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EFFECTS ON EMPLOYEES' COMPENSATION UNDER THE RIGHT TO DISCONNECT

By: Tyler Jochman*

INTRODUCTION

The use of technology in our modern life is constant, and being connected 24/7 to work through email, text messaging, and phone calls has taken over as the new normal. Our cell phones which at one time connected us to our loved ones have now become a handcuff tying us to our jobs. While many employees throughout the COVID-19 pandemic have begun to work from home, the lines between when employees are on the clock and off the clock are greyed even more. Namely, how employees should be compensated for doing work off the clock, even for something as simple as answering work-related phone calls or e-mails.

The law regarding compensating workers for working during their off hours is in its infancy, and unlike other movements for worker's rights the issue is more than often ignored because everyone does it. Critics of the law often ask, "what's a five-minute phone call?" or "what is the harm in responding to a text?" The issue is a moral one, is it a form of theft, maybe even indentured servitude to force employees to work without compensation, no matter how short the amount of time is.

As a response to this issue, countries and municipalities have implemented right to disconnect statutes which protect workers from having to answer work calls, emails, and messages past working hours. If this law were to be implemented on a federal level, how would employee compensation be affected?

First this article will examine the background of the right to disconnect law, how such a law would affect a worker's compensation by viewing the effects of both "exempt" employees and "non-exempt" employees, and then finally the paper will go in depth for penalties of a violation of the right to disconnect law by using current laws and frameworks previously enacted by the legislature.

BACKGROUND

In the simplest terms, a right to disconnect law would bring back an era of the traditional 9 to 5 job, once an employee leaves the office, they are restricted from doing any work-related activities. It is a movement to take back a person's autonomy from overbearing employers. This law would restrict employers from forcing employees to work after business hours. Thus, allowing employees to be able to "disconnect" from their work after employees leave the office for the day. Proposed and implemented laws¹ have restricted employees from answering emails, phone calls, and texts while off the clock and in other instances limited the number of hours of overtime employees are allowed to work.² The reasoning and purpose behind the right to disconnect laws can best be summed up by Benoit Hamon, a member of the French Legislature. "Employees physically leave the office, but they do not leave their work. They remain attached by a kind of electronic leash - like a dog. The texts, the messages, the emails - they colonize the life of the individual to the point where he or she eventually breaks down."³ France implemented a right to disconnect law on January 1st, 2017.⁴ The France law placed restrictions on when employees cannot send emails.⁵

While France was the first country to implement the right to disconnect, other countries shortly followed their lead. Representative Winston Castelo of the Philippines introduced House Bill 4721⁶ which aimed to amend the Labor Code. This bill would establish hours to

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¹ See N.Y.C., N.Y., No. 726-2018, § 20-1406(d)(i)-(iii) (2018); See also David Z. Morris, *New French Law Bars Work Email After Hours*, FORTUNE, <http://fortune.com/2017/01/01/french-right-to-disconnect-law/>; 3 Lab Code. No. 2016-1088, ch. 2, art. 55 (2016).

² See N.Y.C., N.Y., No. 726-2018, § 20-1406(d)(i)-(iii) (2018).

³ Hugh Schofield, *The plan to ban work emails out of hours*, BBC NEWS (May 11, 2016), <https://www.bbc.com/news/magazine-36249647> (quoting MP Benoit Hamon).

⁴ David Z. Morris, *New French Law Bars Work Email After Hours*, FORTUNE, <http://fortune.com/2017/01/01/french-right-to-disconnect-law/>.

⁵ *Supra* note 4, Lab Code. tit. 3, ch. 2, art. 55, L. No. 2016-1088.

⁶ Abegail De Vega, *Bello: 'Right to disconnect' after office hours choice of employees*, DEP'T OF LAB. & EMP. (PHIL.) (Feb. 18, 2021, 6:29 AM), <https://www.dole.gov.ph/news/bello-right-to-disconnect-after-office-hours-choice-ofemployees/>.

which employees are allowed to answer emails and texts.⁷ In Japan, the phenomenon of death by overwork has coined a new term *Karoshi*, which literally translates to “overwork death”.⁸ Although companies are liable for when employees die due to overwork, the punishment includes only a fine for employers. However, according to Reuters, the fine is relatively small based on the totality of overworking an employee.⁹ As a result of this criticism, the Japanese government and businesses have worked together through regulation and a push to change company culture.¹⁰

Company advocacy is another way that the goals of the right to disconnect movement can be accomplished. The goal of at-will employment is fluidity of the workforce. Therefore, companies or employers who offer the best benefits or best working conditions will attract the best talent. Take for example the fight for 15. This movement has fought to raise the minimum wage across the country.¹¹ Amazon took the initiative by raising its minimum wage to \$15,¹² putting pressure on other retailers such as Walmart and Target to do the same, as these companies share the same labor pool. This theory of advocacy has been implemented with the right to disconnect law. Through encouragement by Germany’s department of labor, Daimler, a car and truck manufacturer, has implemented a software system restricting emailing employees who are on vacation.¹³ Other countries have encouraged this type of advocacy, the governments of Spain and South Korea have also implemented plans for a more balanced work-life balance.¹⁴

⁷ *Id.*

⁸ Int’l. Lab. Org., *Case Study: Karoshi: Death from overwork*, INT’L LAB. ORG (Apr. 23, 2013), http://www.ilo.org/safework/info/publications/WCMS_211571/lang--en/index.htm.

⁹ Taiga Uranaka & Teppei Kasai, *Japan’s Dentsu gets only small fine for overtime breaches despite outcry*, REUTERS (Oct. 6, 2017, 1:25 AM), <https://www.reuters.com/article/us-dentsu-overwork/japans-dentsu-gets-only-small-fine-for-overtime-breaches-despite-outcry-idUSKBNICBOIS>.

¹⁰ Jeremy Berke, *Japan is facing a ‘death by overwork’ problem—here’s how companies are combatting it*, BUSINESS INSIDER (Mar. 25, 2018, 8:30 AM), <https://www.businessinsider.com/japan-is-facing-a-death-by-overwork-problem-2018-3>.

¹¹ Fight For \$15 Org., *About Us*, FIGHT FOR \$15, <https://fightfor15.org/about-us/>.

¹² Lauren Thomas, *Amazon’s minimum wage hike puts the pressure on Walmart, Target, and others to follow*, CNBC (Oct. 2, 2018, 12:17 PM) <https://www.cnbc.com/2018/10/02/amazons-minimum-wage-hike-puts-pressure-on-walmart-target-to-follow.html>.

¹³ Rebecca J. Rosen, *Daimler Employees Can Set Emails to Auto-Delete During Vacation*, THE ATLANTIC (Aug. 14, 2014), <https://www.theatlantic.com/business/archive/2014/08/daimlers-german-employees-can-set-emails-to-auto-delete-during-vacation/376068/>.

¹⁴ Kate Samuelson, *France’s ‘Right to Disconnect’ and 4 Other Countries Trying to Improve Work-Life Balance*, TIME (Jan. 3, 2017, 1:27 PM), <https://time.com/4620532/countries-work-life-balance/>.

The United States is behind other countries when it comes to right to disconnect legislation. Currently the United States has not implemented a right to disconnect law, however, New York City's City Council has introduced a bill that would restrict citizens of New York City from having to check their emails after working hours¹⁵. The penalties of this law would include (i) for each instance of an employee being required to access work-related electronic communications outside of the standard work hours: two hundred fifty dollars; (ii) for each instance of unlawful retaliation not including discharge from employment: full compensation including wages and benefits lost, five hundred dollars and equitable relief as appropriate; and (iii) for each instance of unlawful discharge from employment: full compensation including wages and benefits lost, two thousand five hundred dollars and equitable relief, including reinstatement, as appropriate.¹⁶

Should the right to disconnect law pass, this would be the first US locality to incorporate such a law. As discussed later, an implementation of such a law would create issues between federal and state laws. However, with such a worldwide movement, it is only a matter of time before legislation like this will reach the state or even federal level.¹⁷

Every law has a cause and effect. If a right to disconnect law were to be implemented in the United States, there are many issues to consider. How would the right to disconnect impact employee's compensation? And following from the New York model for penalties, what will penalties look like moving forward? An employee must be compensated for every minute of their time.

EFFECTS ON COMPENSATION

If a right to disconnect law were to be implemented in the United States, the legislature would face many challenges in its implementation. One of which, would be how the Fair Labor Standards Act (FLSA) would conform to the new legislation. In the United States, the FLSA dictates how employees are paid.¹⁸ If exempt employees who are paid by the year now have hours where they cannot work, will their pay decrease? Alternatively, how would non-exempt employees pay change with better monitoring of employees through the right to disconnect laws?

¹⁵ N.Y.C., N.Y., No. 726-2018, § 20-1406 (2018).

¹⁶ N.Y.C., N.Y., No. 726-2018, § 20-1406(d)(i)-(iii) (2018).

¹⁷ *Id.*

¹⁸ *See* 29 U.S.C.A. §§ 206-207 (2018).

FLSA's Conformity to a Right to Disconnect Law

The laws surrounding an employees pay is dictated by the Fair Labor Standards Act.¹⁹ If a right to disconnect law was to be implemented, the FLSA would have to change to conform with the new legislation. The first distinction that must be determined under the FLSA, is whether employees are classified between exempt and non-exempt employees.²⁰ Exempt employees are employees who are exempted from overtime laws, commonly referred to as “salaried” employees. The law prescribes a test to be considered an exempt employee, employer must satisfy the two prongs of the salary basis test.²¹

The two prongs of the salary basis test are the duties prong and the pay prong. To satisfy the duties prong,²² an employee must be considered what is referred to as a white-collar employee,²³ meaning the employee must fall into one of three categories. The three categories include: an executive employee,²⁴ who either (a) primary duty consists of the management of the establishment in which he is employed or of a customarily recognized department or subdivision thereof, and (b) who customarily and regularly directs the work of other employees therein²⁵; administrative employee,²⁶ who administrative employees, which is of principal importance to employer, rather than collateral tasks which may take up more than 50 percent of employee's time²⁷; or a professional employee, whose principal duties involve specialized scientific or other knowledge and training²⁸. The courts rule of thumb is that the higher the employee is paid; the lower standard of review is for this test. The second prong of the salary basis test is the pay prong.²⁹ Exempt employees must be paid a minimum salary of \$23,000 per year. An exempt employee does not receive overtime compensation, and whether the employee works twenty or eighty hours during the week, their compensation will not

¹⁹ *Id.*

²⁰ *Id.*

²¹ SUSAN PRINCE, FAIR LABOR STANDARDS HANDBOOK FOR STATES, LOCAL GOVERNMENTS AND SCHOOLS ¶220 THE SALARY BASIS TEST (Supp. 2020).

²² *Id.*

²³ *Id.*

²⁴ 29 U.S.C.A. § 213(a)(1).

²⁵ 29 C.F.R. § 541.100(a)(2)-(3).

²⁶ *Id.*

²⁷ 29 C.F.R. § 541.200(a)(1)-(3).

²⁸ *Id.*

²⁹ *Id.*

change. In fact, a dock in pay for missed hours could result in a breach of the employee's exempt status.³⁰

Although compensation for salaried employees under a right to disconnect rule would be unaffected from the legal standpoint, the value of the employee will have risen because the Employee is working less hours for the same amount of pay. According to a 2014 Work and Education Survey, Salaried Employees work an average of 49 hours per week compared to hourly workers who work an average of 44 hours per week.³¹ A right to disconnect law could cap a salaried employee's hours, restricting them from over work and limiting those employees to a more manageable workweek.

Effect on Non-Exempt Employees

Employees who do not qualify as exempt employees are considered non-exempt employees (also known as "hourly" employees). These employees, after forty hours of work are subject to employee overtime laws including time and a half pay. Protections for employees pay under the FLSA include a \$7.25 hourly wage. The minimum wage rule is known as an immutable rule, which cannot be contracted around.³² Because non-exempt employees are paid the hour, non-exempt employees in theory, would be less affected by possible right to disconnect legislation.

By simple cause and effect, when a person works less hours, the person normally will get paid less. As right to disconnect legislation around the world is still in its infancy,³³ there has been no affirmative data to prove a decrease in employees pay. If exempt employees are no longer "on-call" for twenty-four hours a day, the employer will not be inclined to pay an employee a larger salary for not being accessible whenever the employer requests. At first glance this may not

³⁰ *Wage and Leave Deductions for 'Snow Day' Violated the Salary Test Court Says Docking of Pay Demonstrated Workers Were Hourly Employees*, EMP.'S GUIDE FAIR LAB. STANDARDS ACT NEWSL. (Thompson Publ'g Grp., Inc., Wash. D.C.), May 2003.

³¹ Lydia Saad, *The "40-Hour" Workweek is Actually Longer – by Seven Hours*, GALLUP (Aug. 29, 2014), <https://news.gallup.com/poll/175286/hour-workweek-actually-longer-seven-hours.aspx>.

³² MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW: CASES AND MATERIALS 437-38 (9th ed. 2015).

³³ Loi 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels [Law 2016-1088 of August 8, 2016, relating to Work, the Modernization of Social Dialogue, and the Securing of Professional Careers], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], August 9, 2016, ch. 2 art. 55; France being the first to implement "right to disconnect" in 2016. David Z. Morris, *New French Law Bars Work Email After Hours*, FORTUNE (Jan. 1, 2017, 12:51 PM), <https://fortune.com/2017/01/01/French-right-to-disconnect-law/>.

seem to be an issue, however, as aforementioned, an exempt employee can be considered non-exempt if the employer docks their pay for missed days or hours of work.³⁴ Therefore, the very definition of an exempt employee under the FLSA could change based on implementation of this legislation, and force salaried employees into non-exempt status.

A similar worry was suggested after an attempt by the Obama administration to increase the salary within the salary basis test from \$23,000 to \$47,000.³⁵ An article dated August, 2016 suggested that employees who were once classified as exempt employees under the former overtime laws, would be “disconnecting” from responding to their employer’s emails as the employees who were once exempt employees are now subject to overtime laws.³⁶ In reality, non-exempt employees do not cease from doing the work, rather the employee goes without compensation.

Although a reply to an email or a text message relating to work may take no more than five minutes, the time adds up quickly. This results in dozens of unpaid working hours. Any time an employee goes without pay for work done constitutes an offense known as wage theft.³⁷ In 2015, 8,781 cases of wage theft were brought in federal court.³⁸ These offenses are not always done out of malice by either side. As Kyle Peterson from the law firm Seyfarth Shaw stated, “well-meaning employers often get caught up in some of the technicalities and rules that are really hard to apply to the evolving workplace.”³⁹ Although Mr. Peterson makes a compelling point, a right to disconnect law would eliminate the technicalities he spoke of, and in fact, a bright line rule would be created. Any work done by an employee, is to be compensated for his or her work.⁴⁰

Another hurdle faced by employees is access to the courtroom. Since the decision in *Epic Systems Corporation v. Lewis*⁴¹ wage and hour cases may no longer be brought on a class action basis and

³⁴ See 29 U.S.C. § 206 (2018); 29 U.S.C. § 207.

³⁵ James Sherk, *Obama’s New Overtime Rule Turns Salaried Employees into Hourly Workers*, CNS NEWS (May 19, 2016, 12:21 PM), <https://www.cnsnews.com/commentary/james-sherk/obamas-new-overtime-rule-turns-salaried-employees-hourly-workers-ibm>.

³⁶ *Id.*

³⁷ *Backpay*, U.S. DEP’T OF LAB., <https://dol.gov/general/topic/wages/backpay> (last visited Feb. 19, 2021).

³⁸ Annie Hunt, *FLSA lawsuits break records in 2015 and set to rise in 2016*, LEGAL NEWSLINE (Jan. 29, 2016), <https://legalnewsline.com/stories/510660586-flsa-lawsuits-break-records-in-2015-and-set-to-rise-in-2016>.

³⁹ *Id.*

⁴⁰ *Supra* note 37.

⁴¹ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018).

employers can force employees into arbitration through employment contracts. This creates a barrier on many different levels for the employee who is trying to receive justice. Another barrier that exists is known as the repeat player issue.⁴² In alternative dispute resolution, specifically in arbitration, the parties face an issue of arbiter in which repeat litigants will turn to the same arbitrator to receive favorable results.⁴³

For non-exempt employees, a right to disconnect law would put an end to these types of wage theft cases. By restricting the interaction taking place in the first place, right to disconnect laws would stop this type of wage theft by not allowing the interaction in the first place.

Effect on Exempt Employees

Implemented in 1938, the Fair Labor Standards Act has been through many additions and amendments to the act to protect workers.⁴⁴ One of those amendments is the Portal-to-Portal Act⁴⁵. Employers are normally not required to pay employees for preliminary activities (before work activities such as a commute) and postliminary activities (such as time spent leaving work)⁴⁶. However, there are exceptions to this rule. In *Alvarez v. IBP Inc.*,⁴⁷ the court held that employees who were required to put on safety equipment and then walk to their positions had compensable time under the Portal-to-Portal Act. One of the key aspects of the Portal-to-Portal Act is whether there was a principal activity. A principal activity is the main activity or purpose of the employee. In its most basic terms, a principal activity is what the employee was hired for.⁴⁸ Take logging into a computer after hours, a process that takes only a few minutes. Exempt employees, as discussed previously, are always on the clock as they are paid yearly. However once right to disconnect legislation is implemented, and exempt employees would have the ability to be “off

⁴² Edward Silverman, *The Suspicious Existence of the “Repeat Player Effect” in Mandatory Arbitration of Employment Disputes*, NAT’L L. REV. (Mar. 31, 2013), <https://www.natlawreview.com/article/suspicious-existence-repeat-player-effect-mandatory-arbitration-employment-disputes>.

⁴³ *Id.*

⁴⁴ Fair Labor Standards Amendments of 1989, H.R.2710, 101st Congress.

⁴⁵ *Alvarez v. IBP, Inc.*, 339 F.3d 894, 901-2 (9th Cir. 2003), *aff’d*, 546 U.S. 21 (2005); *See also* Portal-to-Portal Act § 4, 29 U.S.C. § 254.

⁴⁶ Portal-to-Portal Act § 4 OR 29 U.S.C. § 254(d); *Alvarez*, 339 F.3d at 902-03.

⁴⁷ *Alvarez*, 339 F.3d at 903-04.

⁴⁸ *Id.* at 902-03

the clock” when does the workday start? Is it every time the employee logs into their computer? Every time their phone buzzes? Or does it start as soon as the employee starts typing? These minute details need to be acknowledged by any legislation that is proposed. Using the Portal-to-Portal Act, specifically focusing on the principal activity of the work, the exempt employee’s pay starts when the employee logs into their computer.

This act could possibly change the landscape of exempt employees by redefining what an exempt employee is. The reason behind the FLSA was to exempt white-collar employees from overtime regulations because of all the extra duties white collar employees have within a business. With right to disconnect laws, the definition of an exempt employee will change, although the employee may still be exempt from overtime laws, the FLSA’s guidance that exempt employees are never off the clock as their salary is dictated not by hours worked but rather based on a weekly, monthly, or yearly basis. However, with an opportunity to be off the clock, the definition of exempt employees.

Whenever new legislation is implemented, other laws must change to conform with the laws. Here is no different. If a right to disconnect law was implemented the definitions of both exempt and non-exempt employees would change. Furthermore, a right to disconnect law would negate instances where employees would be put in a situation where they would have to choose between their job and their homelife.

PENALTIES FOR VIOLATION

In civil law, traditionally two remedies are available, injunctive relief and monetary relief.⁴⁹ In determining which damages are appropriate, one must first look to what the law protects. Here, a right to disconnect law would be injunctive in nature due to the law’s restriction on the number of hours worked. Therefore, monetary sanctions would provide the best protection.

One of the most important issues when determining damages is determining back pay for the wronged employee. Back pay is a common remedy for wage disputes such as wage theft.⁵⁰ In fact, back pay would be the perfect remedy for right to disconnect legislation,

⁴⁹ *Livingstone v. Rawyards Coal Co.* [1880] 5 App. Cas. 25 (HL) 39 (appeal taken from Scot.), <http://www.bailii.org/uk/cases/UKHL/1880/3.pdf>.

⁵⁰ *Backpay*, U.S. DEP’T OF LAB., <https://dol.gov/general/topic/wages/backpay> (last visited Feb. 19, 2021); U.S. DEP’T OF LAB., *supra* note 37.

because back pay would make the worker “whole” again. Furthermore, back pay damages are not capped,⁵¹ allowing for the wronged worker to get what he or she deserves. However, back pay alone would not be enough. Sanctions on the company should also be required. It is not enough to right the wronged worker, but an employee may only recover a few hundred dollars based on the amount of overtime he or she was shorted if they are a non-exempt employee, and an exempt employee may not even see any back pay, losing the employee’s motivation for bringing a claim.

New York Legislation, and Future United States Laws

The proposed New York right to disconnect bill would impose a fine of \$250 a day for each time an employer requires an employee to answer emails outside of the workplace.⁵² The law also provides for reinstatement to those who report a violation of the law, plus an additional monetary award.⁵³ This provides for a retaliation provision, although as in other employment law statutes, retaliation laws are vague and do not consider subjective adverse employment actions.⁵⁴ These subjective employment actions focus on the reputation of the employee, who in exercising his or her legal rights of refusing to work is actually harming personal work reputation when it comes to promotions, assignments, and other perks of employment that are normally awarded to favorable employees. This bill’s biggest criticism comes from business owners in New York who argue that technology is a convenience to employees, and most communications are voluntary.⁵⁵

This sanction seems appropriate; however, this law is not written effectively. The problem with this piece of legislation is giving the employee the option, rather than restricting an employer from contacting the employee during her off hours. Obviously, this law could not apply to every employee. Certain professions such as doctors, IT

⁵¹ Liquidated damages for violation of wage and hour provisions of Fair Labor Standards Act 26 A.L.R. Fed. 607

⁵² COMM. ON CONSUMER AFFS. & BUS. LICENSING, PRIVATE EMPLOYEES DISCONNECTING FROM ELECTRONIC COMMUNICATIONS DURING NON-WORK HOURS, N.Y.C. Council Int. No. 0726 (2018), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3458217&GUID=8930D471-5788-AF4-B960-54620B2535F7&Options=ID%7cText%7c&Search=disconnect>; COMM. ON CONSUMER AFFS. & BUS. LICENSING, *supra* note 2.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Jake Offenhartz, *Proposal to Ban After-Hours Work Emails Faces Opposition from Bosses*, *De Blasio*, GOTHAMIST (Jan. 17, 2019, 2:35 PM), <http://gothamist.com/news/proposal-to-ban-after-hours-work-emails-faces-opposition-from-bosses-de-blasio>.

professionals, and certain government employees would be exempt from a law like this due to the nature of their work. However, it would be advisable to add a provision to compensate those who are required to call in above their normal salary would help in alleviating the on-call employees. Although not required under the FLSA, the Society for Human Resources Management suggests a policy for compensating exempt employees who are placed on-call.⁵⁶ This policy includes defining what circumstances an employee maybe placed on call, a distinction between when an employee is on call and when they are within “normal working hours”, and the rate of pay for an on-call employee.⁵⁷

Effects of Lochner, and the Application to Right to Disconnect

The common argument against the right to disconnect law or any law that places reasonable restrictions on employees’ freedom is that employees have a freedom to contract. This case, which has been overruled many times is *Lochner v. New York*.⁵⁸ In 1905, the Supreme Court heard a case of *Lochner* who was challenging a law restricting his right to work eighty hours a week.⁵⁹ The Court held there was a right to contract written within the constitution⁶⁰, and thus the workers protection was eroded in light of his right to contract to work eighty hours a week.⁶¹ The issue with *Lochner*, which has been overruled on multiple occasions, and has been considered a judicial insult when the court makes rules not defined in the legislature. Using *Lochner* as a guide, not only as a constitutional law example, but if left unchecked, the employee/employer relationship can result in a one-sided power struggle. Presently, there has been a reversion to the *Lochner* era. The debate has reverted to the question of what is more important—an employee’s right to work as many hours as he contracts to weighed against the safety of the employer.

Whether the law is contracting to work eighty hours a week or contracting out of a law that gives a person the right to disconnect from his workplace, if the rule is not an immutable rule, it will be unlikely that an employer will allow the employee protection. In an employment contract, employees and employers are allowed to contract

⁵⁶ Resources and Tools. SHRM.org. <https://www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/additional%20pay%20for%20exempt%20employees.aspx>.

⁵⁷ *Id.*

⁵⁸ *Lochner v. New York*, 198 U.S. 45, 53 (1905).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

around certain laws known as mutable rules. Examples of mutable rules include good cause termination and arbitration agreements, whereas immutable rules are unable to be contracted around, these include overtime laws, minimum wage, and OSHA laws. Therefore, for the right to disconnect law to be effective, the law would have to be immutable, so employees do not try to contract around them. This is supported by Justice Ginsberg's dissent in *Epic Systems v. Lewis* when discussing rules which are favorable to employers.⁶² While discussing pro-employer arbitration agreements in employment contracts, she found that in 1992 "2 percent of non-unionized employers used mandatory arbitration agreements, while 54 percent do so [in 2017]."⁶³

Comparison of International Law

American exceptionalism in the workplace is a common phrase used by scholars of employment law, this does not suggest that United States employment laws are better or worse than other countries, rather United States employment laws view on the employee/employer is vastly different from the rest of the world. Laws such as employment at will, maternity leave, and employment contracts are just a few examples of how the United States differs from the rest of the world.⁶⁴ City Councilman Rafeal Espinel the drafter of New York's right to disconnect bill sums up the American work ethic best, "We live with an always-on mentality because we believe that that's what's expected from us from our job. That can lead to exploitation of workers. Technology has aggressively advanced over the past 15 years with email and smartphone, but regulations and laws haven't caught up with it."⁶⁵ Countries such as Germany, France, and Japan have all implemented some type of right to disconnect laws or pressure by the government for protection from the dangers of overwork.⁶⁶

⁶² *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1644 (2018).

⁶³ *Id.*

⁶⁴ Torys Pensions and Employment Group, *10 Key Differences Between Canadian and U.S. Employment Laws*, TORYS LLP (Aug. 20, 2018), <https://www.torys.com/insights/publications/2018/08/10-key-differences-between-canadian-and-us-employment-laws>.

⁶⁵ Jeanette Settembre, *New Yorkers could legally refuse to answer work emails after hours if this bill passes*, MARKET WATCH (Jan. 18, 2019, 9:44 AM ET), <https://www.marketwatch.com/story/new-yorkers-could-legally-refuse-to-answer-work-emails-after-hours-if-this-bill-passes-2019-01-18?mod=moneyish>.

⁶⁶ Kate Samuelson, *France's 'Right to Disconnect' and 4 Other Countries Trying to Improve Work-Life Balance*, TIME (Jan. 3, 2017, 1:27 PM EST), <https://time.com/4620532/countries-work-life-balance/>; Julian Ryall, *Japan announces new laws to force workers to go on holiday*, THE TELEGRAPH (Jan. 8, 2015, 5:58 PM),

The original right to disconnect law was implemented in France in 2016, the French law restricts companies of 50 or more from sending or receiving emails after working hours. To comply with this law, employees receive an out of office reminder.⁶⁷ At the time there are no penalties for violation, but French companies have been compliant with the law.⁶⁸ France's law has set the framework for New York City's legislation⁶⁹ and provides a solid framework for future laws. This new law however has not come without skeptics, many France and even multinational corporations who do business in France has voiced concerns over the effectiveness of the law.⁷⁰ "Most people don't dare. . . They're afraid they'll miss something." stated Jean Luc Bauché when asked if French workers still check their phones outside of working hours.⁷¹

Germany has taken a different approach, although the German legislature does not have a right to disconnect law, companies have identified the issue of employees always being connected to their work.⁷² Companies such as Daimler have implemented software that restricts emails when on vacation. This is an example of companies taking the initiative to protect their workers from burnout. In Japan, the issue of work life balance has gotten so out of line that the Japanese have coined the term "karoshi" meaning death by overwork.⁷³

<https://www.telegraph.co.uk/news/worldnews/asia/japan/11333843/Japan-announces-new-laws-to-force-workers-to-go-on-holiday.html>; Cecile Martin, *Right to Disconnect: New Right for French Employees?*, THE NATIONAL LAW REVIEW (Feb. 3, 2017), <https://www.natlawreview.com/article/right-to-disconnect-new-right-french-employees>.

⁶⁷ Vivienne Walt, *France's 'Right to Disconnect' Law Isn't All It's Cracked Up to Be*, TIME (Jan. 4, 2017, 1:38 PM EST), <http://time.com/4622095/france-right-to-disconnect-email-work/>.

⁶⁸ Amy B. Wang, *French employees can legally ignore work emails outside of office hours*, CHICAGO TRIBUNE (Jan. 1, 2017), <https://www.chicagotribune.com/news/nationworld/ct-france-right-to-disconnect-20170101-story.html>.

⁶⁹ Jeanette Settembre, *New Yorkers could legally refuse to answer work emails after hours if this bill passes*, MARKET WATCH (Jan. 18, 2019, 9:44 AM ET), <https://www.marketwatch.com/story/new-yorkers-could-legally-refuse-to-answer-work-emails-after-hours-if-this-bill-passes-2019-01-18?mod=moneyish>; THE NEW YORK CITY COUNCIL LEGISLATIVE RESEARCH CENTER, FILE NO. INT 0726-2018, PRIVATE EMPLOYEES DISCONNECTING FROM ELECTRONIC COMMUNICATIONS DURING NON-WORK HOURS (2018), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3458217&GUID=8930D471-5788-4AF4-B960-54620B2535F7&Options=ID%7cText%7c&Search=disconnect>.

⁷⁰ Eleanor Beardsley, *For French Law On Right To 'Disconnect,' Much Support — And A Few Doubts*, NPR (Jan. 3, 2017, 6:35 PM ET), <https://www.npr.org/sections/parallels/2017/01/03/508028703/for-french-law-on-right-to-disconnect-much-support-and-a-few-doubts>.

⁷¹ *Id.*

⁷² Megan Gibson, *Here's a Radical Way to End Vacation Email Overload*, TIME (Aug. 15, 2014, 12:47 PM EDT), <https://time.com/3116424/daimler-vacation-email-out-of-office/>.

⁷³ Emiko Jozuka & Yoko Wakatsuki, *Death by overwork: Pressure mounts on Japan to act*,

Advocacy in Japan has risen for right to disconnect after an advertisement employee committed suicide after logging one-hundred and five hours of overtime in one month⁷⁴. This is not the only story of death by overwork. Kenichi Uchino a 30-year-old third generation employee of Toyota was a proud husband and father of a one- and three-year-old. But for the six months before his death, he had worked 80 hours of overtime per month. Kenichi, prior to his passing away remarked to his wife that his happiest moments were when he was sleeping. Finally, his work overtook him, and he passed away due to overwork.⁷⁵ In response, Japanese companies have combined actions taken from both France and Germany by implementing restrictions on overtime hours to sixty-five hours a week as well as sanctions for companies whose employees die from karoshi. In following Germany's approach, Japanese companies have taken a stance on advocacy. Drones, shaming, and alarm bells to leave work are all techniques used in Japanese offices to get employees to leave the office⁷⁶. In addition, Japan has also implemented laws forcing employees to go on vacation⁷⁷. The recent law in Japan has forced employers to grant employees' request for days off. In the past, Japanese companies could deny any request for a day off of the 10 days Japanese workers were entitled to, but the new scheme focuses on a better work-life balance.⁷⁸

Other countries have recognized the issues of work-life balance and responded by enacting new legislation to protect workers. What can Americans learn from these other countries? The biggest lesson is the danger of overwork. Karoshi is not limited to Japan, and the stress of being constantly connected to the workplace and hours worked is a real issue.

Wage Theft: A Potential Remedy

It is without question that under the FLSA, workers must be paid

CNN (Nov. 30, 2016, 4:07 AM ET), <https://money.cnn.com/2016/11/30/news/economy/japan-workers-overwork-death/index.html>.

⁷⁴ *Id.*

⁷⁵ *Death by overwork in Japan*, THE ECONOMIST (Dec. 19, 2007), <https://www.economist.com/asia/2007/12/19/jobs-for-life>; *Nagoya court rules Toyota employee died from overwork*, THE JAPAN TIMES (Dec. 1, 2007), <https://www.japantimes.co.jp/news/2007/12/01/national/nagoya-court-rules-toyota-employee-died-from-overwork/>.

⁷⁶ Marco Margaritoff, *This Japanese Firm Wants to Use Drones to Force Overtime Employees to Go Home*, THE DRIVE (Dec. 8, 2017), <http://www.thedrive.com/aerial/16812/this-japanese-firm-wants-to-use-drones-to-force-overtime-employees-to-go-home>.

⁷⁷ Or Ryall, *supra* note 66.

⁷⁸ *Id.*

for their work.⁷⁹ When employees are not however, this constitutes a cause of action known as wage theft. The Department of Labor dictates "Every employer shall pay to each of his employees . . . who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce."⁸⁰ Interpreting this law to the most basic understanding; the time it takes for an employee to answer a text or respond to an email while not at work could constitute a cause of action. Although it is unlikely that an employee would bring a cause of action for the five minutes it takes to respond to an email or answer a phone call, that time adds up quick. For example, if an employee takes fifteen minutes a week to answer emails without getting paid, that is thirteen hours of pay the employee loses per year. In 2014 researchers valued the average loss per worker per year was \$2,634.⁸¹

The total annual wage theft from front-line workers in low-wage industries in the three cities approached \$3 billion. If these findings in New York, Chicago, and Los Angeles are generalizable to the rest of the U.S. low-wage workforce of 30 million, wage theft is costing workers more than \$50 billion a year.⁸² Wage theft is a prevalent issue in the United States. In 2014 the Department of Labor recovered \$280 million in wage and hour violations.⁸³

A claim for wage theft does provide some remedy for employees who were given directions to complete an assignment and were either not paid overtime or were just not paid at all, could recover damages. This would be the natural starting point for the employee's remedy. A claim for wage theft however usually has a focus on non-exempt employees as non-exempt employees are more likely to have under reported hours. However as discussed before a claim for wage theft can also arise from a misclassified employee collects from under-reported hours.

There are many different penalties that right to disconnect legislation, however finding the right penalty for implementation of a right to disconnect law is essential. By comparing the different right to disconnect laws, the result will be the most effective right to

⁷⁹ 29 U.S.C. § 206 (2018).

⁸⁰ 29 U.S.C. § 206(a) (2018).

⁸¹ Brady Meixell & Ross Eisenbrey, *An Epidemic of Wage Theft is Costing Workers Hundreds of Millions of Dollars a Year*, ECONOMIC POLICY INSTITUTE (Sept. 11, 2014), <https://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/>.

⁸² *Id.*

⁸³ U.S. Dep't of Lab., Budget in Brief, 47 (FY 2012).

disconnect law in the future.

CONCLUSION

A right to disconnect law restricts employers from forcing employees to work after business hours.⁸⁴ This allows employees to be able to “disconnect” from their work after employees leave the office for the day. The question behind this article has been if right to disconnect legislation were to be implemented in the United States, how the law would affect past enacted legislation, and how it would affect the FLSA. The short answer, it would change the legislative framework of the FLSA, and appropriate sanctions would include monetary relief to the employee and punitive damages to the employer.

The landscape of the FLSA would drastically change, the biggest change would be to the definition of an exempt employee. Under the current law an exempt employee can be called to complete a task at any time. However, if the right to disconnect legislation is implemented and exempt employees are not required to answer to their employers at any time, then the definition of exempt employee will change.

Damages for violation of the right to disconnect legislation should include both punitive damages and monetary relief for the employee. monetary damages being for the employee to recuperate back pay whereas the punitive damages being an incentive for litigation.

As technology makes more advances, so will the workplace, nothing needs to wait anymore as a request from a boss that was traditionally waited until the next day in the office is now a matter of a simple text and email. An employee makes enough sacrifices during working hours, their sacrifices do not need to continue in their free time.

⁸⁴ David Z. Morris, *New French Law Bars Work Email After Hours*, FORTUNE (Jan. 1, 2017, 12:51 PM CST), <http://fortune.com/2017/01/01/french-right-to-disconnect-law/>.