees noted “improved productivity” as a motivating factor in their decision to do so.¹⁵⁵ The same study also revealed that 52% of employees “say management expects them to be available after hours via their smartphone, even if they do not have a corporate-issued device.”¹⁵⁶ These findings clearly illustrate that the pervasive nature of ICTs is not a problem from which the United States is immune. And here, perhaps, is where there is some good news for American employees and employers alike. By observing the various iterations and applications of the right to disconnect and taking the best and most workable parts from each, the United States is well-positioned to craft an effective solution based upon years of ongoing, worldwide research and development.

At first blush, the German approach, which leaves the creation and enforcement of any right to disconnect with the employers themselves, appears to be the best fit. While unions are noted for bringing their own proposals to the bargaining table,¹⁵⁷ it is currently the employer who is taking steps to ensure that non-hourly employees still have some way of “clocking out” when the day is done.¹⁵⁸ An environment such as this, where the omnipresent hand of the legislature is not directly involved in setting or directing policy, aligns with an American marketplace that is generally circumspect of regulatory interference. Curiously, the arguably business-friendly German approach has created some of

152. *Id.*

153. *Id.* at Schedule 2, § 3, Part VII.0.1 (21.1.2)(5)(a).

154. According to a 2021 study by the Pew Research Center, 97% of Americans own a cellular phone of some kind, with smartphone ownership up to 85% of the population. *See Mobile Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/mobile/>.

155. OXFORD ECON., MAXIMIZING MOBILE VALUE: TO BYOD OR NOT TO BYOD 6 (Oxford Economics & Samsung, 2022).

156. *Id.* at 11.

157. VARGAS-LLAVE ET AL., *supra* note 13, at 30-31.

158. *See* discussion *supra* Section I(C)(3).

the more draconian results, e.g., the aforementioned auto-delete function in Daimler's corporate email system.¹⁵⁹

The legislative approaches found in much of the rest of the world also have lessons to teach the American workplace, even if direct regulation would not be a workable solution. The Belgian and Spanish models illustrate the diverse ways in which the fundamental question surrounding disconnection can be approached. While the focus in Belgium is on workplace and worker safety, the question in Spain has been one of digital security. These independent paths have found their way to a similar outcome wherein employees have some right at the end of the working day to draw a line between themselves and the ICTs that link them to their workplace. Similarly, in the United States, the debate over disconnection could take various forms. Digital privacy is an ongoing, multifaceted area of legal thought and development. Workplace health and safety is already the ambit of a considerable executive agency, and thus, for one scholar, stands out as a possible foundation for the right to disconnect in the United States.¹⁶⁰

The United States also has the advantage of seeing how enforcement of the right to disconnect might best be accomplished, primarily by taking notice of the various ways it has been enforced around the world to date. As explored above, the enforcement mechanisms in Latin America, in particular, are indicative of the numerous approaches that may or may not lead to fruitful results. For example, Colombia's law provided both workable definitions and a clear use of existing workplace harassment statutes to enforce the right to disconnect.¹⁶¹ Mexico, however, granted enforcement to an existing inspection agency, but failed to adequately define what disconnection means, thus hobbling any effort to effectively protect the right.¹⁶² The lesson for the United States is clear: some sort of enforcement mechanism will be needed, but it must be carefully crafted so that all parties involved are effectively held to account.

Within the United States, the *sine qua non* of establishing the employee right to disconnect will be compromise—from the largest deliberative bodies to the smallest employment agreements, there will need to be an understanding of every party's interest. To achieve this, especially in the short-term, the United States ought to follow the lead of Ontario and find a way to establish, however narrow, a right to disconnect. The Ontarian approach marries the legitimacy of regulation with the flexibility of company-level policy-setting: the “French” establishment of a “German” process.

This approach appears to be at the heart of AB 2751, California's new right to disconnect bill. By adding new language to that state's Labor Code, the current version of AB 2751 would require employers to “establish a workplace policy that provides employees the right to disconnect from communications from the employer during nonworking hours.”¹⁶³ This bill also includes a qualified definition of the right itself, which embraces a broad expression of

159. *Id.*

160. *See The Employee Right to Disconnect*, *supra* note 11, at 33-37.

161. *See discussion supra* Section III(B).

162. *Id.*

163. AB-2751, Cal. State Leg., 2023-24 Sess., § 1(b) (2024).

“ignor[ing] communications from the employer[.]”¹⁶⁴ and provides for enforcement upon establishing “a pattern of violation[.]”¹⁶⁵ The expression of the right to disconnect proposed by this bill is one that establishes workable definitions for critical components, while leaving flexibility for employers whose workplaces may not be amenable to a more strict disconnection scheme.¹⁶⁶ What cannot be overstated here is the fact that AB 2751 marks the first time one of the vaunted laboratories of American democracy has chosen to enter the ongoing, worldwide conversation regarding the realities of ICT-reliant work.

CONCLUSION

The story of the employee right to disconnect is one of inevitable development. The advent of groundbreaking technologies, leveraged by a range of professions and industries, created a way for employees to go to work without necessarily going to the workplace. These technologies, and the modality they spawned, rescued entire workforces when a global pandemic rendered the office a veritable biohazard. This modality, previously a lifeboat, is now an increasing portion of the employee experience.¹⁶⁷

The right to disconnect is not solely a product of the COVID-19 pandemic’s effect upon workplaces around the world. That being said, the ongoing proliferation of the right is inextricably linked to the expansion of regulatory schemes for teleworking that have been created around the world, both before and during the pandemic. Over the past decade, the line between workplace and non-workplace has been permanently blurred by the increased capabilities of ICTs, leaving workers exposed to extended working hours, some of which may effectively go uncompensated. The global pandemic turbocharged both the need for and availability of teleworking arrangements. In so doing, it led to the refinement of myriad regulatory schemes around the world. Now that the effects of the pandemic on workplaces are beginning to wane, the question remains how ICTs and telework arrangements can and should be regulated to protect employees.

This question, and the realities of navigating teleworking arrangements that face employees and employers, is not one from which the United States is exempt. Yet, there has been minimal effort to recognize the issue or confront the questions that come with it. There is, as yet, scant acknowledgement that employees should, or even could, have some protection from a workplace that can follow them into the most intimate spaces of their personal lives and personal time by way of the smartphone in their pocket.

Why is this? The ubiquity of ICTs in the United States is beyond doubt. The pivot to “work from home” during the pandemic was as much an American experience as it was a European one. Additionally, concerns with employee

164. AB-2751, Cal. State Leg., 2023-24 Sess., § 1(a)(5) (2024).

165. AB-2751, Cal. State Leg., 2023-24 Sess., § 1(e) (2024).

166. The current version of this bill allows for exceptions to the right to disconnect for emergency situations and to accomplish short-notice changes to workplace scheduling. *See* AB-2751, Cal. State Leg., 2023-24 Sess., § 1(d) (2024).

167. Mutebi & Hobbs, *supra* note 120, at 14-15.

burnout are raised just as loudly in this country as anywhere else.¹⁶⁸ The employee right to disconnect deserves a place at the table where discussions of employment and labor law take place in this country.

Various nations around the world have provided examples of how to consider and implement this right—as an expression of workplace safety, digital security, or workers’ rights. Some nations have left the responsibility with individual employers to navigate the issue with their own employees, instead of turning to legislative bodies. Regardless of the method, the wider world is recognizing and wrestling with the inevitable challenges of work facilitated by ICTs and the resulting workplaces that can be found beyond the traditional office. This ongoing conversation includes varied, good faith efforts to join in the process of seeking and crafting a solution that allows all employees to disconnect from their place of work after the workday has ended. The opportunity to cultivate this discourse continues to await our Nation’s understanding and involvement. Perhaps there is hope, at long last, that the conversation has found willing participants in the United States, as demonstrated by California’s AB 2751. Ultimately, embracing the challenges inherent in creating an American expression of the employee right to disconnect is in the best interest of all working people.

168. Thalia Plata, *Work Burnout Signs: What to Look for and What to Do about It*, BOS. UNIV.: THE BRINK (Apr. 14, 2022), <https://www.bu.edu/articles/2022/work-burnout-signs-symptoms/>.