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The Employee Right to Disconnect

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Cover Page Footnote

Professor of Law and Director, Labor and Employment Law Program, Marquette University Law School. This Article is part of a Symposium that the Journal of International and Comparative Law of the University of Notre Dame Law School hosted on February 23, 2018, which included the panel: Human Rights to a Healthy Working Environment. The irony is not lost on the author that he wrote a large segment of this Paper after his normal working hours, and even on "vacation." Much thanks to Khatija Choudhry, Marquette Law Class of 2019, for her excellent research and writing assistance on this Paper. The Paper is dedicated in honor of my father, Steven Secunda, the man I most admire most of all.

THE EMPLOYEE RIGHT TO DISCONNECT

PAUL M. SECUNDA*

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INTRODUCTION

“A healthy working environment is one in which there is not only an absence of harmful conditions but an abundance of health-promoting ones.”¹

Overworking seems like the quintessential American ideal—only through hard work is one able to achieve the elusive American dream of upward social mobility.² Yet, the phenomenon of people literally working themselves to death neither originated in the United States, nor is it uniquely American. Consider the fact that the Japanese actually have a term—*karoshi*—for people

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¹ *Occupational Health: Stress at the Workplace*, WHO, http://www.who.int/occupational_health/topics/stressatwp/en/ (last visited Nov. 17, 2018) [hereinafter "*Occupational Health*"].

² See RONALD WRIGHT, *A SHORT HISTORY OF PROGRESS* 124 (2004) (“[S]ocialism never took root in America because the poor see themselves not as an exploited proletariat but as temporarily embarrassed millionaires.”).

who kill themselves through overwork.³ A recent article told of a thirty-one year old Japanese woman, Miwa Sado, a journalist for the country's public broadcaster, NHK, who died of heart failure because of overwork.⁴ According to the account, "[Sado] logged 159 hours of overtime and took only two days off in the month leading up to her death from heart failure in July 2013."⁵

Although overworking does take place in the traditional brick-and-mortar workplace, various technologies are making it increasingly easier for employees to work additional hours away from work and at home.⁶ The use of smartphones, laptops, and other digital communication devices means that employees are incapable of escaping work.⁷ Sometimes employees place upon themselves the burden of these onerous work schedules,⁸ but real-world evidence also suggests that employers are also a culprit.⁹ Employers electronically contact their employees through text message, chat, or e-mail,

³ See Justin McCurry, *Japanese Woman 'Dies from Overwork' After Logging 159 Hours of Overtime in a Month*, GUARDIAN (Oct. 5, 2017), <https://www.theguardian.com/world/2017/oct/05/japanese-woman-dies-overwork-159-hours-overtime>. On the other hand, Japan is attempting new strategies to keep employees from over-working. See George Nishiyama & Megumi Fujikawa, *Japan, Which Invented Workaholics, Tells Employees: Go Home Already!*, WALL ST. J. (Nov. 3, 2017), <https://www.wsj.com/articles/japan-which-invented-workaholics-tells-employees-go-home-already-1509634033> ("Around the room, employees take turns in a formal closing ceremony meant to cut overtime and raise productivity. The company is hoping that the up-tempo music will encourage workers to 'go into higher gear' and get the job done."). As will be discussed *infra* Part II.B, the Japanese approach to over-work seems closer to the German model of corporate self-regulation.

⁴ See McCurry, *supra* note 3.

⁵ *Id.*

⁶ See Jeffrey M. Jones, *In U.S., Telecommuting for Work Climbs to 37%*, GALLUP NEWS (Aug. 19, 2015), <http://news.gallup.com/poll/184649/telecommuting-work-climbs.aspx> (finding telecommuting in 2015 to be four times more common than in 1995); JON C. MESSENGER, WORKING ANYTIME, ANYWHERE: THE EVOLUTION OF TELEWORK AND ITS EFFECTS ON THE WORLD OF WORK (Mar. 2017), <https://www.upf.edu/documents/3885005/140470042/11.Messenger.pdf/97d66c02-0edf-5fd8-2b29-7300017d47c0> [hereinafter WORKING ANYTIME] ("21st Century office work is often supported by internet connections, and thus can be done from basically anywhere and at any time."); see also Eurofound & International Labour Office [ILO] (2017), *Working Anytime, Anywhere: The Effects on the World of Work* (2017) [hereinafter Eurofound] (defining "T" as Telecommunications and "ICTM" as Information and Communication Technologies Mobile Work). As for other countries, Japan uses technological mobility to attract a diversified workforce comprised of the elderly and young mothers, while Brazil and India use mobile technology to reduce the cost of a physical workspace. *Id.* at 11. Lastly, Finland and the Netherlands have found positive results with using technology to maintain a better work-life balance. *Id.* at 22.

⁷ See *Are You a Digital Dictator?*, CHALLENGER, GRAY & CHRISTMAS, INC. (Oct. 12, 2017), <https://www.challengergray.com/press/press-releases/are-you-digital-dictator> (last visited Nov. 17, 2018) [hereinafter CHALLENGER] (noting employers can now easily contact employees with workplace concerns outside of regular working period on platforms, such as text messaging, e-mail, and social media).

⁸ See Jon Burns, *The Five Reasons Employees Work Overtime*, REPLICON (May 31, 2016), <https://www.replicon.com/five-reasons-employees-work-overtime> (suggesting that employees work overtime because of work overload, distractions, or to obtain higher positions in the workplace); see also Nathan Gilkerson et al., *Work-Life Balance 2.0? An Examination of Social Media Management Practice and Agency Employee Coping Strategies in a 24/7 Social World*, 12 PUB. REL. J. 1, 8 ("Most [interviewed] said client work related to social media and dynamic online content [had] created [at least some] clashes between time demanded by work and personal responsibilities. Some [respondents] reported significant stress related to [their] agency roles spilling over from work into non-work hours.").

⁹ See WORKING ANYTIME, *supra* note 6, at 306 ("[A] significant part of this work arrangement has a supplemental character—that is, it leads to working beyond normal/contractual working hours, which often appears to be unpaid.").

"after-work"¹⁰ to attend to some task, duty, project or assignment.¹¹ Sometimes these messages are in the language of compulsion,¹² while other times these messages may casually pose the question of whether the employee is available to complete a task. Either way, employees in the United States and across the world are under significant pressure to continue working even after the proverbial whistle has blown on the workday.¹³

Such workplace dynamics cause numerous problems for employees and employers. First, issues of both workplace privacy and autonomy arise.¹⁴ At what point do employers cease to have the right to intrude upon the private space and time of their employees?¹⁵ Even during the workday, historically, there are times and places where workplace privacy is inviolable and not subject to the employer's prying eyes.¹⁶ There are also decisions employees make about their private lives, sexual and otherwise, that should not be subject to employer intervention.¹⁷ Second, there is the matter of the safety and health of employees who work too many hours.¹⁸ The Japanese example of *karoshi* is

¹⁰ "After-work" depends on when the employer expects an employee to be available but does not refer to any specific time period. For example, an employer could expect their employee to work from 9:00 p.m. to 5:00 a.m. to accommodate international communications. This means that "after-hours" for this employee is anytime outside of the defined period, where they can expect to spend their time in their own interest, rather than that of the employer. See CHALLENGER, *supra* note 7 (noting "after hours" in this context takes on broad definition, referring to any time that an employee is "off-duty").

¹¹ Employers have increasingly demanded flexibility from their employees. See *id.* (finding over 80% of supervisors would contact employees after-hours).

¹² See *id.* (finding nearly half of employers would expect response to after-hours communication prior to following workday, with 54% expecting a response within a few hours or sooner). For instance, one story told of Amazon employees often finding themselves receiving e-mails past midnight, followed up with a text message asking why they did not respond. See Jodi Kantor & David Streitfeld, *Inside Amazon: Wrestling Big Ideas in a Bruising Workplace*, N.Y. TIMES (Aug. 15, 2015), <https://www.nytimes.com/2015/08/16/technology/inside-amazon-wrestling-big-ideas-in-a-bruising-workplace.html>.

¹³ See Eurofound, *supra* note 6, at 1, 17 (highlighting the paradoxical nature of technology in the workplace: allowing employees to enjoy increased autonomy, but also creating high-level deadlines and increased pressure to perform). WORKING ANYTIME, *supra* note 6, at 303–04 ("Today's location-independent, technology-enabled new ways of working, from the mobile full-time sales person to the occasional work-related e-mail or phone call from home, are all part of the same (r)evolution in the inter-relationship between paid work and personal life.").

¹⁴ Privacy and autonomy are distinct legal rights. Privacy refers to the employee's "right to be left alone." Put another way, it is the right of employees to not be subjected to wrongful employer intrusions on protected employee interests. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 7.06 (AM. LAW. INST. 2017). Autonomy refers to an employee's protected personal interests outside of the employment relationship such as engaging in lawful off-duty conduct, and politics. *Id.* § 7.08.

¹⁵ See *K-Mart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632, 640 (Tex. Ct. App. 1984) (finding employer's intrusion on employee's locker unreasonable because employee placed padlock on it); see also *Sims v. NCI Holding Corp.*, 759 N.W.2d 333 (Iowa 2009) (finding regular and random drug testing of employees was not an invasion of privacy so long as the sample was properly collected). See generally Paul M. Secunda, *Privatizing Workplace Privacy*, 88 NOTRE DAME L. REV. 277 (2012) [hereinafter *Privatizing Workplace Privacy*] (describing workplace privacy protections in the public and private sector of United States workplaces).

¹⁶ For example, it is universally accepted that "[a]n employer observing an employee engaged in private physical functions in a bathroom stall is an intrusion into a protected privacy interest." RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 7.03 cmt. b (AM. LAW. INST. 2017).

¹⁷ Protections for decisions related to sexual privacy can be located in *Lawrence v. Texas*, 539 U.S. 558 (2003); see *infra* Part I.A.2. See generally Paul M. Secunda, *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85 (2006) [hereinafter *The (Neglected) Importance*] (discussing *Lawrence's* implications for termination of public employees on sexual privacy grounds).

¹⁸ See discussion *infra* Section I.B.

an eye-catching example, but even well short of that type of extreme overwork,¹⁹ studies show that tired, stressed-out employees get injured, sick, and miss work at alarmingly high rates.²⁰ Recent studies have shown that the exposure to constant workplace demands, or even the mere anticipation of such demands, is detrimental to employee health.²¹ Third, and related, employers notice a lack of productivity from overworked employees, as "more" work at some point does not equal "better" work.²² Fourth, and finally, consider why maximum hour laws, overtime, and the weekend, have all played such a prominent role in most advanced-industrial societies in the last century: the importance of leisure time.²³ Most employees work not as an end in itself (though some do),²⁴ but as means to be able to provide other utility-optimizing goods to their families and friends: housing, food, recreation, retirement, vacations, entertainment, and the list goes on. Needless to say, overworked and stressed employees have less time for leisure.

Currently, neither the United States nor Canada²⁵ has any law directly dealing with whether or not employees have a right to be free from electronic workplace communications once their day ends.²⁶ Yet, an employee's "right to disconnect" from workplace communication devices has quite recently become

¹⁹ To be clear, overwork and stress has led to increased workplace suicides in the United States in recent years. See Rachel Feintzeig, *With Workplace Suicides Rising, Companies Plan for the Unthinkable*, WALL ST. J. (Jan. 17, 2018) <https://www.wsj.com/articles/with-workplace-suicides-rising-companies-plan-for-the-unthinkable-1516205932> ("According to the Bureau of Labor Statistics, suicides at workplaces totaled 291 in 2016, the most recent year of data and the highest number . . . [in] 25 years."); see also *id.* ("[W]orkers consumed with their work also might end their lives while on the job, perhaps in an attempt to send a message.").

²⁰ See William J. Becker, Liuba Y. Belkin & Samantha A. Conroy, *Exhausted, but Unable to Disconnect: After-Hours Email, Work-Family Balance and Identification*, 2016 ACAD. MGMT. PROC. J.1 (Aug. 2016) (observing how feeling tied to work e-mails constantly can lead to employees experiencing chronic stress and emotional exhaustion); Gilkerson, *supra* note 8, at 11 (presenting agency professionals account "about the stress and workload issues their younger colleagues faced related to their client social media responsibilities, with accounts of an 'always working' mentality often leading to anxiety, job dissatisfaction, and burnout").

²¹ See *Occupational Health*, *supra* note 1 ("Research findings show that the most stressful type of work is that which values excessive demands and pressures that are not matched to workers' knowledge and abilities, where there is little opportunity to exercise any choice or control, and where there is little support from others.").

²² Indeed, given the vicarious liability of employers when their employees "act in the scope of employment," if employees respond to messages while driving, employers might actually be harmed. See *Kubert v. Best*, 75 A.3d 1214 (N.J. Super. Ct. App. Div. 2013) (holding the author of a text message liable for a car accident because the author should have known that the recipient was driving while responding).

²³ See discussion *infra* Section I.D.

²⁴ Satisfied people work because it offers them a sense of autonomy, discretion, and an opportunity for social engagement. See BARRY SCHWARTZ, *WHY WE WORK* 8 (2015).

²⁵ See Donalee Moulton, *The Problem With a 'Right to Disconnect' Law*, L. DAILY (CAN.) (Apr. 11, 2017), <https://www.thelawyersdaily.ca/it/articles/2859/the-problem-with-a-right-to-disconnect-law-> ("Some find that overtime and hours of work already governed by provincial legislation, as well as time off and leaves of absence . . . The right to disconnect, however, is an element that has not yet been addressed specifically in Canada.").

²⁶ However, some states do have laws regarding employee compensation for on-call time. For example, New York requires employers to compensate employee on-call time as hours worked for minimum wage and overtime requirements, if the employer requires them to remain available to work at or near the employer's premises. N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.2. Those call-in statutes are not the subject of this Article. *But see* N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.4; SEATTLE, WASH., MUN. CODE § 14.22 (2016). On the other hand, in Canada, "[c]urrent employment standards legislation across Canada provides for some resting periods that must be respected by the employer between work shifts." Moulton, *supra* note 25.

an important employment law matter in other advanced industrial economies in the European Union, most prominently France and Germany.²⁷ France has taken a legislative approach,²⁸ while Germany has taken a private-ordering or corporate self-regulation approach.²⁹ Both France's "droit à la déconnexion," and Germany's voluntary corporate self-regulation have advantages and disadvantages.³⁰ Of course, it is also axiomatic that one does not just transplant other countries' legal frameworks into one's own.³¹ This is especially true when dealing with civil law countries, like France and Germany, on the one hand, and a common law country, like the United States, on the other.³²

It is with this comparative law axiom squarely in mind that this contribution to the Symposium seeks to locate employee disconnection rights within a human right for more healthy workplaces. This approach not only borrows from both the French and German models, but also considers the unique workplace realities of the United States, with its large degree of employment-at-will flexibility and its consequent laissez-faire approach to employment relations.³³ Additionally, and as will be discussed in greater detail below, the Fair Labor Standards Act (FLSA)³⁴ makes an important distinction between nonexempt employees—who can earn overtime after working forty hours in a workweek—and exempt employees—who cannot earn overtime—that needs to be considered when asking which employees are being encouraged to continue working through electronic communication appeals after the work day has ended.³⁵ In this vein, this Paper concludes that a recognized employee disconnection right should *not* be tied to an employee's level of education, sophistication, or compensation.³⁶

After considering some of the more pertinent characteristics of the American workplace, this Article embraces a tactical choice to focus on the safety and health objectives of protecting employees from overwork by significantly minimizing electronic communication requests after work. There are four advantages to this safety and health approach, as opposed to concentrating on employee privacy, productivity, or leisure. First, for better or worse, the United States has in place an occupational health and safety

²⁷ See discussion *infra* Section II.

²⁸ France recently passed a law requiring employers to establish employee's rights to not respond to after-hours communications. See CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. 55 (Fr.).

²⁹ Eurofound, *supra* note 6, at 50 (discussing Germany's approach to establishing a right to disconnect through tripartite actions led by the national government).

³⁰ See *infra* Section II.C.

³¹ See Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN. ST. L. REV. 923, 968 (2011) ("Comparative law scholars frequently warn of the dangers of legal transplants. Doctrines or procedures that effectively work in one system may produce deleterious effects in another system given differences in political culture, constitutional frameworks, and other contextual factors.").

³² Countries adopting civil law systems adhere to comprehensive codes outlining each action, procedure, and remedies. In contrast, common law systems rely on precedent established by judicial decisions with scattered statutes. See Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 424–435 (1967) (finding no matter what system is adopted, the law will evolve to serve the needs of the society it serves).

³³ See discussion *infra* Section II.

³⁴ Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. § 201 (2012).

³⁵ The difference between exempt and nonexempt employees is that nonexempt employees enjoy additional protections due to their economic inability to bargain for individual protections. *Id.* § 202.

³⁶ See discussion *infra* Section IV.

administrative legal regime that deals with workplace safety and health issues under the Occupational Safety and Health Act (OSHA).³⁷ Although rightfully criticized for its ineptitude at times at passing permanent workplace regulations or for overly complex regulations,³⁸ it is a system that has been functioning to some degree for forty-five years and can be easily utilized to handle issues related to employee disconnection from workplace communications. Second, OSHA provides a legal approach that essentially borrows from the French and German employee disconnection models. On the one hand, OSHA is legislation with some default prohibitions, such as the General Duty Clause, similar to the French model,³⁹ but on the other hand, it allows for employers to meet safety and health standards through creating equally effective ones of their own, often called permanent variances, more like the German model.⁴⁰ Third, by treating all employees, exempt or nonexempt, as equally deserving of these OSHA disconnection protections, one need not get bogged down on more complex issues surrounding compensation, productivity, privacy, and autonomy concerns. Indeed, such a right being universal is also more consistent with it being a human right.⁴¹ The level of safety and health protection from overwork caused by the lack of employee disconnection could, in turn, be based on the characteristics and types of industries involved.⁴² Fourth, and finally, these disconnection safety and health protections will have a salubrious downstream effect on employee privacy, autonomy, productivity and leisure.⁴³

This Article is divided into four parts. Part I discusses the increasing use by employers of contacting their employees through after-work electronic communications, which causes employees to work increasingly long hours and which, on balance, leads to detrimental impacts on employee privacy, autonomy, safety, health, productivity, and leisure. For each detrimental

³⁷ Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified at 29 U.S.C. §§ 651–78 (2006)) *See generally About OSHA*, U.S. DEP'T LAB., <https://www.osha.gov/about.html> (last visited Jan. 7, 2018) (“With the Occupational Safety and Health Act of 1970, Congress created the Occupational Safety and Health Administration (OSHA) to assure safe and healthful working conditions for men and women by setting and enforcing standards and by providing training, outreach, education and assistance.”).

³⁸ *See* John Howard, *OSHA Standards-Setting: Past Glory, Present Reality and Future Hope*, 14 EMP. RTS. & EMP. POL'Y J. 237, 242 (2010) (“OSHA’s health standards are criticized for many different things. Among the most common criticisms are that OSHA health standards are unnecessarily complex, excessively lengthy, and written by lawyers to survive judicial challenge.”).

³⁹ The General Duty Clause requires employers to provide a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm.” Occupational Safety and Health (OSHA), 29 U.S.C. § 654 (2012). The General Duty Clause only applies when a safety or health standard is not already on point. *See id.*

⁴⁰ *Id.* § 655(b)(6)(C).

⁴¹ The Equality and Human Rights Commission defines human rights as “basic rights and freedoms that belong to every person in the world.” *See What are Human Rights?*, EQUALITY & HUM. RTS. COMMISSION, <https://www.equalityhumanrights.com/en/human-rights/what-are-human-rights> (last visited Jan. 8, 2018).

⁴² For instance, the FLSA already regulates hazardous industries by undertaking routine, programmatic workplace inspections and by preventing sixteen and seventeen-year-old employees from working in such industries. 29 U.S.C. § 212 (2012); 29 C.F.R. § 570 (2018). Because of the danger associated with such work perhaps after-work communications would be more strictly regulated. Moreover, some industries, by their very nature, demand ‘after-work’ hours. *See* Gilkerson, *supra* note 8, at 14.

⁴³ *See* discussion *infra* CONCLUSION.

impact, Part I considers current law in the particular area of labor and employment. Part II then considers the legal responses taken by France and Germany to this employee disconnection problem, highlighting the advantages and disadvantages of those countries' legal approaches. Part III considers the shortcoming of current United States law and European frameworks, while setting out a safety and health approach to employees' right to disconnection that seeks the existing OSHA framework, combining legislative and self-regulatory methods, to achieve a practical and politically viable solution to untether employees from the workplace after work.

I. THE INESCAPABLE NATURE OF WORK IN THE UNITED STATES WORKPLACE

According to a recent study, a majority of workers in the United States feel overworked in, or overwhelmed by, their jobs.⁴⁴ Part of this crushing stress appears to come from the fact that the workday never really ends for some workers.⁴⁵ It has become increasingly common in the American workplace for employers, supervisors, and managers to contact employees by e-mail, text, or social media once the workers have left for the day.⁴⁶ The requests range from urgent demands that the employee return to work immediately, to requests for the employee to finish a task by the following morning.⁴⁷ The important point, recognized by four Justices of the United States Supreme Court over three decades ago, is that the workplace is no longer contained within four walls.⁴⁸

⁴⁴ CHALLENGER, *supra* note 7; *see also* FAMILY & WORK INST., ELLEN GALINSKY, ET AL., *OVER WORK IN AMERICA: WHEN THE WAY WE WORK BECOMES TOO MUCH* 20 (2005). "This study suggests that many American employees are near the breaking point—we hope that this will be the clarion call that brings the issue of overwork to the attention of business leaders and policy-makers throughout the country." *Study: U.S. Workers Burned Out*, ABC NEWS, <https://abcnews.go.com/US/story?id=93295&page=1> (last visited Nov. 21, 2018).

⁴⁵ Or as Jon C. Messenger, International Labour Organization (ILO) team leader of the Working Conditions Group, puts it: you can work anywhere anytime, and some people do. *See* WORKING ANYTIME, *supra* note 6, at 303 ("21st Century office work is often supported by internet connections, and thus can be done from basically anywhere and at any time."); *see also id.* at 304 ("Telework/ICT-Mobile Work (T/ICTM) . . . work can be defined as the use of ICTs—such as smartphones, tablets, laptops and desktop computers—for the purposes of work outside the employer's premises."). T/ICTM is the language for this type of work utilized by the ILO.

⁴⁶ *See* CHALLENGER, *supra* note 7 (finding through a survey that the "vast majority of managers in the United States indicated they would contact their employees outside of work hours."). Challenger's survey found that 80% of managers who contact employees after work would do so using e-mail or text message. *Id.* Additionally, 42% of managers would contact employees via phone call, and 25% would use social media or chat software to contact their employees. *Id.*

⁴⁷ "28.6 percent of [surveyed supervisors] expect[ed] a response within a few hours." *Id.* Nearly 49% said they would not expect a response to an after-work electronic communication until the next work day. *Id.* Additionally, "[e]ven though almost half of [supervisor] respondents said they wouldn't expect a response until the next workday, most employees feel the need to answer their bosses in a timely manner, worrying about it until the issue is handled." *Id.* (quoting Andrew Challenger).

⁴⁸ *See* O'Connor v. Ortega, 480 U.S. 709, 739 (1987) (Blackmun, J., dissenting) ("Finally and most importantly, the reality of work in modern time, whether done by public or private employees, reveals why a public employee's expectation of privacy in the workplace should be carefully safeguarded and not lightly set aside. It is, unfortunately, all too true that the workplace has become another home for most working Americans. Many employees spend the better part of their days and much of their evenings at work."); *see also* CHALLENGER, *supra* note 7 ("Smartphones, e-mail, FaceTime, and text have all streamlined communication, with exponential benefits to employers, customers, and clients.

The workplace is where you take your smartphone, pager, laptop or smartwatch, and where you can continue to do work long after the traditional workday has ended.⁴⁹ Work is being done not only at home, but in transit and on vacation. The result has been loss of privacy and autonomy, causing a detrimental impact on safety and health, an attendant loss of productivity, and a lack of time for any leisure or recreational activities alone or with family and friends. Employees need to unplug to regain appropriate work-life balance.⁵⁰

A. PRIVACY AND AUTONOMY

1. *The Detrimental Impact of After-Work Electronic Communications on Privacy and Autonomy*

Genetic mapping, retina scanning, and microchipping are all technologies that once seemed to be science fiction, but are now widely available, transforming the way we operate in our daily lives.⁵¹ Yet, as technology accelerates exponentially month by month, legal implementation has not kept pace, leaving employees without needed privacy and autonomy protections.⁵² Although some older United States federal statutes, such as the Electronic Communications Privacy Act of 1986,⁵³ have been utilized by courts to limit the information employers obtain from employees' personal devices and e-mails,⁵⁴ many instances exist where employee surveillance outside the workplace has been deemed appropriate given an employer's "legitimate business interest."⁵⁵ As discussed below, the Fourth Amendment of the United

However, these technological advantages also weaken the boundary between work and home life, adding to the feeling of burnout.") (quoting Andrew Challenger).

⁴⁹ See WORKING ANYTIME, *supra* note 6, at 303 ("This new independence of work from place changes the role of technology in the work environment dramatically.").

⁵⁰ See Gilkerson, *supra* note 8, at 20 (stating that in order for social media professionals to get a break, "twice a year [they] unplug all of [their] devices for at least a week and communicate [their] absence to colleagues and clients. The last two years [he] literally put [his] phone in a safe. During the unplugged time, [he] spend[s] time outdoors and with [his] family.").

⁵¹ See PRISCILLA M. REGAN, LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY 1–2 (1995).

⁵² See Vivek Wadhwa, *Laws and Ethics Can't Keep Pace with Technology*, MIT TECH. REV. (Apr. 15, 2014), <https://www.technologyreview.com/s/526401/laws-and-ethics-cant-keep-pace-with-technology/>.

⁵³ See, e.g., 18 U.S.C. § 2511 (2012). The ECPA includes the Stored Communications Act (SCA), Title II of the Act. See generally JEFFREY M. HIRSCH ET AL., UNDERSTANDING EMPLOYMENT LAW 88–90 (2nd ed. 2013) ("Title I of the ECPA bans the interception or disclosure of electronic communications, while Title II, the Stored Communication Act (SCA), regulates access to stored electronic communications.").

⁵⁴ See *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548, 561–69 (S.D.N.Y. 2008).

⁵⁵ Employers have a legitimate interest in determining whether an employee uses illegal drugs or abuses alcohol in order to "maintain a work-force free from the adverse effects of illegal drug and alcohol abuse." See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 7.06 (AM. LAW. INST. 2017); see also *Gilmore v. Enogex, Inc.*, 878 P.2d 360, 364 (Okla. 1994) ("Employers have a legitimate interest in maintaining a work force free from the adverse effects of illegal drug and alcohol abuse."); *Frye v. IBP, Inc.*, 15 F. Supp. 2d 1032, 1039 (D. Kan. 1998) (finding that when employee had tampered with original sample, employer had sufficient reason to request a second sample).

States Constitution does not apply to the private-sector workplace,⁵⁶ in which about 58% of U.S. employees work.⁵⁷

Even more concerning, the monitoring of employee mobile devices can often allow employers to obtain GPS tracking information through which employers can uncover employees' locations, daily routines, private sexual information, and medical conditions.⁵⁸ In some instances, an employer's use of technology can even put an employee's physical autonomy at risk.⁵⁹ For example, companies, such as the Wisconsin-based Three-Square Market, have given employees the ability to choose whether they wish to be implanted with a microchip in their skin in order to access workplace services or areas.⁶⁰ While the CEO of Three-Square Market maintains that the insertion of these chips is voluntary, the existence of such technology certainly raises grave employee privacy and autonomy concerns.⁶¹ The following subpart considers how both working inside and outside the office on mobile devices places sensitive employee information in jeopardy.

2. A Brief Synopsis of Employee Workplace Privacy Rights in the United States

Different privacy rights exist in the workplace for public sector and private sector employees in the United States.⁶² Suffice to say because the law has changed little in this area, this section is limited to five salient points.

First, "federal constitutional claims are only able to be brought against public employers as a result of the state action doctrine."⁶³ This leads to a

⁵⁶ See *Smith v. Maryland*, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting) ("Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes."); see also *Katz v. United States*, 389 U.S. 347, 351–352 (1967) ("[W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.").

⁵⁷ *Employment by Major Industry Sector*, BUREAU LAB. STAT., https://www.bls.gov/emp/ep_table_201.htm (last modified Oct. 24, 2017).

⁵⁸ See *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring) (where the police surveilled defendant's Jeep using GPS technology, Justice Sotomayor stated: "With increasing regularity, the Government will be capable of duplicating the monitoring undertaken in this case by enlisting factory—or owner—installed vehicle tracking devices or GPS-enabled smartphones."); see also *id.* ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.") ("Disclosed in [GPS] data . . . will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on." (citing *People v. Weaver*, 909 N.E.2d 1195, 1199 (N.Y. 2009))).

⁵⁹ See Mary Bowerman, *Wisconsin Company to Install Rice- Sized Microchips in Employees*, USA TODAY (July 24, 2017), <http://www.usatoday.com/story/tech/nation-now/2017/07/24/wisconsin-company-install-rice-sized-microchips-employees/503867001/> (discussing Wisconsin company offering voluntarily to insert chips into employees' bodies so that they can access workplace services or areas of the office).

⁶⁰ *Id.*

⁶¹ *Id.*; see also Maggie Astor, *Microchip Implants for Employees? One Company Says Yes*, N.Y. TIMES (July 25, 2017), <https://www.nytimes.com/2017/07/25/technology/microchips-wisconsin-company-employees.html> (observing once chips are implanted, it is hard to predict or stop the widening of their usage).

⁶² See *The (Neglected) Importance*, *supra* note 17, at 91–114.

divide in employee workplace privacy protections in the United States between public and private sector workers, with it being largely believed that public sector employees have more privacy protections because of the Fourth Amendment.⁶⁴ Second, private sector employees must instead rely on either the common law of torts,⁶⁵ restated in chapter 7 of the Restatement of Employment Law,⁶⁶ or on various other federal and state legislative enactments,⁶⁷ for their workplace privacy rights. Third, the "pace of workplace technological innovation has made it more likely that [all] employers will utilize technologically advanced methods to intrude upon their employees' workplace privacy interests."⁶⁸ Fourth, more recent United States Supreme Court decisional law suggests a leveling down of public sector employee privacy interests to the level of private sector employees.⁶⁹ Fifth, and finally, as uncertain and confusing as United States workplace privacy law may be when one is at work, neither public sector nor private sector privacy law appear to provide much, if any protection, to worker privacy interests when away from work.⁷⁰

It is because of the difficulty with locating after-work employee privacy rights in constitutional, statutory, or the common law that this article shies away from basing a right to disconnection on such an amorphous legal basis.

⁶³ *Privatizing Workplace Privacy*, *supra* note 15, at 278; *see id.* at 278 n.2 (citing Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329, 330 (1993) ("[T]he idea [is] that the Constitution is especially concerned with the limitation of 'public' power and, by the same token, that it is not ordinarily concerned with the regulation of other, 'private,' sources of power.")).

⁶⁴ *See id.* at 278–79.

⁶⁵ *See* HIRSCH, *supra* note 53, at 108.

⁶⁶ RESTATEMENT (THIRD) OF EMPLOYMENT LAW §§ 7.01–7.07 (AM. LAW. INST. 2017).

⁶⁷ For example, the Federal Fair Credit Reporting Act (FCRA) protects employees and prospective employees from criminal background checks conducted by third-party agencies. 15 U.S.C. §§ 1681–1681t (2012); *see* *Lewis v. Ohio Professional Electronic Network, L.L.C.*, 190 F. Supp. 2d 1049 (S.D. Ohio 2002) (applying the FCRA and analyzing its applicability to specific circumstances). As far as state law goes, an increasing number of states have off-duty conduct statutes that protect lawful employee activities outside of work. *See, e.g.*, CAL. LAB. CODE § 96(k) (West 2011); COLO. REV. STAT. ANN. § 24-34-402.5(1) (West 2009); N.Y. LAB. LAW § 201-d(2) (McKinney 2009); N.D. CENT. CODE §§ 14-02.4-01-03 (2011).

⁶⁸ *Privatizing Workplace Privacy*, *supra* note 15, at 279–80; *see id.* at 280 n.8 (citing Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 259 (2011) ("As scientific and technological advances make their way into the government's investigative arsenal, the frequency and scope of administrative searches will only expand.")).

⁶⁹ *See* *City of Ontario, California v. Quon*, 560 U.S. 746 (2010); *see also* *Privatizing Workplace Privacy*, *supra* note 15, at 281 ("*Quon* suggests that public employee workplace privacy rights should be ['privatized' and] reduced to the level of employees in the private sector.")).

⁷⁰ *See, e.g.*, *Brunner v. Al Attar*, 786 S.W.2d 784, 786–87 (Tex. App. 1990) (upholding lower court decision against employee terminated for her off-duty volunteer work with an AIDS foundation under public policy tort theory). Indeed, off-duty work statutes have been passed in a number of states because there is no privacy protection from one's employer away from work. *See generally* Marisa Anne Pagnattaro, *What Do You Do When You Are Not at Work: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625 (2004) (cataloging existing off-duty conduct statutes as of date of article); David L. Hudson, Jr., *Public Employees, Private Speech*, 103 A.B.A. J. 48, 51–52 (May 2017) ("I think that courts increasingly defer to government's efforts to control its employees' speech—both on duty and off duty—to protect its own expression. . . . In many of these cases, courts and employers appear concerned not about what such off-duty speech reflects about the worker's job performance but instead about what it might lead the public to attribute to the employer." (quoting University of Colorado law professor Helen Norton)).

3. A Brief Synopsis of Employee Autonomy Rights in the United States

Autonomy rights have long been considered separate from privacy rights⁷¹ and the right to autonomy has been a fundamental part of the United States' libertarian ethos at least for the last fifty or so years.⁷² In the 1965 landmark case of *Griswold v. Connecticut*,⁷³ the Court located a constitutional right to privacy within the penumbras of the Bill of Rights.⁷⁴ Although *Griswold* itself struck down anti-contraception laws for married couples,⁷⁵ its greater import derived from its rooting the right to be left alone within the very structure of the Federal Constitution.⁷⁶

In 1977, the Supreme Court focused on decisional autonomy in the case of *Whalen v. Roe*.⁷⁷ In *Whalen*, the Court tied the conception of privacy as personhood to an individual's right to be free from arbitrary governmental interference with regard to an individual's freedom in making certain fundamental life decisions.⁷⁸ In 1992, Justices O'Connor, Kennedy, and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey* stated:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.⁷⁹

In 2003, the Court discussed the issue of personal autonomy with regard to sexual privacy in *Lawrence v. Texas*.⁸⁰ As I have written previously, “[t]he Supreme Court's opinion in *Lawrence* greatly altered the substantive due

⁷¹ “As Professor Solove explains, basing privacy on conceptions of personhood differs from other conceptions of privacy because personhood conceptions focus on the normative good ‘of the protection of the integrity of the personality.’” *The (Neglected) Importance*, *supra* note 17, at 111. See *NASA v. Nelson*, 562 U.S. 134, 144 (2011) (“[T]he cases sometimes characterized as protecting ‘privacy’ actually involved ‘at least two different kinds of interests’: one, an ‘interest in avoiding disclosure of personal matters’; the other, an interest in ‘making certain kinds of important decisions’ free from government interference.” (citing *Whalen v. Roe*, 429 U.S. 589, 598–600 (1977))).

⁷² See William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1052 (2005) (contending that the American life is animated by presumptive libertarian mentality: “Libertarian is the presumption that the state leaves us alone to choose our own path to happiness.”); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205–06 (1890) (noting that privacy is based on the principle “of inviolate personality” and that there is “a general right to privacy for thoughts, emotions, and sensations”); see also *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (holding that individuals have a “fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy”).

⁷³ See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁷⁴ *Id.* at 484–86.

⁷⁵ *Id.* at 483, 486–87 (Goldberg, J., concurring).

⁷⁶ *Id.* at 485.

⁷⁷ *Whalen v. Roe*, 429 U.S. 589 (1977).

⁷⁸ *Id.* at 592.

⁷⁹ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

⁸⁰ *Lawrence v. Texas*, 539 U.S. 558 (2003).

process constitutional landscape by striking down the Texas anti-sodomy statute and reemphasizing the importance of providing a haven from state interference to individuals when such individuals seek to make private and personal decisions pertaining to sex.”⁸¹ *Lawrence* “presumes an autonomy of self,”⁸² “with the government’s having to put forward a legitimate and substantial interest to interfere with the personal and private decisional conduct of individuals.”⁸³ The latest manifestation of the constitutional right to decisional autonomy took place in the watershed case of *Obergefell v. Hodges*.⁸⁴ As most readers know, *Obergefell*, relying in part on *Lawrence* and the substantive due process clause of the Fourteenth Amendment, found a constitutional right to same-sex marriage.⁸⁵ The Court stated: “Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.”⁸⁶

The development of autonomy interests in the public sector has had a positive influence on similar interests in the private sector, particularly in the drafting of sections 7.08 and 7.09 of the Third Restatement of Employment Law⁸⁷ and in the expansion of state off-duty conduct statutes.⁸⁸ With regard to the Restatement of Employment Law, section 7.08 is the first formal attempt to articulate an autonomy right for workers in the private sector.⁸⁹ More specifically, it states that, “[e]mployees have protected interests in personal autonomy outside of the employment relationship,” and gives examples, such as: (1) lawful conduct outside of work; (2) adhering to political, moral, ethical, religious, or other personal beliefs outside of work; and (3) belonging to lawful associations.⁹⁰ Interestingly, the Restatement approach to employee autonomy provides for liability if an employer intrudes upon one of these listed interests.⁹¹ On the other hand, no employer liability exists if the employer can show interference with employee autonomy interests outside of work is undertaken under a “reasonable and good faith belief that the employee’s exercise of an autonomy interest interfered with the employer’s legitimate business interests, including its orderly operation and reputation in the marketplace.”⁹² The devil, of course, is in the details. What constitutes an

⁸¹ *The (Neglected) Importance*, *supra* note 17, at 115–16.

⁸² *Lawrence*, 539 U.S. at 562.

⁸³ *The (Neglected) Importance*, *supra* note 17, at 118.

⁸⁴ *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

⁸⁵ *Id.* at 2599 (“Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.” (citing *Lawrence*, 539 U.S. at 574)).

⁸⁶ *Id.* at 2602.

⁸⁷ See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 7.08 (AM. LAW. INST. 2017) (subjecting employer to liability for intruding upon an employee’s autonomy interest, unless that autonomy interest interferes with the employer’s legitimate business interests).

⁸⁸ See, e.g., CAL. LAB. CODE § 96(k) (West 2011); COLO. REV. STAT. ANN. § 24-34-402.5(1) (West 2009); CONN. GEN. STAT. ANN. § 31-51q (2018); N.D. CENT. CODE §§ 14-02.4-01_03 (2011); N.Y. LAB. LAW § 201-d(2) (McKinney 2009). See generally Pagnattaro, *supra* note 70, at 640–670 (surveying state statutory protection of employee off duty conduct).

⁸⁹ See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 7.08 (AM. LAW. INST. 2017).

⁹⁰ *Id.* § 7.08(a)(1)–(3).

⁹¹ *Id.* § 7.08(b).

⁹² *Id.* § 7.08(c).

employer's legitimate business interest and orderly operation? Does requiring employees to immediately respond to workplace demands after work and on an expedited basis fit that definition? The best answer is probably *sometimes*, but really the Restatement does not deal in any meaningful way with employees and their right to disconnect from the workplace.

State off-duty conduct statutes, for their part, require that employers allow employees to engage in lawful off-duty conduct as long as the employer does not have a contrary and overriding legitimate business interest.⁹³ One commentator describes these laws this way:

There are two basic types of state statutes pertaining to an employee's off-duty conduct. The first category deals with the lawful use of consumable products, including tobacco. The second category pertains to other lawful off-duty conduct. The latter statutes run the range from California's very broad wording, to a narrower focus in Connecticut where private employees' First Amendment rights are protected against violations by their employers.⁹⁴

Similar to autonomy rights under the Restatement of Employment Law, the same problems exist as to whether employers do or do not have a legitimate business interest in interfering with their employees' solitude once the work day ends.⁹⁵ For instance:

Under the [South Dakota] statute, the right to use tobacco products is subject to restrictions. An employer may restrict the use if: 1) the restriction “[r]elates to a bona fide occupational qualification and is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees,” or 2) the restriction is “necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.”⁹⁶

It might depend on the urgency of the request and the ability for other workers to complete the same work during work hours.⁹⁷

In any event, the complicated history of defining personal rights of autonomy both inside and outside of work make it, like privacy, not a sturdy foundation on which to base a workplace right for disconnection. It would be too difficult to enforce such a right either through constitutional litigation in the public sector or through statutory or common law actions in the private-

⁹³ See Pagnattaro, *supra* note 70, at 640.

⁹⁴ *Id.*

⁹⁵ *Id.* at 644.

⁹⁶ *Id.*

⁹⁷ See CHALLENGER, *supra* note 7 (“Emergencies do happen, and a work emergency is one of the more appropriate times to contact a subordinate outside of the workday. Additionally, a number of industries and professionals, like health care, legal, and many sales positions, require bosses and employees to be in contact after hours.”).

sector, given the difficulty in defining and applying the chosen legal standards with any precision. Thus, this Paper turns to a consideration of a workplace safety and health approach under OSHA to the employee disconnection problem.

B. EMPLOYEE SAFETY AND HEALTH

1. *The Detrimental Impact of After-Work Electronic Communications on Safety and Health*

Work-related stress arises when employees face demands and pressures in the workplace that they are ill-equipped to deal with, making it difficult for them to cope.⁹⁸ As one recent commentator states in relation to stress caused by after-work electronic communication from one's employer, "[t]his constant pressure not only negatively impacts morale, but also likely results in subpar work, as workers feel they are constantly on call, with no real downtime."⁹⁹ So, workplace stress increases when employees feel that they have little control or support with the demands of the work place.¹⁰⁰ It is not surprising then that employers who contact employees outside of working hours place even more pressure on the employee and create a toxic working environment.¹⁰¹

Constant stress on employees can have serious real-world effects on employees' health, including disease, cardiovascular concerns, and mental health issues.¹⁰² An individual's inability to disconnect from work also manifests in employees through physical means such as fatigue, stress, depression, musculoskeletal disorders, and chronic infections.¹⁰³ Health concerns also touch on the mental or emotional well-being of the employees through subjective complaints concerning issues like chronic fatigue.¹⁰⁴ Employer communication with employees outside of the office can lead to safety concerns as well. More than 40% of employees surveyed admit they have responded to work communications while driving.¹⁰⁵ It has been estimated that in total, the culture of constant work results in over 120,000 deaths per year.¹⁰⁶

But the absence of harmful conditions is not enough to create a healthy workplace. The World Health Organization maintains that in order to create a

⁹⁸ See *Occupational Health*, *supra* note 1.

⁹⁹ CHALLENGER, *supra* note 7.

¹⁰⁰ See *Occupational Health*, *supra* note 1.

¹⁰¹ See Gilkerson, *supra* note 8, at 13 (recounting an observation from a social medial professional: "No job should expect you to be 'on' 24/7 unless you're a doctor—which clearly you're not. We're not curing cancer. No one will die if we don't answer an email until 9:00 a.m. the next day. Any job that makes you feel that way doesn't value you as a person. RUN.").

¹⁰² FAMILY & WORK INST., *supra* note 44.

¹⁰³ See A E Dembe et al., *The Impact of Overtime and Long Work Hours on Occupational Injuries and Illnesses: New Evidence from the United States*, 62 OCCUPATIONAL & ENVTL. MED. 588 (2005).

¹⁰⁴ See Jungsun Park, et al., *Long Working Hours and Subjective Fatigue Symptoms*, 39 INDUS. HEALTH 250 (2011).

¹⁰⁵ CHALLENGER, *supra* note 7 (observing that 43% of employees respond to workplace communication on their mobile devices while driving).

¹⁰⁶ BEHAV. SCI. & POLICY ASS'N, JOEL GOH, ET AL., WORKPLACE STRESSORS & HEALTH OUTCOMES: HEALTH POLICY FOR THE WORKPLACE (2015), <https://behavioralpolicy.org/articles/workplace-stressors-health-outcomes-health-policy-for-the-workplace/>.

healthy working environment, there must be an abundance of “health-promoting conditions.”¹⁰⁷ One example of a relevant health-promoting condition would be the implementation of policies for after-hours communication.¹⁰⁸ Such policies reduce workplace stress because they set up employee expectations in order to help them cope with the realities of the workplace.¹⁰⁹ It also gives employees a means of resolution in the event that such policies are not followed, allowing them to feel more supported in the workplace. Yet, at least one recent survey of supervisors suggests most companies do not have an after-hour communications policy and are not even contemplating implementing one.¹¹⁰

Despite the detrimental effects of taking on additional stress, modern employees have been willing to dedicate a significant amount of time to working in fast paced, high pressure environments, including responding to never ending workplace demands, all in the hopes of moving up the ranks of their organization.¹¹¹ This type of overwork has led to tragic stories of poor health and even death.¹¹² For instance, workplace suicides, linked at times to workplace stress, are on the rise in the United States.¹¹³ Often times, these stories go viral not because they are so outrageous, but rather because they give a voice to the experience of a majority of workers.¹¹⁴ The question arises: how does current occupational safety and health law in the United States handle such issues, if at all?

2. Brief Primer on OSHA

Congress passed the Occupational Safety and Health Act (OSHAct or the Act) in 1970¹¹⁵ “to protect workers from the risk of injury, illness, or death in American workplaces.”¹¹⁶ Although states still play a significant role in guaranteeing workplace safety and health, the Act is by far the primary source of safety and health workplace protections in the United States.¹¹⁷

The OSHAct’s coverage is relatively broad and applies to most private employers and their employees.¹¹⁸ Employee exemptions include employees covered by other statutes, such as railway workers¹¹⁹ and small farmers.¹²⁰

¹⁰⁷ See *Occupational Health*, *supra* note 1.

¹⁰⁸ See, e.g., *Overtime Policy*, SOC’Y FOR HUM. RESOURCE MGMT., https://www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/cms_012729.aspx (last visited Nov. 24, 2018) [hereinafter *Overtime policy*].

¹⁰⁹ See *Occupational Health*, *supra* note 1.

¹¹⁰ See CHALLENGER, *supra* note 7 (“Most companies do not have any kind of policy on contacting subordinates after work. . . . Nearly 88 percent of companies have no policy on contacting workers outside working hours, and only 3 percent are working on one.”).

¹¹¹ See *id.*

¹¹² See McCurry, *supra* note 3; Nishiyama & Fujikawa, *supra* note 3.

¹¹³ See Feintzeig, *supra* note 19.

¹¹⁴ See FAMILY & WORK INST., *supra* note 44, at 20.

¹¹⁵ 29 U.S.C. §§ 651–78 (2012).

¹¹⁶ Howard, *supra* note 38, at 238.

¹¹⁷ See *infra* note 273 and accompanying text (discussing federal-state relationship in the OSHA context).

¹¹⁸ 29 U.S.C. § 652(6) (2018) (defining “employee” as “an employee of an employer who is employed in a business of his employer which affects commerce”); *id.* § 653(a) (applying OSHAct to all “employment,” with few exceptions).

¹¹⁹ *Id.* § 653(b).

Additionally, employers with ten or fewer employees and good safety records are exempt from regular inspections¹²¹ and partially exempt from keeping injury and illness records.¹²² The Act also does not apply directly to public employers and employees,¹²³ though it does require federal agencies to establish consistent safety and health programs.¹²⁴ States are also permitted to create their own occupational health and safety plans, as long as such plans do not provide protections lesser than federal floor and provide coverage for state and local employees.¹²⁵

OSHAct creates a complex regulatory scheme, including the Occupational Safety and Health Administration (OSHA), which exists within the United States Department of Labor (DOL).¹²⁶ The Assistant Secretary of Labor for Occupational Safety's primary duties include promulgating health and safety standards,¹²⁷ conducting inspections of worksites, and prosecuting violations of the Act.¹²⁸ Unlike other United States' labor and employment law statutes, which prohibit or mandate actions by employers or employees, the OSHAct imposes a "general duty" on covered employers that are not otherwise covered by applicable safety and health regulations.¹²⁹

Under section 5(a)(1) of the Act, the General Duty Clause requires employers to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm."¹³⁰ In order for OSHA, where there is no private right of action,¹³¹ to bring a successful General Duties Clause claim, the claim must contain four elements: (1) the employer failed to furnish a workplace free of a hazard, and its employees were exposed to that hazard; (2) the hazard was recognized; (3) the hazard was

¹²⁰ Department of Labor Appropriations Act of 1979, Pub. L. No. 95-480, 92 Stat. 1567 (1979).

¹²¹ See BENJAMIN W. MINTZ, OSHA: HISTORY, LAW, AND POLICY 690-92 (1984) (describing regular practice of Congress, attaching inspection limitations to appropriation bills).

¹²² 29 C.F.R. § 1904.1 (2018).

¹²³ 29 U.S.C. § 652(5) (excluding public employers, except for United States Postal Service).

¹²⁴ *Id.* § 668.

¹²⁵ *Id.* §§ 667, 672. The OSHAct preempts a significant portion of state safety and health measures, in large part to ensure a minimum level of protection and to minimize employers' burden in complying with health and safety laws. *Id.* § 667; N.J. State Chamber of Commerce v. Hughey, 774 F.2d 587, 592 (3d Cir. 1985) (discussing preemption of state laws requiring employers to disclose information about hazardous substances under Hazard Communication Standard, 29 C.F.R. § 1900.1200). However, section 18 of the Act expressly permits state regulation of safety and health standards not covered by the Act. 29 U.S.C. § 667(a). A state may also seek permission from OSHA to assume responsibility for enforcing federal occupational safety and health regulations. *Id.* § 667(b); see also STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW: CASES AND MATERIALS 1007, 1097-98 (5th ed. 2012) (stating that as of 2010, there were twenty-two state plans, including a plan for Puerto Rico, which covered private, state, and local employees).

¹²⁶ Additionally, the administrative scheme includes: the National Institute for Occupational Safety and Health, which is part of the Department of Health and Human Services (HHS) and conducts research and proposes new standards, 29 U.S.C. § 671; the Occupational Safety and Health Review Commission, which is an independent agency, and resolves OSHA disputes, *id.* § 661; and the National Advisory Committee on Occupational Safety and Health, which is also an independent agency that advises the DOL and HHS regarding the evaluation of proposed standards. *Id.* § 656.

¹²⁷ See Howard, *supra* note 38, at 238 ("Among the duties delegated to the Secretary in the Act, the authority to adopt and enforce occupational safety and health standards represents the core functions for OSHA.").

¹²⁸ HIRSCH, *supra* note 53, at 235.

¹²⁹ 29 U.S.C. § 654(a)(1).

¹³⁰ *Id.*

¹³¹ Instead, covered employees can file complaints with OSHA, who then determines whether to issue a Notice that the employer has violated the Act.

causing, or was likely to cause, death or serious physical harm; and (4) a feasible method existed to correct the hazard.¹³² In the seminal OSHA General Duty Clause case, *National Realty & Construction Co. v. OSHRC*,¹³³ the employer was alleged to have violated the General Duty Clause by allowing an employee to ride on the runner of a front-end loader; the worker was killed when the front-end loader toppled on top of him.¹³⁴ At issue was whether the employer furnished a workplace free of the hazard of riding dangerous equipment.¹³⁵ The D.C. Circuit emphasized that a hazard must be preventable to support a violation of a General Duties Clause claim and held that the Clause did not impose strict liability on an employer.¹³⁶ No violation occurred, according to the court, because the Secretary failed to present evidence showing “the particular steps a cited employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of those measures.”¹³⁷

General Duty Clause claims are generally only available if, under section 5(a)(2) of the Act,¹³⁸ there is not a specific safety or health standard promulgated under the Act which applies.¹³⁹ If a standard applies to the hazard in question, a section 5(a)(1) General Duty Clause claim is typically foreclosed in favor of a claim that the employer violated the relevant standard.¹⁴⁰ With regard to safety and health standards enacted by OSHA, this Paper concerns itself with only permanent standards.¹⁴¹ Surprisingly, OSHA is bound by little more than general criteria and certain administrative procedures. Although this vagueness gives OSHA much latitude in promulgating permanent regulations, court and legislative review of OSHA regulations has been a recurring problem.¹⁴²

Section 6(b) of the Act details the procedures for promulgating permanent safety and health standards.¹⁴³ These procedures require: an interested party proposing a rule, announcement of the rule in the Federal Register, comments on the proposed rule, review of the rule by the Office of Management and Budget, promulgation of the rule, and review by the 1996.¹⁴⁴ Furthermore, since 1996, Congress has required all federal agencies to send new regulations

¹³² See *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 (D.C. Cir. 1973).

¹³³ *Id.*

¹³⁴ *Id.* at 1262.

¹³⁵ *Id.* at 1265.

¹³⁶ *Id.* at 1265–66.

¹³⁷ *Id.* at 1268.

¹³⁸ 29 U.S.C. § 654(a)(2) (2012).

¹³⁹ See *id.*

¹⁴⁰ *United Auto. Workers v. Gen. Dynamics Land Sys. Div.*, 815 F.2d 1570 (D.C. Cir. 1987); *Nat'l Realty & Constr. Co.*, 489 F.2d at 1261.

¹⁴¹ The administrative standards permitted by the OSHA Act actually fall under three basic schemes: interim standards, emergency temporary standards, and permanent standards. The first two types of standards are not relevant to this Paper. See generally WILLBORN, *supra* note 125, at 1007 (pointing out that the vast majority of OSHA standards are interim standards because of the difficulty of enacting permanent standards).

¹⁴² See generally Thomas J. Ryan, *Judicial Review of OSHA Standards: The Effect of the Right to Pre-Enforcement Review of OSHA Standards on Subsequent Challenges*, 54 *FORDHAM L. R.* 117, 118–20 (1985) (discussing the process of judicial review on OSHA standards).

¹⁴³ 29 U.S.C. § 655(b).

¹⁴⁴ Ryan, *supra* note 142, at 117–118.

to Congress for review; Congress, subject to the President's approval, then has sixty days to reject the rule before it goes into effect.¹⁴⁵

With regard to federal court review of OSHA standards, they are upheld "if supported by substantial evidence in the record considered as a whole."¹⁴⁶ Even with the substantial complexity, OSHA, over the years, has enacted important workplace safety and health regulations.¹⁴⁷ Four criteria have been teased from the sparse statutory text: (1) technological feasibility; (2) economic feasibility; (3) benefit to work safety and health; and (4) perhaps a cost-benefit analysis.¹⁴⁸ Technological feasibility refers to the standard "that modern technology has at least conceived some industrial strategies or devices which are likely to be capable of meeting the [permissible exposure limit] and which the industries are generally capable of adopting."¹⁴⁹ In this regard, and significantly, Congress intended the OSHAct to be a "technology-forcing piece of legislation."¹⁵⁰

Economic feasibility means "a reasonable assessment of the likely range of costs of its standard, and the likely effects of those costs on the industry, so as to demonstrate a reasonable likelihood that these costs will not threaten the existence or competitive structure of an industry."¹⁵¹ To be clear, consideration of economic feasibility does not mean that financially burdensome rules are improper; indeed, the financial ruin of some employers may be consistent with the Act's purposes.¹⁵² On the other hand, placing an entire industry at a

¹⁴⁵ 5 U.S.C. §§ 801–802 (2018) (describing "joint resolution of disapproval" of administrative rule). Congress may override a presidential veto of a joint resolution of disapproval. *Id.* § 801(a)(3). In 2001, Congress and the Bush Administration used this scheme to overturn new economic regulations promulgated in the final stages of the Clinton Administration. *See* WILLBORN, *supra* note 125, at 1051. Even more recently, the Trump Administration used this power to overturn thirty federal regulations passed in the last days of the Obama Administration. *See* Eric J. Conn, *The OSHA Defense Report: OSHA Updates from Conn Maciel Carey's OSHA Practice Group*, OSHA DEF. REP. (Aug. 1, 2017), <https://oshadefensereport.com/2017/08/01/trump-admin-pumps-the-breaks-on-new-osha-rules-in-the-first-regulatory-agenda/>.

¹⁴⁶ 29 U.S.C. § 655(f); *see* *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 653 (1980).

¹⁴⁷ *See, e.g.*, Bloodborne Pathogens Standard, 29 C.F.R. 1910.1030 (1999) (following congressional urging, the Secretary revised this rule to create a new Needlestick Standard).

¹⁴⁸ Two different OSHA sections are the source of these criteria: section 6(b)(5), which applies to toxic materials and harmful physical agents, 29 U.S.C. § 655(b)(5); and section 3(8), which defines more generally the meaning of occupational safety and health standards. *Id.* § 652(8). Section 6(b)(5) of the Act specifies the substantive criteria for health standards as follows: "[OSHA], in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." *Id.* § 655(b)(5). Section 3(8) states that an "occupational safety and health standard" is a standard that "requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." *Id.* § 652(8).

¹⁴⁹ *See* *AFL-CIO v. OSHA*, 965 F.2d 962, 980 (11th Cir. 1992) (quoting *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1266 (D.C. Cir. 1980)); *see also* *AFL-CIO v. Brennan*, 530 F.2d 109, 121 (3d Cir. 1975) (eliminating prohibition against employees putting hands in dies, which is part of the mechanical press that cuts or forms materials).

¹⁵⁰ *Brennan*, 530 F.2d at 121.

¹⁵¹ *AFL-CIO*, 965 F.2d at 982 (quoting *Marshall*, 647 F.2d at 1266).

¹⁵² *Id.*; *Indus. Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467, 478 (D.C. Cir. 1974) (citing as an example the "economic demise of an employer who has lagged behind the rest of the industry in

significant disadvantage to foreign competitors may also be a relevant factor.¹⁵³ The third factor, benefit to worker safety and health, derives from the “necessary or appropriate to provide safe or healthful employment” language in section 3(8), and it requires the Secretary to show that a permanent standard benefits employees’ health and safety. This factor focuses on scientific evidence—typically studies on the dangers associated with the hazard at issue.¹⁵⁴ Even more specifically, OSHA must be able to show that a hazard presents a risk to employees’ health and safety under current standards and that this risk will be reduced by the proposed standard.¹⁵⁵ In turn, OSHA must show that a workplace is currently not “safe,” meaning that the workplace is not free of a “significant risk of harm.”¹⁵⁶ In short, under the “significant risk test,” OSHA must establish that the current exposure level of a hazard presents a significant risk to employees and must additionally show, by substantial evidence, that the proposed standard would reduce that risk.¹⁵⁷

The fourth potential substantive criteria for OSHA permanent standards is the most controversial. Over the years, some commentators have maintained that OSHA should also be required to perform a cost-benefit analysis to justify a permanent OSHA standard.¹⁵⁸ The lead case in this area of OSHA, *American Textile Manufacturers Institute v. Donovan (Cotton Dust case)*,¹⁵⁹ which considered a health workplace standard limiting employees’ exposure to cotton dust, because of its potential to cause respiratory illness.¹⁶⁰ The Court held that the Secretary does *not* have to use cost-benefit analyses to justify standards promulgated under section 6(b)(5) of the Act because in adopting that section, Congress had already implicitly undertaken that analysis “by placing the ‘benefit’ of worker health above all other considerations save those making attainment of this ‘benefit’ unachievable.”¹⁶¹ After the *Cotton Dust* case,

protecting the health and safety of employees and is consequently financially unable to comply with new standards as quickly as other employers”).

¹⁵³ See generally Ann. P. Bartel & Lacy Glenn Thomas, *Predation Through Regulation: The Wage and Profit Effects of the Occupational Safety and Health Administration and the Environmental Protection Agency*, 30 J.L. & ECON. 239 (1987) (arguing that safety regulations could provide economic benefits to employers).

¹⁵⁴ See WILLBORN, *supra* note 125, at 1020–22 (discussing scientific issues with health benefit studies).

¹⁵⁵ See *Indus. Union Dep’t, AFL-CIO v. Am. Petro. Inst.*, 448 U.S. 607, 638–39 (1980) (plurality reviewed OSHA’s standard on employees’ exposure to benzene, a substance that can cause leukemia at high doses, and concluded, that it was “reasonably necessary or appropriate to provide safe or healthful employment and places of employment.”). However, the Court ended up invalidating the benzene exposure standard on other grounds. *Id.* at 645.

¹⁵⁶ *Id.* at 642 (holding that before “promulgat[ing] any permanent health or safety standard, [OSHA] is required to make a threshold finding that a place of employment is unsafe—in the sense that significant risks are present and can be eliminated or lessened by a change in practices.”).

¹⁵⁷ *Id.* at 653; accord *United Steelworkers v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980). Relying on the court’s citation to a “one-in-a-thousand” risk, many courts now consider a significant risk to be present where an employee’s career exposure to a substance causes a one-in-a-thousand chance that harm will occur. See *United Auto Workers v. Pendergrass*, 878 F.2d 389 (D.C. Cir. 1989) (quoting *Indus. Union Dep’t, AFL-CIO*, 448 U.S. at 655).

¹⁵⁸ See WILLBORN, *supra* note 125, at 1020–22 (discussing economic issues with cost-benefit analyses).

¹⁵⁹ *Am. Textile Mfr. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981).

¹⁶⁰ *Id.* at 495.

¹⁶¹ *Id.* at 509, 513. The Court left open whether cost-benefit analyses are required for *safety* standards promulgated only under section 3(8) of the Act, or whether the Secretary is *forbidden* from using cost-benefit analyses in most instances. *Id.* at 513 n.32, 521 n.38.

OSHA has applied a “cost effectiveness” standard to evaluate proposed standards, choosing the least expensive means to achieve a predetermined level of protection.¹⁶²

Beyond the substantive criteria for determining the validity of permanent standards, another interesting aspect of the OSHA regulatory scheme is the use of temporary and permanent variances from having to comply with an otherwise applicable permanent standard.¹⁶³ In other words, even where a permanent standard has been held enforceable, an employer may avoid its application by seeking a variance from OSHA.¹⁶⁴ A temporary variance is available where the employer establishes that: (1) it is “unable to comply with the standard by its effective date because of the unavailability of professional or technical [workers],” the unavailability of needed materials and equipment, or necessary construction to the facility cannot be completed in time;¹⁶⁵ (2) the employer is taking steps to protect employees against the hazards protected by the standard at issue;¹⁶⁶ and (3) the employer will comply with the standard as soon as practicable.¹⁶⁷ Employees must be given notice of temporary variances and such variances can last no more than two years.¹⁶⁸ With regard to permanent variances, it is appropriate where an employer convinces OSHA that it has an alternative method to ensure the same level of workplace safety and health as the standard at issue.¹⁶⁹ As with temporary variances, employees must have notice and an opportunity to comment before OSHA will issue a permanent variance.¹⁷⁰ Additionally, permanent variances must describe the alternative method of safety or health and may be modified or revoked at any point once six months have elapsed since their issuance.¹⁷¹

As will be discussed below,¹⁷² of the various adverse impacts after-work electronic communications have on employees, this Paper maintains that the safety and health framework provides the most practical and effective check on abuse of such communications by employers.

C. PRODUCTIVITY AND COMPENSATION

1. *The Detrimental Impact of After-Work Electronic Communications on Productivity and Compensation*

Improvements in data compilation have allowed employers to continuously track employee performance and compensable time, further

¹⁶² See Bldg. & Constr. Trades Dep't, *AFL-CIO v. Brock*, 838 F.2d 1258, 1269 (D.C. Cir. 1988) (evaluating the standard under cost-effectiveness analysis but withholding judgment whether cost-benefit analysis is required under OSHA).

¹⁶³ 29 U.S.C. § 655 (2012).

¹⁶⁴ *Id.* § 655(b)(6)(A).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* § 655(d).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² See *infra* Part IV.

pushing the cultural norm that employees should be available at all times.¹⁷³ Amazon has become the prime example of a work culture that encourages endless work. Employees of the giant are regularly encouraged to “toil long and late.”¹⁷⁴ The company’s boasts of its unreasonably high standards and claims that creating a high intensity work culture is what has brought them so much success.¹⁷⁵

But, of course, there is a dark side to the high stress environment that Amazon developed, pushing many employees to their breaking point and resulting in unsettlingly high turnover rates.¹⁷⁶ The intense culture of Amazon is not as unique as Amazon CEO Jeff Bezos perhaps believes it to be.¹⁷⁷ Many employers demand that employees be available at all hours of the day, communicating workplace tasks through mobile communication, even after hours.¹⁷⁸ But the research on working long hours is clear: working excessively significantly decreases productivity.¹⁷⁹ Not only does working excessively have negative effects on employees, as productivity decreases, but these negative effects are also felt by society as a whole, as an increasing number of individuals face health risks associated with overwork and burnout.¹⁸⁰

Connected very much to productivity concerns are compensation issues. One of the ways that employers ensure productivity is by paying workers a competitive wage rate. Needless to say, not being paid for time after work because an employee is exempt from overtime requirements, or nonexempt and afraid to bring up the issue with their supervisors, is also a dynamic that can cause a significant loss in productivity.¹⁸¹ A common misconception is that more work means more output. Workers are willing to agree to this bargain because of the increased income. But the “constant pressure not only negatively impacts morale, but also likely results in subpar work, as workers feel they are constantly on call, with no real downtime.”¹⁸² It is “a lot of hard work to prevent hard work.”¹⁸³

¹⁷³ See Sarah Green Carmichael, *The Research Is Clear: Long Hours Backfire for People and for Companies*, HARV. BUS. REV. (Aug. 19, 2015), <https://hbr.org/2015/08/the-research-is-clear-long-hours-backfire-for-people-and-for-companies>.

¹⁷⁴ Jodi Kantor and David Streitfeld, *Inside Amazon: Wrestling Big Ideas in a Bruising Workplace*, N.Y. TIMES, (Aug. 15, 2015), <https://www.nytimes.com/2015/08/16/technology/inside-amazon-wrestling-big-ideas-in-a-bruising-workplace.html>.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See CHALLENGER, *supra* note 7.

¹⁷⁹ Lonnie Golden, *The Effects of Working Time on Productivity and Firm Performance*, *Research Synthesis Paper*, 33 INT’L LAB. ORG. [ILO] CONDITIONS WORK & EMP. SERIES 5–9 (Aug. 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149325; see also Nishiyama & Fujikawa, *supra* note 3 (“Up until now, [Japan’s] legendary work ethic hasn’t helped the economy much. Japan barely grew for most of the past quarter-century, and the average worker is only two-thirds as productive as the average American, a gap that has stayed persistently wide.”).

¹⁸⁰ See Dembe, *supra* note 103, at 592–95; see also Nishiyama & Fujikawa, *supra* note 3 (“[Prime Minister Abe] says companies need to reorganize their workplaces so employees can be more productive during the day and go home at night.”).

¹⁸¹ See CHALLENGER, *supra* note 7 (“[M]anagers should be mindful that after-hours communication keeps their staff on the clock and will likely contribute to their feeling overworked and unable to disconnect, especially if it’s a normal occurrence.”).

¹⁸² *Id.*

¹⁸³ See Nishiyama & Fujikawa, *supra* note 3.

Of course, it is also important to consider how current federal wage and hour law in the United States deal with this new phenomenon of after-hours work to see whether it provides any check on such practices or assists in harming workplace productivity, or both.

2. U.S. Wage and Hour Law: The Fair Labor Standards Act

Laws governing employees' compensation and leave include some of the oldest employment legislation in the United States, as well as some of the most recent. The hallmark compensation statute is the Fair Labor Standards Act (FLSA).¹⁸⁴ The FLSA was successfully enacted in 1938 with the purpose of eliminating the harmful effect on the economy caused by "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."¹⁸⁵ The Act's three pillars—child labor, minimum wage, and overtime—reflect the Depression-era concerns from which they arose. However, the overtime laws in particular, based on their relationship to the number of hours an employee works in a workweek, is the focus here.

The primary goal of the FLSA's overtime provision is to spread employment among as many employees as possible.¹⁸⁶ This occurs by encouraging employers to hire more workers rather than paying overtime premiums to their current workforce.¹⁸⁷ The overtime provision also acts to compensate employees who must work an excessive number of hours and to reduce employers' incentive to subject employees to such a high level of work.¹⁸⁸ From there, the argument proceeds that when employees work from home or away from work, they potentially work excessive hours, which may subject employers to higher labor costs.

Here is where the complication of focusing on productivity or compensation as the basis for employee disconnection law enters. Under United States overtime law, employees are divided into two categories: exempt and nonexempt. Nonexempt employees tend to be paid on an hourly basis, do not exercise much discretion in the workplace, and are eligible for premium pay (1.5x the "regular rate")¹⁸⁹ for every hour worked over forty hours in a workweek.¹⁹⁰ On the other hand, exempt employees, who tend to be more sophisticated in terms of education, skill, and economic bargaining power, are

¹⁸⁴ 29 U.S.C. §§ 201–219 (2012).

¹⁸⁵ *Id.* § 202(a) (stating that these labor conditions burden commerce, constitute unfair competition, and lead to labor disputes that burden and obstruct commerce).

¹⁸⁶ *Marshall v. Chala Enter., Inc.*, 645 F.2d 799, 803 (9th Cir. 1981) (stating the goal of FLSA's overtime provision was "to spread employment more widely through the work force by discouraging employers from requiring more than forty hours per week from each employee").

¹⁸⁷ The classic example concerns needing eighty hours of work to complete a given project. Does the FLSA make it cheaper to hire one employee or two? The answer is two because two employees can each work forty hours at the normal hourly rate, while one employee will earn the normal hourly rate for the first forty hours and the premium rate (1.5x the normal) for the additional hours. Critics of this simplistic calculation have rightly pointed out that this example does not take into account the costs involved with hiring a second worker—including advertising, hiring, training, and benefit costs. This has made the work-spreading calculation less straightforward. *See* 29 U.S.C. § 202 (2012).

¹⁸⁸ WILLBORN, *supra* note 125, at 600–02.

¹⁸⁹ 29 U.S.C. § 207(a)(1) (2012).

¹⁹⁰ *Id.*

not eligible for overtime no matter how many hours they work.¹⁹¹ Exempt employees fall into a large number of categories, but the three broadest are referred to as the “white-collar exemptions” and apply to administrative, professional, and executive employees.¹⁹² To be exempt, employees must be paid on a salary basis and meet one version of the duties test.¹⁹³ The duties test, in turn, usually requires that the primary duty of the employee involves high-level skill, discretion, or creativity.¹⁹⁴

When it comes to employees working after hours, being exempt means there are no consequences as far as compensation. Contrarily, nonexempt employees must be paid for additional work done after working hours and at a premium rate for any work done for more than forty hours in a workweek.¹⁹⁵ Depending on how much an employer contacts employees after work by phone, e-mail, or text, the potential legal liability can be staggering, as a number of recent cases highlight.¹⁹⁶ Indeed, to avoid this inadvertent scenario, where nonexempt employees take upon themselves to choose to do additional work away from the office, many employers have responded with strict overtime policies, establishing specifically when employees are allowed to log overtime hours.¹⁹⁷

The growing use of electronic communication in recent years to keep employees tethered to the workplace after work is not the first time that new technologies have challenged the FLSA system. Consider the case of *Bright v. Houston Northwest Medical Center Survivor, Inc.*¹⁹⁸ Bright, a biomedical equipment repair technician, who was forced to remain on call to repair ER medical equipment with a pager 24/7 while away from work, argued that he should receive compensation for any time he spent on call.¹⁹⁹ Specifically, his employer required that he was to: (1) always wear an electronic pager; (2) remain within a twenty minute radius of the hospital; and (3) refrain from becoming intoxicated or otherwise impaired.²⁰⁰ The court decided that such on call time is only compensable if an employee is not able to use the time effectively for their own purposes.²⁰¹ Ultimately, the court held that despite the

¹⁹¹ Another way of explaining this is to say that there is technically no federal maximum hour law in the United States. 29 U.S.C. § 213 (2012).

¹⁹² *Id.*

¹⁹³ The salary basis test is hardly a barrier, as it only requires that the employee is paid a salary that is equivalent to or no less than \$455 per week. 29 C.F.R. § 541.600(a) (2016); see also Rick Cohen, *The Debate over Reforming Overtime Regulations*, NONPROFIT Q. (July 29, 2015); Sean Higgins, *Trump Administration Won't Save Obama-Era Overtime Rule*, WASH. EXAMINER (Sept. 5, 2017), <https://www.washingtonexaminer.com/trump-administration-wont-save-obama-era-overtime-rule> (discussing the United States Department of Justice discontinuing Obama-era expansion of the FLSA).

¹⁹⁴ 29 C.F.R. § 541.3 (2004).

¹⁹⁵ 29 U.S.C. § 207(a) (2012).

¹⁹⁶ See *Villarreal v. City of Monterey*, 254 F. Supp. 3d 1168, 1191 (N.D. Cal. 2017) (holding that the employee's recovery for employer violation of FLSA overtime compensation would not be limited under the doctrine of equitable estoppel); *Murray v. Birmingham Bd. of Educ.*, 172 F. Supp. 3d 1225 (N.D. Ala. 2016) (finding that the city school system violated the FLSA for not compensating overtime hours worked by several school employees); *Mendiola v. CPS Sec. Sol., Inc.*, 340 P.3d 355 (2015) (requiring employer to include “sleep time” of security guards as part of calculating compensation).

¹⁹⁷ See, e.g., *Overtime Policy*, *supra* note 108, at 2.

¹⁹⁸ *Bright v. Houston Nw. Med. Ctr. Survivor, Inc.*, 934 F.2d 671, 672 (5th Cir. 1991).

¹⁹⁹ *Id.* at 672–73.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 678.

substantial burden placed on Bright by the pager and the condition of on call time, it did not qualify Bright for overtime because he was still able to use enough of the on call time for his own purposes.²⁰² In addition to cases like *Bright*, state legislation discounts compensation for on call time and permits workdays that basically never end.²⁰³

So, given the lay of the FLSA land and cases like *Bright*, the question becomes: how does increased connection of employees to work through electronic communications interact with the exempt and nonexempt dichotomy? The answer appears to be that the FLSA does little to tamp down the excessive amounts of work that such workplace connectivity increasingly causes. For exempt employees, they can literally be forced to double their work hours without labor cost to their employers. For that reason, the FLSA provides almost no incentive to employers not to demand after-hours work through e-mail and other methods. Although potential consequences do exist for overworking nonexempt employees, there appears to be an enforcement problem. It is noteworthy that there are few reported cases concerning nonexempt employees not being compensated for after-hours work. This must be because of the very attributes of these workers. They lack the education, skills, and economic bargaining power to push back against employers overreaching into employees' non-work hours and may be afraid to assert their rights, given the precarity of at-will employment.

In all, seeking to tie wage and hour laws to employer electronic communication practices with regard to their employees' after-hours work appears to be fraught with many complexities. At the very least, such a rule would have to separate employees into exempt and nonexempt categories and the very nature of exempt work does not lend itself to be curtailed based on the number of hours worked. It is for this reason that productivity and leisure concerns are not the basis on which to seek to regulate this form of after-hours work. The next part turns to the possibility of using safety and health law and regulations to help employees meaningfully disconnect from the workplace after work.

D. REST AND LEISURE

1. *The Detrimental Impact of After-Work Electronic Communications on Rest and Leisure*

²⁰² *Id.* at 678–79 (“This does not imply that the employee must have substantially the same flexibility or freedom as he would if not on call.”). The dissent vehemently disagreed, maintaining the court’s decision permitted employers to place additional work-related burdens upon an employee without having to provide additional compensation. *Id.* at 679 (“Bright’s life was significantly circumscribed by his employer without compensation. There was no relief by way of other employees sharing the duties so that Bright would have periods of being free from the restrictions.”).

²⁰³ See Michelle Chen, *Home-Care Workers Clocking 24-Hour Shifts Are Being Paid for Only 13 Hours*, NATION (Jan. 19, 2018), <https://www.thenation.com/article/home-care-workers-clocking-24-hour-shifts-are-being-paid-for-only-13-hours/> (“Under [New York’s] arcane regulations . . . the health-care agencies that employ [home-care workers] are allowed to pay them for only half of a 24-hour shift and discount the remaining on-duty hours as three hours of meals and eight hours of ‘sleep.’”).

Having considered privacy and autonomy, occupational safety and health, and productivity and compensation concerns, this Paper now turns to another victim of the increased inability to disconnect from the workplace; due to the onslaught of after work electronic communication between employer and employee. To begin with, it will surprise no one to hear that leisure time has immense health benefits, including lowered stress and depression levels, and increased overall quality of life.²⁰⁴ More broadly, time away from work gives people the ability to foster creativity, independence, and freedom of choice.²⁰⁵ Aside from the individual benefits, leisure time often develops a stronger sense of community and family.²⁰⁶ Even on their days off, employees often spend leisure time helping the communities they are a part of by dedicating time to extracurricular activities, such as coaching and mentoring, gardening, or simply spending time with friends and family in church, synagogue, mosque or other religious settings.²⁰⁷ The constant anticipation of being contacted by an employer strips away the ability for employees to truly enjoy time away from work.²⁰⁸ Part of the reason that employees are so willing to kowtow to their employers every need, even after work, is the highly uncertain type of job security that most American workers have: employment-at-will.

2. United States Exceptionalism: The Employment-at-Will Doctrine

When it comes to the job security of employees in the United States, whether they know it or not,²⁰⁹ most of them are employed at will.²¹⁰ Employment-at-will means there is no formal contract—individual or collective—and employees can be terminated for good reason, bad reason, or no reason at all, and may leave their job for good reason, bad reason, or no reason at all.²¹¹ Given the fact that almost all employers have more economic and bargaining power than their employees, considering that they make employment decisions whether to hire, fire, or promote, the employment-at-

²⁰⁴ See Brooks B. Gump & Karen A. Matthews, *Are Vacations Good for Your Health? The 9-year Mortality Experience After the Multiple Risk Factor Intervention Trial*, 62 *PSYCHOSOMATIC MED.* 608 (2000) (finding men were 32% less likely to die from heart disease when taking adequate time off over a nine-year period); see also Vatsal Chikani, et al., *Vacations Improve Mental Health Among Rural Women: The Wisconsin Rural Women's Health Study*, 104 *WISC. MED. J.* 20, 21–22 (2005) (finding women who vacationed at least twice a year were less likely to suffer from depression and increased stress).

²⁰⁵ See Laura J. Keller, *BofA Adds New Perk for Its Bankers and Traders: Paid Sabbaticals*, *BLOOMBERG* (Dec. 19, 2017), <https://www.bloomberg.com/news/articles/2017-12-19/bofa-adds-new-perk-for-its-bankers-and-traders-paid-sabbaticals> (discussing Bank of America's sabbatical program, allowing employees to take four additional weeks off work to do whatever they want).

²⁰⁶ See Dana Sitar, *These 7 Unexpected Companies Will Actually Let You Take Sabbatical Leave*, *PENNY HOARDER* (Sept. 3, 2016), <https://www.thepennyhoarder.com/make-money/sabbatical-leave/> (finding some companies condition leave time on participation in community service activities).

²⁰⁷ See *id.*

²⁰⁸ See Keller, *supra* note 205 (discussing how some employees take their work with them on vacation); CHALLENGER, *supra* note 7 (“[M]ost employees feel the need to answer their bosses in a timely manner, worrying about it until the issue handled.”).

²⁰⁹ See Jesse Rudy, *What They Don't Know Won't Hurt Them: Defending Employment-at-Will in Light of Findings That Employees Believe They Possess Just Cause Protection*, 23 *BERKELEY J. EMP. & LAB. L.* 307, 330–31 (2002).

²¹⁰ *Id.*

²¹¹ See HIRSCH, *supra* note 53, at 1–2.

will rule operates to allow employers almost limitless discretion to rid themselves of unwanted employees.²¹² As long as that employer does not tread upon some unlawful reason—like discrimination, retaliating, harassment, or based on a protected employee classifications²¹³—employers can terminate an employee on a whim.²¹⁴ This is the law in all United States states, except Montana.²¹⁵

Montana, like most of the rest of the world and like Convention 158, adopted by the International Labour Organization (ILO), has what is generically referred to as a just cause standard.²¹⁶ Although “just cause,” has no universal meaning,²¹⁷ it generally means that not only must the employer have a good reason for taking an adverse employment action against an employee,²¹⁸ but the employee should get a fair process including notice of the reasons and an opportunity to tell his or her side of the story,²¹⁹ and like circumstances should be treated similarly, regardless of how well liked or popular the employee is.²²⁰

With regard to after-work electronic communications from employers requiring more work, the lack of just cause protection for most workers in the United States means that most workers work scared.²²¹ They fear that if they do not complete an employer’s after work request, they will face repercussions.²²² Although it is true that the employment-at-will doctrine has been diminished to varying degrees in different states based on contract, tort, and good faith protections,²²³ the larger truth of the matter is that most at-will employees go along to get along, and employers in the United States have more ability to discharge employees than in any other advanced industrial country in the world.²²⁴ In the after-work communication context this means that many workers stay tethered to their smart phones or other mobile devices, just in case they are needed for an assignment immediately.²²⁵

²¹² *Id.*

²¹³ See EEOC, EQUAL EMPLOYMENT OPPORTUNITY IS THE LAW, https://www.eeoc.gov/employers/upload/poster_screen_reader_optimized.pdf (outlining protected classes under federal law).

²¹⁴ HIRSCH, *supra* note 53, at 1–2.

²¹⁵ See MONT. CODE ANN. § 39-2-903(2) (2017).

²¹⁶ See Termination of Employment Convention No. 158, *entered into force* Nov. 23, 1985, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C158.

²¹⁷ See HIRSCH, *supra* note 53, at §501(d) (discussing how the meaning of just cause differs depending on the nature of employment).

²¹⁸ See Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62, 64 (2008) (stating the just cause standard as one which “precludes termination unless the employer can prove that it had just (or good) cause for the termination”).

²¹⁹ *Id.* at 77 (arguing that just cause protection gives all employees an equal amount of process).

²²⁰ *Id.*

²²¹ See David De Cremer, et al., *Can Employees Really Speak Up Without Retribution?*, HARV. BUS. REV. (Oct. 18, 2016), <https://hbr.org/2016/10/can-employees-really-speak-up-without-retribution> (discussing how fear of retribution quiets employees who would otherwise speak up).

²²² *Id.*

²²³ See HIRSCH, *supra* note 53, at §§ 4–6.

²²⁴ See Rudy, *supra* note 209 and accompanying text.

²²⁵ See CHALLENGER, *supra* note 7 (finding employees often answer their phones out of fear of negative repercussions).

Now, this is not to say that sometimes employers do not have emergencies that arise in the normal course of business every so often.²²⁶ And anecdotally at least, most employees seem more than willing to help out their employers when they are in a pickle.²²⁷ But being asked to do extra work, many times without additional compensation and with the attendant loss of leisure time, leads to workers being stressed, depressed, anxious, and unable to disconnect.²²⁸ This situation in turn leads to the loss of productivity, morale, and general feelings of wellbeing.²²⁹ Work literally becomes inescapable. The question presents itself of whether countries with just cause regimes fare better with regard to not contacting employees electronically to do work after work? It is to this consideration of the French and German response to the employee disconnection problem that this Paper now turns to determine how a country with an at-will system, with few ineffective, existing statutory protections, should respond.

II. FRENCH AND GERMAN APPROACHES TO EMPLOYEE DISCONNECTION RIGHTS

At least a few advanced industrial countries in Western Europe have recently taken affirmative steps to regulate the use of digital communication to provide employment protection to their employees. Interestingly, these approaches have important differences. The goal of this part is to explore the two major models—France and Germany—and concludes by considering the advantages and disadvantages of these legal approaches to ensure employee's right to disconnect from the workplace after work.

A. FRENCH LEGISLATIVE MODEL – DROIT À LA DÉCONNEXION

Of all the countries in the world to attack the problem of employee inability to disconnect from the workplace, France has taken the lead. Effective as of January 1, 2017, most French employers are not permitted to contact their employees in most cases after work hours.²³⁰ France is the first country to adopt legislation regarding after-hour electronic communication through its enactment of *Droit à la Déconnexion*.²³¹ This law mandates that employers either come to an agreement with their employees or introduce a charter to address the employees' ability to not respond to work related digital communications after hours.²³² More specifically, the law states:

²²⁶ See CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. 55 (Fr.) (making exceptions for employers contacting employees for emergency purposes).

²²⁷ See generally CHALLENGER, *supra* note 7.

²²⁸ See discussion, *supra* Part I(b)(1).

²²⁹ *Id.*

²³⁰ See Moulton, *supra* note 25.

²³¹ CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. 55 (Fr.).

²³² *Id.*

Modalities by which employees exercise their rights to disconnect, and the setting up of company regulations on digital devices and tools, will be completed with a view to ensuring respect for rest, personal life, and family leave periods. In the absence of agreement, the employer shall draw up a charter, after advice from the enterprise committee, or alternatively, from the staff delegates. The charter will define the modalities by which employees may exercise the right to disconnect, and also provide for the implementation of training and awareness tools for the benefit of employees, management, and management personnel.²³³

There are a few caveats to this pioneering law. First, it only applies to employers with fifty or more employees.²³⁴ One might consider this to be a smaller-employer exemption, similar to the threshold that the United States has in the Family and Medical Leave Act (FMLA).²³⁵ Second, and interestingly, the French law has covered employers that adopt "charters of good conduct" that explain for each workplace when employees are not required to respond to after-work electronic communications.²³⁶ On the other hand, employers are also allowed to come to agreement with employees or their unions about these matters.²³⁷ Third, it appears to try to come to grips with employers receiving free labor by requiring employees to "[answer] an e-mail or two outside of business hours."²³⁸ Such electronic requests after work are compensable time just "as if someone was having work phone conversations outside of normal business hours or reviewing files."²³⁹

This "legislative" approach appears to spring from France's concern about work-life balance, or what might be called, in the language of this Paper, a focus on privacy and autonomy concerns, on the one hand, and leisure time, on the other.²⁴⁰ It is noteworthy that the French disconnection law exempts smaller employers, only because there is no evidence that these smaller employers contact their employees through electronic communications any less after work. One might actually think the opposite, given the realities of life in a workplace with fewer employees available to do the necessary tasks. Finally, it is unclear how the French authorities will enforce this law. For instance, there does not seem to be a private right of action or any administrative mechanism in place to audit employers for compliance with the law or for employees to bring complaints. As one commentator has suggested though, the press that the law has received for its novelty should, at least, cause covered employers to

²³³ *Id.* (translation from French by author).

²³⁴ Moulton, *supra* note 25.

²³⁵ 29 C.F.R. § 825.105 (2008).

²³⁶ Moulton, *supra* note 25 ("Under the requirements of what is commonly called the right to disconnect, companies with more than 50 employees must create a charter of good conduct that spells out when staff should and should not respond to e-mails.").

²³⁷ See CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. 55 (Fr.).

²³⁸ Moulton, *supra* note 25 (quoting Canadian attorney Katherine Poirier).

²³⁹ *Id.*

²⁴⁰ *Id.* ("The intent of France's law is to bring more life back to the work/life balance in a digital age.").

pause before hitting the 'send' button and may even cause a reconsideration to write new policies for employment manuals.²⁴¹

B. GERMAN SELF-REGULATORY MODEL

German employers have also made significant strides in regulating after-hours work, but have done so while avoiding the adoption of legislation like France.²⁴² Instead, German employers have opted to participate in voluntary self-regulation to adopt policies that fit their individual or industrial needs.²⁴³ Specifically, the Confederation of Germany Employers' Associations had the opportunity to partner with the German Trade Union Confederations and the Federal Ministry of Labor and Social Affairs to develop regulations that suit the needs of both employees and employers.²⁴⁴ These parties, jointly known as "social partners," work together to enact policies that are functional within the specific industry, while still relieving pressures on employees.²⁴⁵

Many German employers recognize the harmful effects of placing constant pressure on their employees to engage with their work.²⁴⁶ These employers seek to balance the interests of their employees with their own industrial needs in a manner more appropriate than what the legislature alone could conceive through independent workplace regulation.²⁴⁷ For example, firms such as Volkswagen, BMW, and Puma have all voluntarily imposed restrictions on when managers can e-mail employees outside of working hours.²⁴⁸ Volkswagen, in particular, chooses not to forward any e-mails to an employee sent more than thirty minutes after the end of their working day.²⁴⁹ Workplace policies such as Volkswagen's reflect the needs of both, the employer who may need to contact an employee regarding something done at the end of the day, while also respecting the interest of the employee in preserving their time after work for activities not related to employment.

The German Labor Ministry itself has also adopted policies regarding after-hours communication, in order to encourage other employers to follow suit. The Ministry has banned any communication with staff outside of working hours, except in emergencies.²⁵⁰ It has also implemented rules that do not allow managers to take adverse disciplinary action against employees who switch off their mobile devices or fail to respond to after-hours

²⁴¹ *See id.*

²⁴² Eurofound, *supra* note 6, at 48.

²⁴³ PASCAL R. KREMP, EMPLOYMENT AND EMPLOYEE BENEFITS IN GERMANY: OVERVIEW (THOMSON REUTERS PRACTICAL LAW) (last updated Oct. 1, 2017).

²⁴⁴ *Id.*

²⁴⁵ Eurofound, *supra* note 6, at 1.

²⁴⁶ Amol Sava, *Why Germans Work Fewer Hours but Produce More: A Study In Culture*, HUFF. POST: BLOG (Dec. 6, 2017) https://www.huffingtonpost.com/amol-sarva/why-germans-work-fewer-ho_b_6172262.html.

²⁴⁷ *Id.*

²⁴⁸ Jeevan Vasagar, *Out of Hours Working Banned by German Labour Ministry*, TELEGRAPH (Aug. 30, 2013), <http://www.telegraph.co.uk/news/worldnews/europe/germany/10276815/Out-of-hours-working-banned-by-German-labour-ministry.html>.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

communications.²⁵¹ This policy is more comprehensive than Volkswagen's, since the employer here contemplates exceptional situations, in which after-hours communication is appropriate, and puts in place employment protections for employees who fail to communicate after hours.

But what incentive do employers have to voluntarily implement such policies and regulations? One explanation for why German employers are more willing to protect employees' time after hours is the different approach to working in Germany.²⁵² Unlike the United States, which glorifies non-stop working, German work culture values the productive and effective use of employee time. German workers seek to deliver efficient products in a focused atmosphere in order to guard their personal time—essentially adopting a “work hard, play hard” attitude.²⁵³ German society considers such a clear separation between private and work life as essential.²⁵⁴

Some German lawmakers, such as Andrea Nahles, have criticized the self-regulatory model as being insufficient.²⁵⁵ Nahles, and others with similar views, have suggested that Germany should extend the already existing ban on communication with employees on vacation to after-hours communication in general.²⁵⁶ While these efforts have gone on for a number of years, Germany has yet to pass any law to create an obligation for employers to regulate after-hours communication.²⁵⁷

C. ADVANTAGES AND DISADVANTAGES OF THE FRENCH AND GERMAN MODELS

As with any new proposal for workplace law, the question must be asked whether any potential response to over-connectivity to the workplace is a solution in search of a problem. Some believe the problem arises mostly with certain types of jobs or industries,²⁵⁸ such as managers and teleworkers “for whom the frontiers between the professional and the personal life appear to be [blurrier].”²⁵⁹ There are certainly those—mostly on the employer-side—who believe that either current law can address these issues or, alternatively, an appropriate response would necessarily be too complex to be manageable.²⁶⁰ In other words, leave well enough alone.

Yet, there are others—mostly employees and their advocates—who believe it is necessary to fight for new rules in order to ensure employees a

²⁵¹ *Id.*

²⁵² Sava, *supra* note 246.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Keith Stuart, *German Minister Calls for Anti-Stress Law Ban on Emails Out of Office Hours*, *GUARDIAN* (Aug. 29, 2014), <https://www.theguardian.com/technology/2014/aug/29/germany-anti-stress-law-ban-on-emails-out-of-office-hours>.

²⁵⁶ *See id.* (discussing Germany's law barring contact from employers while employee is on vacation).

²⁵⁷ *See id.*

²⁵⁸ *See* Moulton, *supra* note 25 (espousing the view that “[s]ince every industry has its own standards on responsiveness to outside office hours, it could be difficult to set specific rules across a province on the right to disconnect”).

²⁵⁹ *Id.*

²⁶⁰ *Id.* (“It would be an unwieldy piece of legislation that would be difficult to enforce. ‘By the time the law was in place . . . the technology would have changed.’” (quoting Canadian management attorney Molly Reynolds)).

time and place for mental and physical rest in our increasingly stressed and crazy world. In Canada, for instance, a number of unions maintain that a statute, like France's *Droit à la Déconnexion*, could lower employee and employer expectations associated with answering after-work electronic communications.²⁶¹ It is also true that employees, who even with union representation suffer from disparate bargaining power in the workplace, might be in a better position to push back against such impositions when they can point to a law that supports their unwillingness to be on call during all hours of the day.²⁶²

Both countries have recognized the need for action in order to mitigate the risks associated with constant work related pressures. Yet, neither the French nor the German approach seeks to define the exact number of hours that an employee should not be contacted.²⁶³ Instead, both countries have recognized the varying needs of industries and have, therefore, developed methods of dealing with the issue. The French law creates flexibility for employers to develop policies that fit their individual industries, but it has faced criticism for failing to adequately reprimand employers who violate the law.²⁶⁴

Germany's corporate self-regulatory approach allows employees to engage in discussions with the relevant social partners to develop unique regulations that are tailored to the needs of each party.²⁶⁵ It also encourages employers to develop regulations that serve their industrial needs.²⁶⁶ Such regulation by employers is better than passing rigid legislation, which pushes law makers to balance between legislating regulations, which are simplistic in order to apply with clarity and leave, or developing comprehensive rules, which apply in every conceivable situation but risk becoming too difficult to apply or enforceable.²⁶⁷

The risk, however, with self-regulation is that employers will create rules that seem to favor employees on the surface, but in fact fail to provide substantive protections.²⁶⁸ The incentive for employers to develop such surface level regulation is high, because they reap the benefits of increased public relations and recruitment of better employees. Moreover, nothing requires German employers to engage in corporate self-regulation. While there are a

²⁶¹ *Id.* ("The advantages of a regulatory approach may be a resulting heightening of 'consciousness' around the problem many employees deal with when they believe they cannot ignore after-hours communications—the stress and interruptions to family or personal time.").

²⁶² *Id.* ("It would also potentially alleviate the employee's risk of raising the issue with an employer. It is easier to say 'Hey, leave me alone' when the employer is subject to a legal duty.").

²⁶³ See Moulton, *supra* note 25.

²⁶⁴ See Vivienne Walt, *France's 'Right to Disconnect' Law Isn't All It's Cracked Up to Be*, TIME (Jan. 4, 2017), <http://time.com/4622095/france-right-to-disconnect-email-work/> (noting the absence of financial penalty within the law for violating companies).

²⁶⁵ See Vasagar, *supra* note 248.

²⁶⁶ Eurofound, *supra* note 6, at 29.

²⁶⁷ Cf. COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 70 (4th ed. 2015) (ERISA, for instance, seeks to balance clarity and comprehensiveness by mandating that summary plan descriptions must "be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan.").

²⁶⁸ Martha Lagace, *Industry Self-Regulation: What's Working (and What's Not)?*, HARV. BUS. SCHOOL: RES. & IDEAS (Apr. 9, 2007), <https://hbswk.hbs.edu/item/industry-self-regulation-whats-working-and-whats-not>.

few prominent examples of employers who have been proactive, there is nothing to suggest that there has been a shift in after-hours communication with employees on a large-scale in the country.²⁶⁹

III. THE PROPOSED SAFETY AND HEALTH APPROACH TO THE U.S. RIGHT TO DISCONNECT

There are currently no enacted or proposed regulations under the OSHA Act, which address the scope or timing of workplace related electronic communications between employers and employees.²⁷⁰ Nevertheless, the framework of OSHA, described in detail above,²⁷¹ does allow the implementation of enforceable default rules through its General Duty Clause, when there is no existing safety and health permanent regulation.²⁷² Once a proposed safety and health standard on employee disconnection is promulgated by OSHA, necessary flexibility is also provided under permanent variances so that employers can tailor policies, which are just as effective in preventing employee overwork and stress through lack of disconnection as the OSHA regulation, to the needs of their workplace.²⁷³ This proposed approach would also include an anti-retaliation feature so that employees would be free to file disconnection complaints about overwork through OSHA without retribution.²⁷⁴ No private right of action would exist, as is true with OSHA generally,²⁷⁵ reducing any fear concerning opening up the floodgates of litigation.²⁷⁶ Lastly, as discussed below, the proposed disconnection safety and health standard will be based on the template established by both OSHA and the California Division of Occupational Safety and Health, more commonly referred to as CALOSHA, with regard to the somewhat related phenomenon of workplace violence.²⁷⁷

This section proceeds in three parts. The first part considers how OSHA's General Duty Clause might apply to employee disconnection safety and health issues in the absence of a promulgated permanent standard, much like how OSHA currently handles workplace violence issues. Using CALOSHA's existing regulations on workplace violence protections, the second part takes the next step beyond the General Duty Clause and proposes a disconnection permanent standard for OSHA to enact. Finally, the third part considers a world in which such a disconnection standard exists, and considers additional

²⁶⁹ *Id.* Walt, *supra* note 264 (noting the absence of financial penalty within the law for violating companies).

²⁷⁰ 29 U.S.C. § 651 (2012).

²⁷¹ *See id.* Part I.B.2.

²⁷² 29 U.S.C. § 654 (2012).

²⁷³ *See id.* § 665.

²⁷⁴ *Id.* § 660 (stating the remedies available, and the anti-retaliatory provision of the Act).

²⁷⁵ *Id.*

²⁷⁶ *See* Paul M. Secunda, *Whither the Pickering Rights of Federal Employees*, 79 U. COLO. L. REV. 1101, 1146 (2008) (discussing the use of "floodgates of litigation" argument by employers and courts with regard to a proposal to expand federal employees' First Amendment free speech legal claims).

²⁷⁷ *See* discussion, *infra* Section IV(B).

anti-retaliation provisions to protect the underlying employee right to disconnect.

A. *IN THE ABSENCE OF OSHA REGULATIONS: THE GENERAL DUTY CLAUSE*

As discussed above, under section 5(a)(1) of the OSHA, one of the unique aspects of OSHA is the General Duty Clause, which requires employers to provide a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm.”²⁷⁸ Thus, to establish a General Duty Clause violation, OSHA must show four elements: (1) the employer failed to furnish a workplace free of a hazard, and its employees were exposed to that hazard; (2) the hazard was recognized; (3) the hazard was causing, or was likely to cause, death or serious physical harm; and (4) a feasible method existed to correct the hazard.²⁷⁹ Interestingly, OSHA handles a related area of concern, workplace violence, caused sometimes by stressful work environments, under the General Duty Clause.²⁸⁰ More specifically,

[e]mployers may be found in violation of the General Duty Clause if they fail to reduce or eliminate serious recognized hazards. Under this Instruction, inspectors should therefore gather evidence to demonstrate whether an employer recognized, either individually or through its industry, the existence of a potential workplace violence hazard affecting his or her employees.²⁸¹

In thinking about how a General Duty Clause violation would operate where an employee engages in an excessive amount of work after hours based on electronic communications from their employers, and relying on guidance for workplace violence concerns,²⁸² it would appear that two of the most important factors in deciding whether the employer violated the General Duty Clause would be: (1) whether there was a written employer policy generally prohibiting contacting workers after hours to do work, for safety and health reasons; and (2) whether both supervisors and employees were trained on the meaning of that policy, including any exceptions that might apply in appropriate emergency or unusual circumstances. For instance, in *National Realty & Construction Co. v. OSHRC*,²⁸³ the employer was alleged to have violated the General Duty Clause by allowing an employee to ride on the runner of a front-end loader and the worker was killed, when the front-end

²⁷⁸ 29 U.S.C. § 654(a)(1) (2012).

²⁷⁹ See *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265–67 (D.C. Cir. 1973); *Fabi Constr. Co., Inc. v. Sec'y of Labor*, 508 F.3d 1077, 1081 (D.C. Cir. 2007) (reaffirming standards from *Nat'l Realty*).

²⁸⁰ See U.S. DEP'T OF LABOR: OCCUPATIONAL SAFETY & HEALTH ADMIN., OSHA INSTRUCTION: ENFORCEMENT PROCEDURES AND SCHEDULING FOR OCCUPATIONAL EXPOSURE TO WORKPLACE VIOLENCE, CPL 02-01-058 (2017), https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-01-058.pdf [hereinafter OSHA ENFORCEMENT PROCEDURES].

²⁸¹ *Id.* at 3–4.

²⁸² *Id.* at 5–6.

²⁸³ *Nat'l Realty*, 489 F.2d at 1265.

loader toppled on top of him.²⁸⁴ At issue was whether the employer furnished a workplace free of the hazard of riding dangerous equipment.²⁸⁵ The United States Court of Appeals for the District of Columbia Circuit emphasized that a hazard must be preventable to support a violation of a general duty claim violation, and held that the clause did not impose strict liability on an employer.²⁸⁶ No violation occurred, according to the court, because OSHA failed to present evidence showing “the particular steps a cited employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of those measures.”²⁸⁷

On the other hand, with a disconnection problem leading to substantial mental or physical health concerns because of the amount and frequency of work the employees are being required to do after the workday, it would seem that an employer policy of not contacting workers through electronic communications, except in unusual or emergency situations, would go towards whether a hazard in fact existed at the worksite, whether the hazard was recognized by the employer, and whether there were feasible means of abatement.²⁸⁸ The employee’s condition or the trajectory of their health would go to whether the hazard is likely to cause death or substantial injury. On the factor of feasibility, such a hazard is preventable with proper training of supervisors not to contact employees by text, e-mails or social media after work in normal circumstances. As far as injuries that could be caused, overwork stemming from excessive electronic communication requests can cause death, including suicide or cardiac arrest, as we saw in cases mentioned in this Paper previously, or serious bodily harm, in the form of extreme stress, depression, and anxiety that functionally debilitate the individual. And finally, training and having such a policy would be a feasible method to correct the hazards associated with this type of overwork. Although such a General Duty Clause claim is not likely to be connected to any existing employee training or permissible exposure level standard, and thus should be allowed to be brought, it certainly does suffer from other shortfalls. For example, what if the employer, like most employers these days, does not have a policy on after-work electronic communications?²⁸⁹ Can it be said that the hazard is recognized in those circumstances? Additionally, what if electronic communications cause annoyances, stress, and inconveniences, but are not likely to cause death or serious harm? And finally, what if certain types of industries, by their very nature, require employees to be on call or to be in contact often after work with their employer?²⁹⁰ Each of these questions suggests that a General Duty Clause claim alone will be insufficient long term

²⁸⁴ *Id.* at 1261.

²⁸⁵ *Id.* at 1262.

²⁸⁶ *Id.* at 1265–66.

²⁸⁷ *Id.* at 1268.

²⁸⁸ *See id.*

²⁸⁹ CHALLENGER, *supra* note 7 (“Most companies do not have any kind of policy of contacting subordinates after work. . . . Nearly 88 percent of companies have no policy on contacting workers outside working hours, and only 3 percent are working on one.”).

²⁹⁰ *Id.* (“[A] number of industries and professions, like health care, legal, and many sales positions, require bosses and employees to be in contact after hours.”). Additionally, “[e]mergencies do happen, and a work emergency is one of the more appropriate times to contact a subordinate outside of the workday.” *Id.*

to guard against safety and health concerns associated with after-work electronic communications, and that it will eventually be necessary for OSHA to consider promulgating a permanent standard on contacting workers electronically outside working hours.

B. PROMULGATING A PERMANENT REGULATION ON EMPLOYEE DISCONNECTION

Rather than reinvent the wheel in thinking about how to formulate a permanent OSHA employee disconnection standard, it makes sense to consider the success or lack of success of current standards in the OSHA context. It appears that the rules that have the most overlap with disconnection are those dealing with workplace violence.²⁹¹ Unfortunately, workplace violence is also an increasing phenomenon in the America workplace.²⁹² Like disconnection problems, workplace violence can stem from feelings and issues that arise outside of the physical workplace; cause stress, depression, and anxiety in employees; and, of course, can have a dramatic impact on the workplace itself. Both federal OSHA and the California state OSHA program, CALOSHA, have attempted to address the workplace violence issue. These rules provide potential insights for thinking about permanent standards concerning disconnection issue.

As far as OSHA, the locus of standard setting is the Directorate of Standards and Guidance.²⁹³ As in other federal agencies, this Directorate must compete for limited OSHA resources with enforcement efforts and use of the voluntary compliance programs.²⁹⁴ There is also the concern that OSHA standards should not be overly complex, and this phenomenon is seen to lead to an under-regulation problem.²⁹⁵ To be fair, OSHA “may be engaging in defensive rulemaking to fend off real and imagined judicial challenges to its standards.”²⁹⁶ Regardless of the significant challenges that face the Directorate in researching and promulgating a disconnection standard, it certainly can be accomplished.

As far as workplace violence goes, OSHA defines it to be “[v]iolent acts (including physical assaults and threats of assaults) directed towards persons at work or on duty.”²⁹⁷ It includes beatings, shootings, rapes, suicides, psychological traumas, threats or obscene phone calls, intimidation, or

²⁹¹ See OSHA ENFORCEMENT PROCEDURES, *supra* note 280, at 4, 9 (identifying known risk factors related to workplace violence, such as contact with the public, exchange of money, delivery of passengers, goods, or services, and having a mobile workplace such as a taxicab).

²⁹² See Laurie Kellman, *U.S. Facing Rise in Workplace Homicides*, INS. J. (June 7, 2017), <https://www.insurancejournal.com/news/national/2017/06/07/453727.htm> (“The most recent records by the Bureau of Labor Statistics say workplace homicides rose by 2 percent to 417 cases in 2015, and shootings increasing by 15 percent. The 354 shootings in 2015 represent the first increase since 2012.”).

²⁹³ Howard, *supra* note 38, at 242.

²⁹⁴ *Id.*

²⁹⁵ *Id.* (“Some of the health standards OSHA has promulgated are complex and quite lengthy, and impose a plethora of employer duties. This overregulation characteristic has been mentioned as a factor to explain OSHA’s underregulation problem.”).

²⁹⁶ *Id.* at 243.

²⁹⁷ See OSHA ENFORCEMENT PROCEDURE, *supra* note 280, at 5.

harassment.²⁹⁸ Workplace violence has been especially prevalent in healthcare and social services, including psychiatric facilities, pharmacies and among social workers; retail or dollar stores and late-night establishments; entertainment; and taxicab or Uber industries.²⁹⁹ The OSHA directive states that if risk factors are present,³⁰⁰ an employer should take precautions, including (1) implementing a zero-tolerance policy toward workplace violence, applying to all employees, visitors, or patients; and (2) developing and implementing a well-written workplace violence prevention program, with engineering controls, administrative controls, and training.³⁰¹

Under its Workplace Violence Regulations for Medical Care Providers, effective April 1, 2017,³⁰² CALOSHA has gone beyond a General Duty Clause approach and has required as a standard that healthcare employers implement violent incident logs and record violent incidents in the log.³⁰³ As of July 1, 2017, covered employers must report violent incidents to CALOSHA.³⁰⁴ By April 1, 2018, employers must have implemented a workplace violence prevention plan, reviewed the workplace violence prevention plan, and implemented training provisions for this plan for employees.³⁰⁵ In other words, it appears that the CALOSHA standards are consistent with the OSHA Directive, and elevates a General Duty Clause issue to a permanent standards one.

With regard to what insights can be gathered for a permanent OSHA disconnection standard, it appears from the workplace violence directives and regulations that it is important for employers to know the risk factors for excessively communicating with workers outside work hours. Perhaps, employers could institute some recordkeeping on a log of such communications, so that there is an understanding of how often these practices are utilized and reported to OSHA. Employee evaluations should be undertaken, even if known injury does not occur, as even stress or other types of psychological injury may cause harm. Finally, and most logically, employers should be required to promulgate disconnection policies and train employees on these policies.

With regard to enforcement procedures under OSHA, emphasis could be placed on known risk factors that tend to lead to a high amount of after-work electronic communication. Some types of work that similarly lead to workplace violence incidents and excessive communications after work

²⁹⁸ Although this author is somewhat skeptical, another commentator has suggested that, “[w]ith the current environment, it would not be surprising for California or other states to consider ‘me too movement’-type issues as workplace violence.” See Kerry M. Mohan, *OSHA One Year Into the Trump Administration: What Has Occurred and What’s Expected to Occur—2018*, ST. B. WIS: ONDEMAND (Jan. 25, 2018), <https://marketplace.wisbar.org/Pages/Product.aspx?category=&cat=&pid=CA2729D>. Of course, workplace harassment amounting to sexual assault or rape would clearly meet any definition of workplace violence.

²⁹⁹ See OSHA ENFORCEMENT PROCEDURE, *supra* note 280, at 5–6.

³⁰⁰ *Id.* at 9 (identifying known risk factors of workplace violence, such as: contact with the public, exchange of money, having a mobile workplace, working alone or in small numbers, working late at night or during early morning hours, and working in high-crime areas).

³⁰¹ See *id.* at 4–5.

³⁰² CAL. CODE REGS., tit. 8, § 3342 (2017).

³⁰³ *Id.* § 3342(d).

³⁰⁴ *Id.* § 3342(g).

³⁰⁵ *Id.* § 3342(c), (e), (f).

include: work requiring late nights or early morning hours, or work requiring working alone or in small numbers.³⁰⁶ Disconnection policies could also be especially targeted for industries where after-work communication tends to be more frequent, such as healthcare, legal, and many retail positions. Where risk factors are present in industries with frequent over-communication through electronic means, employers should respond based on their disconnection policies and the training they have given their employees. Although implementing a zero-tolerance policy, as is done with workplace violence, makes little sense in the disconnection context, employers could, nevertheless, develop and implement a well-written after-work electronic communication prevention program and put into place administrative controls, such as analysis of after-work communication practices, training on how to avoid such after-work requests, and create reports of policy violations.³⁰⁷

As with any OSHA safety and health standard, an employer would be able to come up with its own solution to the disconnection problem, so long as it would be as effective in combatting the underlying disconnection problem.³⁰⁸ Under its permanent variance provisions,³⁰⁹ OSHA provides that “[a]n employer . . . may request a permanent variance for a specific workplace.”³¹⁰ In order to receive this type of variance, “the employer must demonstrate, by a preponderance of the evidence, that the proposed alternative means of compliance provides its workers with safety and health protection that is equal to, or greater than, the protection afforded to them by compliance with the standard(s) from which they are seeking the variance.”³¹¹ Within OSHA, “[t]he Office of Technical Programs and Coordination Activities (OTPCA) in OSHA’s Directorate of Technical Support and Emergency Management (DTSEM) receives and processes variance applications.”³¹²

C. ANTI-RETALIATION

Neither the General Duty Clause approach, nor the permanent standard or permanent variance approaches to disconnection would be efficacious if

³⁰⁶ OSHA ENFORCEMENT PROCEDURES, *supra* note 280, at 9.

³⁰⁷ Engineering controls for workplace violence prevention, including alarm systems, panic buttons, metal detectors, mirrors, locks, and lighting, make less sense in the disconnection context. That being said, smartphone and other computer technologies could be utilized to keep track of how often employers are requesting, and employees are receiving, after work requests by texts, e-mail, or social media.

³⁰⁸ *Types of Variances*, OSHA, https://www.osha.gov/dts/otpc/variances/types_variances.html (last visited Dec. 13, 2018) (“A permanent variance authorizes the employer(s) to use an alternative means to comply with the requirements of a standard when they can prove that their proposed methods, conditions, practices, operations, or processes provide workplaces that are at least as safe and healthful as the workplaces provided by the OSHA standards from which they are seeking the permanent variance.”).

³⁰⁹ 29 U.S.C. § 655(d) (2012) (authorizing permanent variances from OSHA standards); 29 C.F.R. § 1905.11 (2018) (setting out regulatory requirements for obtaining permanent variance).

³¹⁰ *Types of Variances*, *supra* note 308.

³¹¹ *Id.* (“In addition, the employer must notify employees of the variance application, and of their right to participate in the variance process. Inability to afford the cost of complying with the standard is not a valid reason for requesting a permanent variance.”).

³¹² *OSHA’s Variance Program*, U.S. DEP’T LAB.: OSHA, <https://www.osha.gov/dts/otpc/variances/index.html> (last visited Dec. 13, 2018).

employees felt that by complaining about excessive after-work electronic communication they would be labelled troublemakers, isolated and alienated in their workplaces, and potentially fired. For all these reasons, it must be clear that OSHA anti-retaliation provisions apply fully to disconnection complaints.

Under section 11(c) of OSHA,³¹³ OSHA investigates whistleblowing under twenty-two federal statutes, including OSHA itself.³¹⁴ On January 13, 2017, OSHA issued “Recommended Practices for Anti-Retaliation Programs,”³¹⁵ which is meant to promote workplaces where workers feel comfortable complaining about unsafe or unhealthy work conditions without fear of retribution.³¹⁶ These anti-retaliation recommended practices list five elements: (1) “[m]anagement leadership, commitment, and accountability”; (2) a “[s]ystem for listening to and resolving employees’ safety and compliance concerns”; (3) a “[s]ystem for receiving and responding to reports of retaliation”; (4) “[a]nti-retaliation training for employees and managers”; and (5) “[p]rogram oversight,” meaning that in other words a CEO is responsible for an open, non-retaliatory environment in the company.³¹⁷

CONCLUSION

The United States should follow the lead of its international counterparts in regulating employer practices concerning employees’ right to disconnect from the workplace after hours to protect employee safety and health. However, the unique landscape of American employment law calls for an equally unique approach for regulating such action. This Paper proposes an approach based on the existing workplace safety and health regimes under OSHA and its complementary state programs, like CALOSHA. Initially, disconnection problems would be handled under the General Duty Clause of OSHA as a way to give employees a method to report overuse of electronic communications with them outside of work and to provide legal sanctions for such conduct. Rather than accepting a general, somewhat undefined legal standard for the long term, this Article also suggests providing a permanent disconnection standard under federal and state law that would have many of the same features that workplace violence prevention standards possess, to

³¹³ 29 U.S.C. § 671(c) (2012).

³¹⁴ See OSHA, RECOMMENDED PRACTICES FOR ANTI-RETALIATION PROGRAMS 1 (2017), <https://www.osha.gov/Publications/OSHA3905.pdf>.

³¹⁵ See *id.*

³¹⁶ See *id.* at 1–2. Retaliation includes: shunning, increased sensitivity to poor work performance, denying or requiring overtime. *Id.* at 3. Adverse actions “can be subtle, [and] it may not always [be] easy to spot.” *Id.*

³¹⁷ See *id.* at 3. Most of the Recommendations Practices for Anti-Retaliations Programs document elaborates on each of these five elements and provide specific examples. See *id.* at 4–11. For instance, with regard to “program oversight,” OSHA recommends that such overseers “may examine a variety of sources, such as: anonymous surveys; confidential interviews with employees who reported compliance concerns or retaliation; narratives from injury or error reports; case studies of investigated issues and responses; claims department or risk management case files related to injuries or errors; and complaint files relating to reporting requirements.” *Id.* at 11.

various degrees. Employers, through permanent variances, would have some flexibility in meeting these standards based on the particular circumstances and needs of their workplaces and industries, but anti-retaliation provisions under OSHA would establish that employees feeling unable to escape from work, by being tethered by their electronic devices to the workplace, would not be retaliated against for filing either internal or external complaints about such excessive and unhealthful management practices. The hope is that the existence of such safety and health rules concerning employees' right to disconnect would also help to protect employee privacy and autonomy, productivity and compensation, and their rest and leisure time.