LEGISLATING A RIGHT TO DISCONNECT

UNI GLOBAL UNION
PROFESSIONALS & MANAGERS

1 BACKGROUND

The purpose of this briefing is to provide guidance to unions that want to campaign and lobby for the introduction of a right to disconnect in their national laws. The previous guides published by UNI Professionals and Managers were directed at unions seeking to negotiate a right to disconnect with employers without the support of a national law. This briefing draws upon our previous work, and the best practices guide in particular should be consulted in conjunction with this briefing.

The right to disconnect refers in short to the right of workers to disconnect from their work and to not receive or answer any work-related emails, calls, or messages outside of normal working hours. It is designed to establish boundaries around the use of electronic communication and to provide workers with an opportunity to improve their work-life balance and ensure that they receive adequate rest and family time. It also protects workers against any negative repercussions for disconnecting.

The right to disconnect emerged as a legal right in France in 2016 and quickly spread to other countries in Europe. Chile was the first country outside Europe to legislate a right to disconnect in 2020 in connection with its new law on remote work during the COVID pandemic and was followed by Argentina a few months later.

As legal systems can vary greatly from country to country, it is not possible to cover all possible aspects of legalizing a right to disconnect in this briefing. Instead, we aim to provide guidance and inspiration for national unions that are themselves experts on the laws in their countries and that wish to campaign for a legal right to disconnect.

Note that the translations of the laws relied upon in this briefing are not official translations and should not be quoted as such.

2 EXISTING LAWS

FRANCE

The right to disconnect as a legal right emerged in France, where in 2016 a law (the so called El Khomri law) was enacted that introduced the right to disconnect as a topic for mandatory negotiation in companies with more than 50 employees.[1] The law built upon a 2001 French Supreme Court ruling that "the employee is under no obligation either to accept working at home or to bring there his files and working tools",[2] and a 2004 decision by the same court that an employee cannot be reprimanded for being unreachable outside working hours.[3]

The law also followed a National Interprofessional Agreement signed by the social partners on 19 June 2013 called "Towards a policy to improve the quality of life at work".[4] This agreement included, under the heading of proper use technology and respect for workers' private life, the notion of protecting workers' "time to disconnect" – something that had already been tested in a number of companies in France at the time.

In the 2016 reform of the labor code, the French government thus included in the chapter "Adapting the Labor Law to the Digital Age" a provision to amend the labor code and introduce a right to disconnect as a subject for mandatory negotiations between the social partners at the company level. By adding a new paragraph

7, Article L2242-17 of the labor code stated the following: "The annual negotiations on equal opportunities between women and men and the quality of working life cover ... The terms enabling employees to fully exercise their right to disconnect and the introduction by the company of schemes regulating the use of digital tools, with a view to ensuring compliance with regulations governing rest and leave periods, privacy and family life."

Workers in both the private and public sectors shall have a right to disconnect in order to ensure respect for their periods of rest, leave, and holidays, as well as for their personal and family privacy.

It further noted that if the social partners cannot reach an agreement, "an employer may draw up a charter, following consultations with the Works Council or, if such does not exist, with staff representatives. Such charter shall define the terms for exercising the right to disconnect while also providing for the implementation of training and awareness-raising measures relating to the reasonable use of digital tools. Such measures shall target employees, supervisors and management."

SPAIN

Following the adoption of the French law, the Spanish government in 2017 began studying the possibility of securing a right to disconnect in Spanish law as well. On 6 December 2018, the government adopted the new Data Protection Act, which transposed the 2016 European Union (EU) General Data Protection Regulation (GDPR) into Spanish law but which also introduced a new set of digital rights for both citizens and employees.[5] Article 88 thus stipulates that workers in both the private and public sectors shall have a right to disconnect in order to ensure respect for their periods of rest, leave, and holidays, as well as for their personal and family privacy.

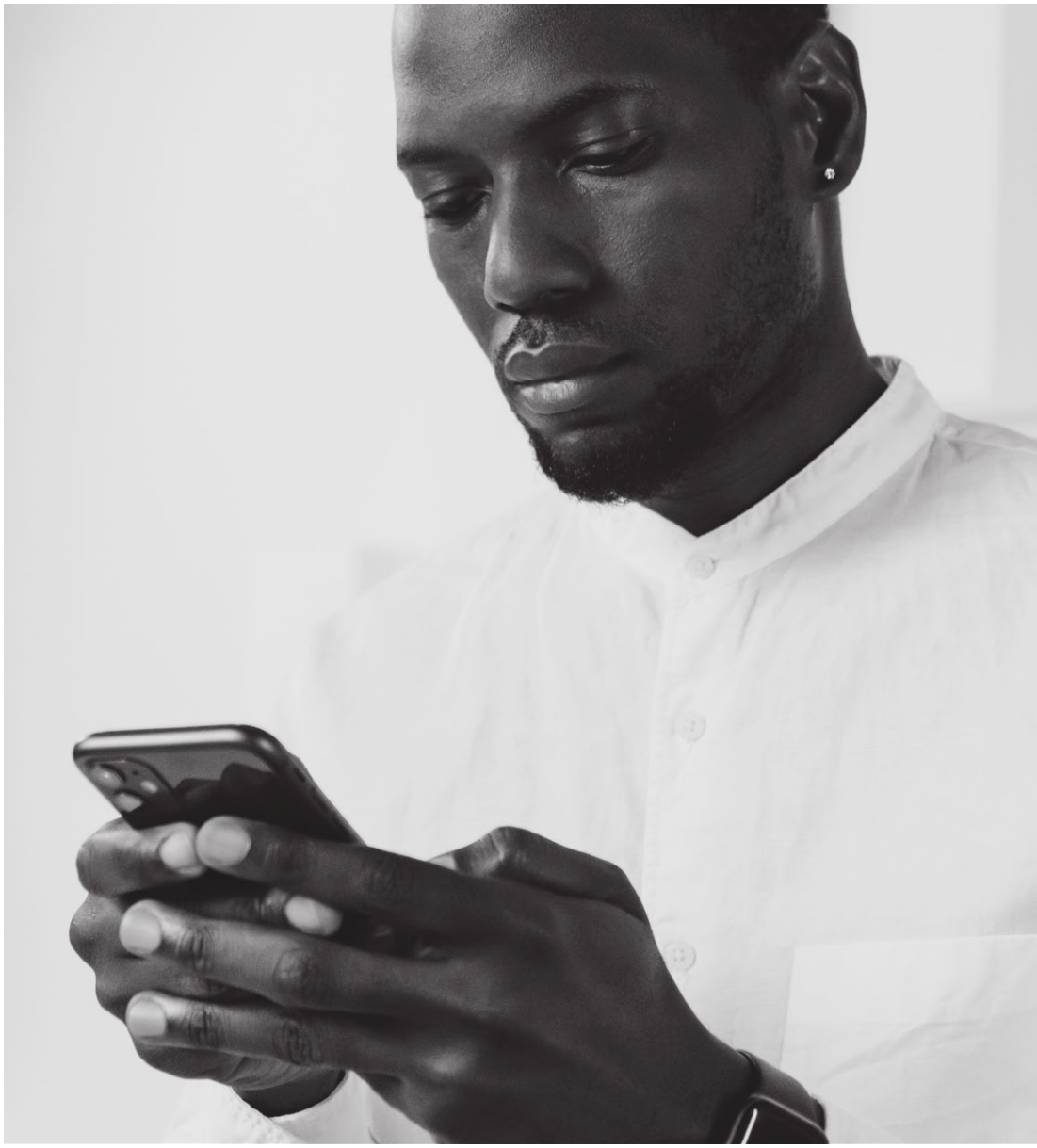
The law does specify, however, that the enjoyment of the right to disconnect must take into account the nature of the employment relationship in question, and that the right may be flexible or even inapplicable if the employment relationship does not allow it.

Like the French law, the Data Protection Act prescribes a central role for the social partners in negotiating the details of the right to disconnect. If there are no unions present, it shall instead be agreed between the company and the worker representatives. The employer shall then prepare an internal policy for all staff, including staff in managerial positions, outlining the proper exercise of the right to disconnect and ensuring that staff receive training on the reasonable use of technology to avoid the risks of digital fatigue. The law specifically notes that workers who work remotely or from their homes either occasionally or regularly shall also enjoy the right to disconnect.

ITALY

A debate about the right to disconnect also ensued in Italy in 2016 following the French example. Two bills were introduced in the Italian Senate to regulate this right, with Bill No 2229 explicitly proposing that workers have the right to disconnect from technological devices and from online platforms without suffering any consequences with regard to their labor relationship or compensation. On 14 June 2017, the right to disconnect was eventually codified into law when Law No. 81/2017 on "Smart Working" was enacted to update the country's outdated legislation on teleworking and to promote and provide a framework for new forms of remote working and facilitate workers' work-life balance.[6]

"Smart work" is in Italy defined as work with no precise constraints in terms of working hours or place of work. Work can thus be done partly from home or



from another place of work as long as it is suitable for performing the job. The employer and the employee must agree in writing about the terms and conditions of "smart working", which must include provisions about the employee's rest periods as well as the technical and organizational measures necessary to ensure the employee's right to disconnect.[7]

The main difference between the Italian law and those of France and Spain is that in Italy, the right to disconnect is limited to workers performing "smart work" and does not apply generally to the broader workforce. "Smart working" has increased since the passing of the law, however: Whereas an estimated 250,000 Italian workers worked flexibly in October 2016,[8] as of October 2019 more than 570,000 workers benefited from this form of working.[9] The Italian government also made a number of references to "smart working" in decrees issued in 2020 in connection with the COVID-19 crisis to broadly enable and promote remote working during the pandemic.[10]

BELGIUM

The issue of disconnection in Belgium is covered in a law of 26 March 2018 called the "Act regarding the strengthening of economic growth and social cohesion", which was introduced as part of a series of initiatives to reform Belgian labor law.[11] The act made it mandatory for employers with more than 50 employees to discuss the issue of disconnection and the use of digital tools with the workplace health and safety committee. The stated purpose of

these provisions was to ensure respect for employees' periods of rest, holidays, and leave, and their balance between work and private life.

Employees in Belgium thus have a right to discuss issues of disconnection with their employers, but they do not have a right to disconnect in the strict sense of the term. The employer can adopt disconnection policies after consulting with the committee but is not required to do so. The law also does not prescribe how often the employer should meet with the committee but notes that it should do so regularly and whenever there are significant changes in the company, and whenever the committee asks for it. In case there is no health and safety committee in place, the trade union delegation can play this role instead.

CHILE

Chile became the first country outside Europe to legislate a right to disconnect when on 26 March 2020 it adopted Law 21.220 to amend the labor code with a new chapter on remote working and teleworking.[12] The timing of the law coincided with the COVID-19 crisis in the country and efforts to limit the spread of the virus, although draft legislation on the right to disconnect had already been proposed at the end of 2018 and approved by the lower house of Congress in April 2019.

While the draft legislation sought to extend the right to disconnect broadly to workers in both the public and the private sector to safeguard their periods of rest, leave, and holidays, as well as their personal and family privacy, Law 21.220 only deals with the right in the context of remote work – like the Italian law on smart working.

The law stipulates that an employer and an employee can make an agreement for flexible work arrangements, where the employee can carry out their work partially or completely from a different location than the company's premises. They can also agree on flexible working hours for the employee, while taking into account the general stipulations on working hours in the labor code, including a minimum 12 hours of consecutive rest between periods of work. In this context, the time of disconnection shall also be agreed upon.

ARGENTINA

Following in the footsteps of Chile but building upon years of efforts and proposals to regulate remote working in the country, the Argentinian Senate adopted on 30 July 2020 law 27.555 on telework.[13] Article 5 of the new law introduces a right to disconnect, noting that remote workers have a right to disconnect from ICT-tools outside of their working day and during holidays. The Argentinian law is the first law globally with specific language to protect workers from sanctions for exercising their right to disconnect. It further stipulates that the employer cannot communicate with or ask their employees to perform tasks outside of normal working hours.

The law was published in the official government bulletin on 14 August but will only be effective 90 days after the end of the restrictions put in place by the Argentinian government in March 2020 to tackle the COVID-19 crisis. Prior to the adoption of the law on telework, a draft law (S723/2020) had been introduced in the Senate to establish a right to disconnect for all workers in Argentina.[14] The draft included several important elements of a comprehensive right to disconnect, such as a prohibition of sanctions and premiums for workers who disconnect and stay connected, respectively, a reference to the need for the social partners to negotiate the modalities of the right to disconnect, and the notion of a suspension of a right to disconnect only in case of emergencies or essential situations that have been previously defined.

3 OTHER LEGISLATIVE ATTEMPTS

PHILIPPINES

In January 2017 a bill was submitted to the Philippine House of Representatives to amend the labor code and legislate a right to disconnect in the country.[15] The bill would have expanded the definition of working hours to include time spent reading and responding to work-related communications after working hours, and would have clarified that an employee shall not be "reprimanded, punished, or otherwise subjected to disciplinary action if he or she disregards a work-related communication after work-hours". It would further have added an obligation on the employer to establish the hours when employees are not supposed to send or answer work-related communication.

Following the submission of the bill, it was referred to the Committee on Labor and Employment where the matter has officially been pending since 17 January 2017. Later that same month, however, the Secretary of the Department of Labor and Employment did issue a statement saying that it is up to the employee to decide whether to respond to work-related messages from their employers after office hours. He noted that "Answering or ignoring texts and emails from employers after working hours is a voluntary engagement of an employee, and they are not obliged to respond. The right to

disconnect is a choice of an employee." The Secretary added that completely disconnecting would not apply for certain jobs, and that the employers must be the ones to implement a policy in accordance with the standards of the labor code, which will benefit both parties.[16]

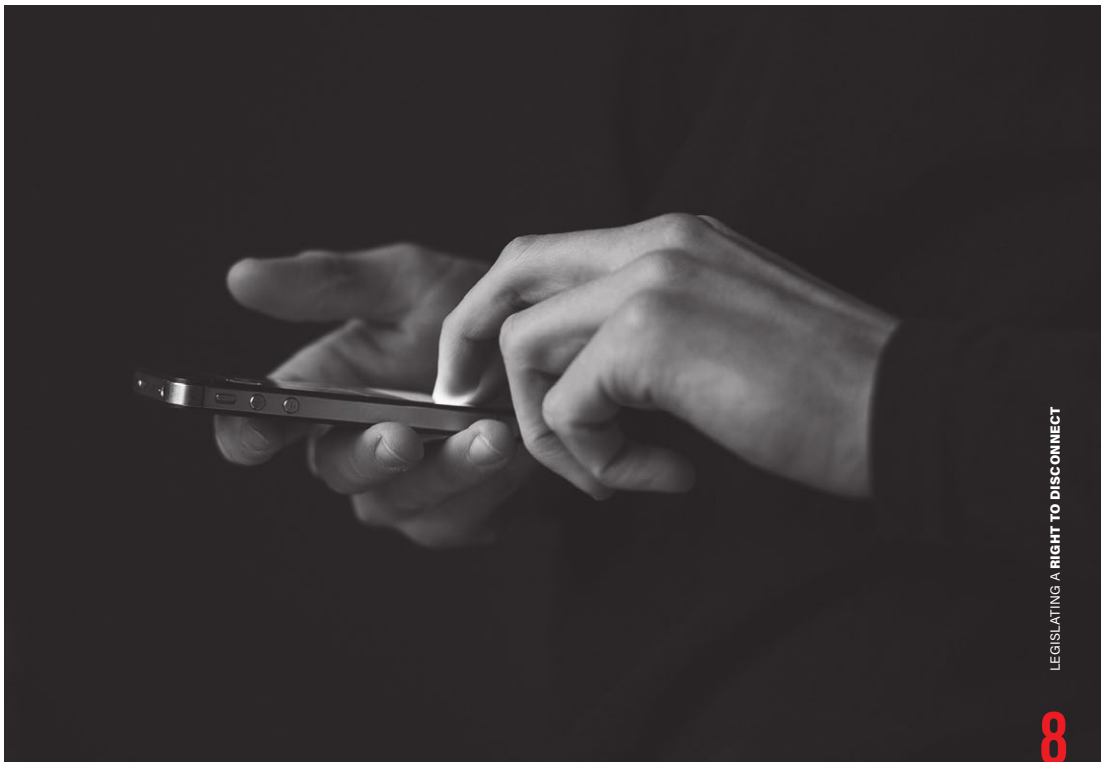
CANADA

There have been two separate initiatives in Canada to regulate a right to disconnect. At the federal level – which covers federally-regulated workplaces in sectors such as transportation, banking, and telecommunications and which includes around 6% of the Canadian workforce – and at the provincial level in Quebec. In Quebec, Bill 1097 was introduced in the National Assembly in March 2018 to "ensure that employee rest periods are respected by requiring employers to adopt an after-hours disconnection policy".[17] Under this policy, employers would have had to determine the weekly periods when employees were entitled to disconnect from all work-related communication, and would also have had to provide for a protocol for the use of communication tools after hours. The bill also proposed minimum and maximum fines for employers who failed to produce either a workplace disconnection policy or an annual status report. The bill only progressed to a first reading and was abandoned in June 2018.

The federal government in 2018 issued a report from a year-long consultation into modernizing the federal labor code in which the right to disconnect was highlighted as a prominent issue. The topic was further investigated by an Expert Panel on Modern Federal Labour Standards, which was appointed by the Canadian government in February 2019. The Panel published its findings in June the same year and recommended that there not be a statutory right to disconnect as it would "currently be difficult to operationalize and enforce." The Panel instead recommended that employers covered by the labor code consult with their employees or their representatives and issue policy statements on the topic of disconnection.[18]

USA

In March 2018, Bill 0726-2018 was submitted to the New York City Council to amend the city's legislation and introduce a right to disconnect.[19] The bill would make it illegal for private sector employers with more than 10 employees to require their workers to stay connected to work after their formal working day ends, except in cases of emergency. It would further



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Local governments would need to provide counseling services to help workers maintain work-life balance and to establish ‘digital detox centers’.

require these employers to adopt a written policy regarding the use of electronic communication tools outside of normal working hours, and would prohibit any retaliation or threat of retaliation against an employee exercising or attempting to exercise their right to disconnect. It would also establish a complaints system for workers and a system of supervision for the New York City Department of Consumer Affairs[20] tasked with enforcing the law. The bill would also provide for fines for employers who breach the law.

The first hearing of the bill took place in January 2019 in the Committee on Consumer Affairs and Business Licensing. The response to the bill was mixed, and the bill has since not moved in the city’s legislative process.

INDIA

In December 2018, a bill to regulate the right to disconnect was also introduced in the Indian Parliament’s lower house. Called “The Right to Disconnect Bill”, it aims to recognize the right to disconnect as a way to reduce stress and to ease tensions between employees’ personal and professional lives.[21] It includes elements of (draft) bills seen elsewhere, like protection against retaliation if an employee does not answer calls after the formal working day ends, and the requirement to negotiate with employees and unions about the terms and conditions of disconnection. It also includes some novel ideas: local governments would need to provide counseling services to help workers maintain work-life balance and to establish “digital detox centers” to this end as well. The bill also foresees a penalty of 1% of total company payroll if an employer breaches the law.

In India, bills introduced by Members of Parliament are called “Private Members’ Bills” – as opposed to bills introduced by the government. While no private members’ bill has become law since 1970, these bills have influenced governments and subsequent legislation on important issues and are thus not without importance.

4 ANALYSIS AND RECOMMENDATIONS

There is no question that the French law has been a great catalyst for initiatives around the world to legislate a right to disconnect, as all the laws and proposals outlined above draw upon it to some extent. In this section we analyze the different laws and proposals to develop a set of recommendations that can be relied upon when seeking to introduce a right to disconnect in national legislation.

1 PRESCRIBE A ROLE FOR SOCIAL PARTNERS

Social partners play a central role in defining the modalities (practical details) of right to disconnect policies in the workplace, and national laws should necessarily prescribe a role for them in further negotiating the right to disconnect. The French and Belgian laws only mention the right to disconnect as a topic for negotiations between unions and employers without further stipulating what the right entails. This can be feasible in countries with high union density and collective bargaining coverage, but it would be advisable to include in national laws some basic principles – like the prohibition against penalizing workers who disconnect – and define a minimum right that can then be expanded upon by the social partners.

2 BE EXPLICIT

While it is possible to derive a right to disconnect from existing working time legislation (see below),[22] and while different language can be used to describe the issue of disconnection and the need for work-life balance, the right to disconnect should ideally be explicitly recognized as a right and so embedded in national law. While the right existed in French case law before 2016, it was only after the adoption of the new law and the specific reference to a right to disconnect that the right was broadly recognized and bargained into collective agreements.

3 DEFINE THE RIGHT

It is advisable to provide a brief explanation of the right to disconnect and highlight its most important principles in law. Chief of these is the protection of workers who exercise their right to disconnect, in that they should not suffer any negative consequences for disconnecting. It could also be worth mentioning that no favorable treatment should be afforded to workers who are constantly connected, in order to ensure non-discrimination in the workplace. Protection against retaliation is only explicitly stated in the Argentinian law (it was also included in the draft bills in the Philippines, India, and USA), but it is mentioned in many collective agreements as a foundational principle of the right to disconnect. It may also be pertinent to note that the right to disconnect does not mean an obligation to disconnect, and that exceptions to the right to disconnect rule can be provided for in essential or emergency situations – as long as these have been previously defined.

4 PROVIDE A RATIONALE

Most of the laws that recognize a right to disconnect also mention that the purpose of the law is to ensure respect for workers' periods of rest, leave, and holidays, as well as for their personal and family life. The benefit of including specific statements like this in the law is that it draws attention to the arenas that need to be protected (daily rest periods; different forms of leave, including medical leave; and holidays and vacations) and highlight that the impact of constant connection is not only on workers' private lives, but on their family lives as well.

5 ANCHOR IN EXISTING LEGISLATION

There are different options for linking the right to disconnect to other existing legal rights. The first option is to make the obvious link to working time, as provisions on working and rest times exist in most, if not all, legislations. Working time legislation normally defines what counts as work and specifies maximum working hours and minimum daily and weekly rest periods. One benefit of discussing the right to disconnect within this framework is that it draws attention to the fact that checking emails or messages after the formal working day ends is actually work and should be counted as such. Thus, if workers check their emails in the evening then that would count as overtime or on-call time and they would be entitled to compensation.

A second option is to link disconnection to remote work, as in the case of the Italian, Chilean, and Argentinian laws. Having a right to disconnect when working remotely is important, as the risk of a blurring between private time and working time is significant. This was also the experience of many during the COVID-19 crisis when millions were forced to work from home. However, the right to disconnect should

not be limited only to workers who work remotely; it is equally important that those who work in a traditional office environment and attend to electronic communications at home in the evening or during weekends are covered by the right to disconnect.

A third option is to treat the right to disconnect as part of a set of digital rights, which is the case in Spain. As mentioned above, Spain's 2018 Data Protection Act built upon the GDPR and introduced a range of rights for both citizens and employees. While this approached worked in Spain as part of their comprehensive reform of digital rights, it may not be as easy to implement elsewhere, in particular outside the realm of the EU's GDPR.

A fourth and more exploratory option would be to link disconnection to occupational safety and health laws and the employer obligations to provide workplaces free from hazards. Stress caused by being constantly connected or on-call and not being able to disconnect, rest, and recover can have serious implications for a worker's physical and mental health, and can inter alia lead to anxiety, depression, and burnout.[23] Employer disconnection policies and practices could thus be one way to limit their workers' exposure to these occupational hazards.

6 IMPLICATE ALL EMPLOYEES

The right to disconnect should be broadly provided to all workers regardless of their employment status (full-time/part-time/gig/self-employed), sector of work (public/private), employment type (managerial/non-managerial), work location (office/remote), etc. Managers may not always qualify for overtime compensation according to national laws, but it is important that the other principles of the right to disconnect apply to them as well. Managers also play a key role in the implementation of disconnection policies in the workplace as they can set good examples for their teams, and are explicitly mentioned in the French and Spanish laws. Furthermore, considering the importance of training with regard to the use of digital tools and disconnection, it could be worth including language in the national law on this, like in the French and Spanish cases.

7 WHAT ABOUT REMEDIES?

The US proposal envisioned the setting up of a complaints procedure for workers whose right to disconnect had been breached by their employer. Complaints procedures have also figured in other proposals, and it could be worth investigating whether that would be feasible in another country, depending on its administrative and legal structures as well as the role and strength of its trade unions.

The laws that currently prescribe a right to disconnect do not contain such mechanisms, nor do they specify fines for employers that violate the right. The draft laws in India, Quebec, and the US included explicit penalties for employer violations, but again these proposals have not become law.

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6 Law No. 81 of 22 May 2017. https://www.gazzettaufficiale.it/eli/id/2017/06/13/17G00096/sg

7 Ibid., art. 19

8 https://www.corporatelivewire.com/top-story.html?id=the-new-regulation-on-smart-working-in-italy

9 https://www.warwicklegal.com/news/326/italy-smart-working-agile-performing-and-increasing

10 Most notably decree 34/2020. It should be noted, however, that the form of remote work promoted by the government did not have the same characteristics of true "smart working", which entails a large degree of flexibility on the part of the employee as to the place and hours to work

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22 This has been the approach in Germany, where many collective agreements that include the right to disconnect have been signed despite German legislation not specifically providing for a right to disconnect

23 See e.g. William J. Becker, Liuba Belkin, Sarah Tuskey, "Killing me softly: Electronic communications monitoring and employee and spouse well-being", Academy of Management Proceedings, 2018 (1)

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