

Global roundtable: Employer considerations for the “right to disconnect” law

WEBINAR SERIES

LEGAL UPDATES

FOR CANADIAN EMPLOYERS

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The background features a dense arrangement of large, vibrant green leaves, likely Philodendrons, with prominent veins. A semi-transparent purple shape, resembling a large arrow pointing to the right, is overlaid on the left and center of the image. The text is positioned within this purple area.

Ontario, Canada

Emily Kroboth

Ontario – Is there really a “right” to disconnect? disconnect? What is the “right to disconnect”?

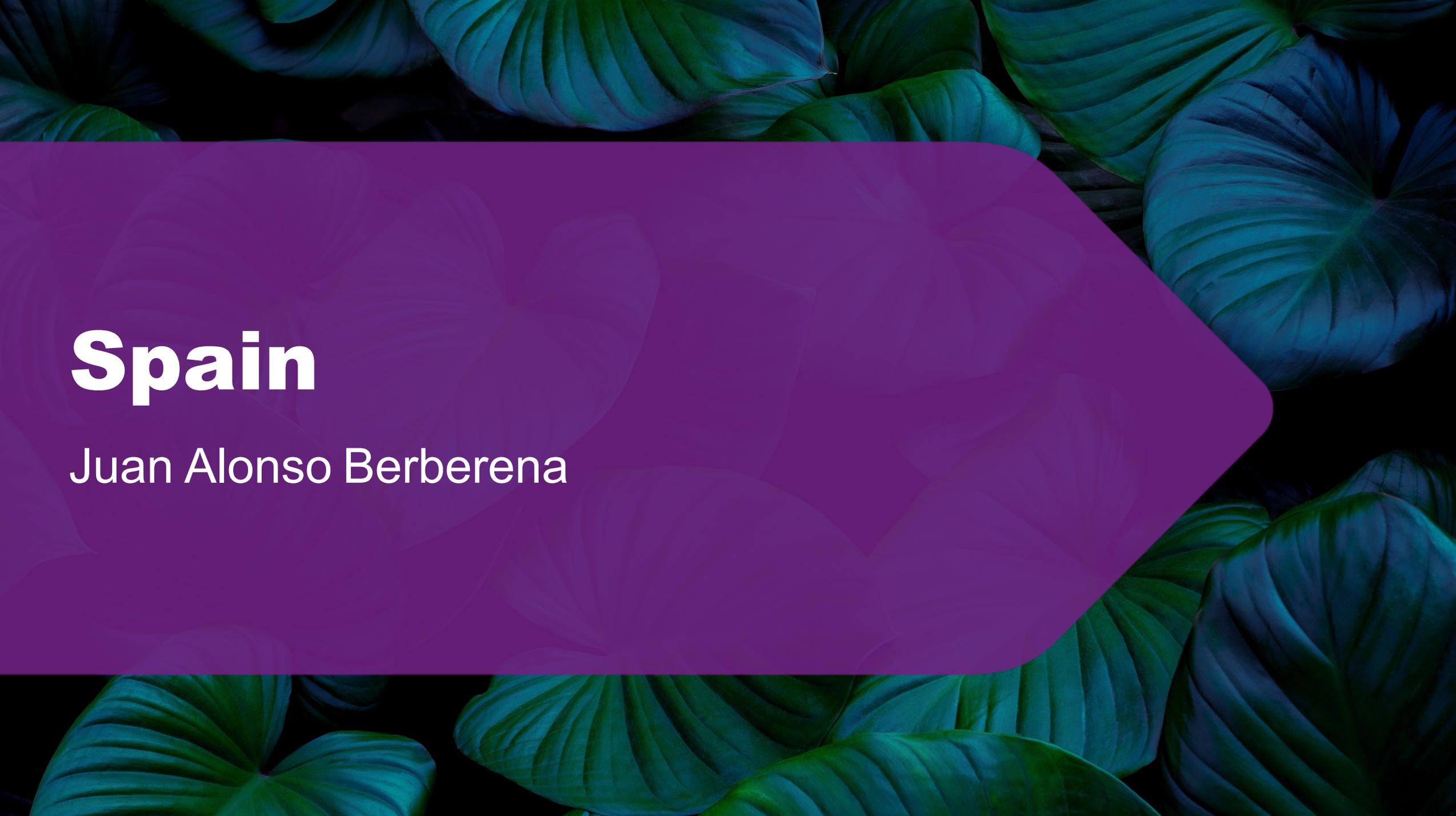
- “Disconnecting from work” means “not engaging in work-related communications, including emails, telephone calls, video calls or the sending or reviewing of other messages, so as to be free from the performance of work.”
- The legal requirement for a policy with respect to disconnecting from work is simply to have one. Currently there are no specific requirements for the content of these policies.
- There are currently no “prescribed” requirements – but this may change if and when the Ontario government releases regulations.
- Ultimately, there is no “right” to disconnect in Ontario.

So what should your “Disconnect from Work” policy contain?

- Employers currently have the flexibility to determine what their “right to disconnect” or their “disconnecting from work” policy should state.
- Some questions to consider, as you think about drafting your organization’s policy:
 - What are your organization’s priorities?
 - To what extent can you, or would you like to, allow your employees to disconnect from work?
 - Do you have employees working non-traditional working hours, for example, due to children learning from home during the pandemic?
 - Do you encourage managers to contact their team within standard working hours?
 - Could you leverage “disconnecting from work” as a retention strategy?

The road ahead for Ontario Employers

- Employers require a “disconnecting from work” policy by June 2nd, 2022.
- The team at Dentons has prepared a template “disconnecting from work” policy, along with an FAQ document.
- If you’d like a copy of the template and the FAQ, please reach out to a Dentons team member.

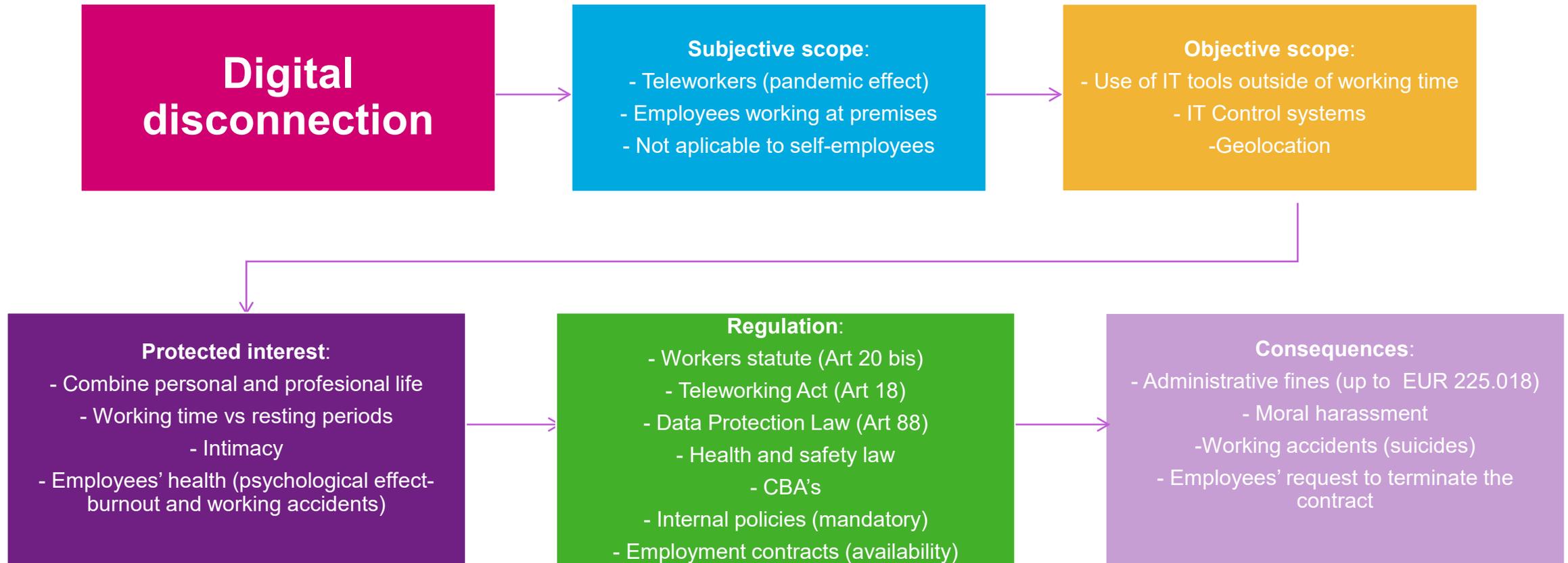
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Spain

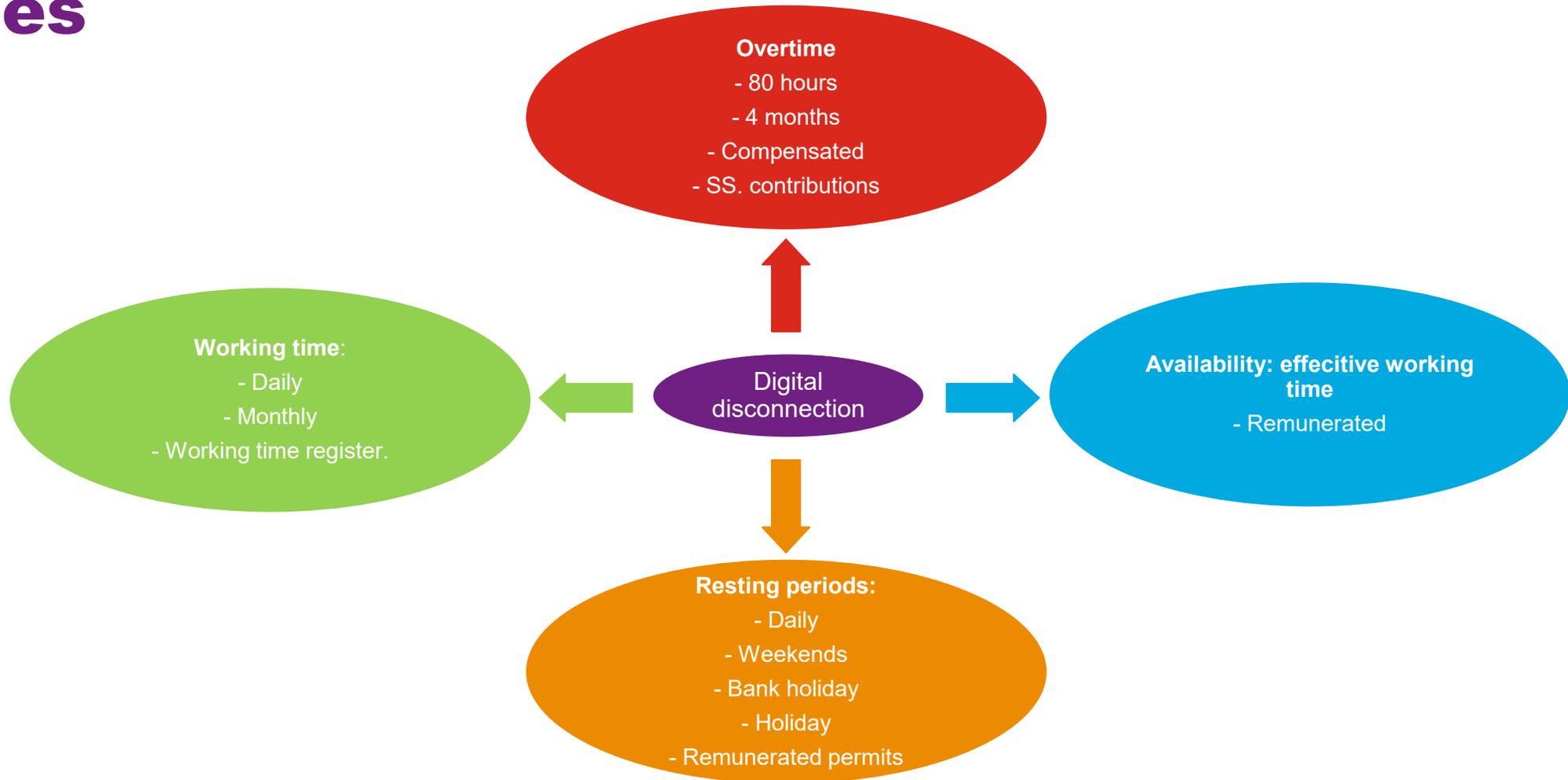
Juan Alonso Berberena

What is digital disconnection?

Executive approach



Digital disconnection vs. Employment rights and duties



Managing cases

Three examples



Long trips and availability



Receiving 25 emails after
22:00



Emergencies during
holiday and losing the
right

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Italy

Luca De Menech

The right to disconnect: The substantial definition

- The “**right to disconnect**” refers to the employee's right to be able to disconnect from work and refrain from engaging in work-related electronic communication, such as emails and other messages, during non-work hours and holidays.
- The above-mentioned right should allow employees **to disconnect from work tools and not respond to employer requests outside of working hours**, without incurring the risk of negative consequences, such as termination and other retaliatory measures. On the other hand, employers should not require workers to work outside of working hours. Employers should not promote an "always connected" work culture in which workers who waive their right to disconnect are clearly favored over those who exercise that right.
- The right to disconnect **aims** at ensuring **the protection of employees' health and safety** and fair working conditions, including **work-life balance**.
- This issue has become increasingly important as a result of the **frequent use**, especially during the Covid-19 emergency period, of so called smart working (i.e. remote working).

Smart-working in Italy during the COVID-19 emergency: Some statistical data

The use of smart working in Italy and comparison with other main European countries (Eurostat data 2018):

Country	% employees employed with smart working modalities
European Average	11,6%
UK	20,2%
France	16,6%
Germany	8,6%
Italy*	2,0%

** Third last in Europe, just above Cyprus and Montenegro*

Year of reference: 2018 - Source: Eurostat

Smart working in Italy during the COVID-19 emergency: Some statistical data

- At the beginning of the COVID-19 outbreak (i.e. **January-February 2020**), the number of employees employed with smart working modalities was 1.2% of the total number of employed persons in Italy.
- In the lockdown period (**March-April 2020**) that percentage grew significantly, on a national basis, to **8.8%**.
- At the end of the collective quarantine (**May-June 2020**) this percentage was reduced, however registering a consolidated average increase of **+4.1%** (settling at 5.3%).
- The greatest increase was recorded in **medium-large companies** (50-249 employees) and **large companies** (250+ employees), which during the lockdown phase recorded a percentage of **21.6%** and **31.4%**, respectively. This means that in large companies, one in four employees was still in smart-working mode during phase 2.

	January-February 2020	March-April 2020	May-June 2020
3-9 employees	1,2	7,8	4,5
10-49 employees	1,4	11,1	7,1
50-249 employees	2,2	21,6	16,2
250 employees and more	4,9	31,4	25,1
TOTAL	1,2	8,8	5,3

Smart working: The main provisions

Smart working is a **particular way of performing working activity** taking place:

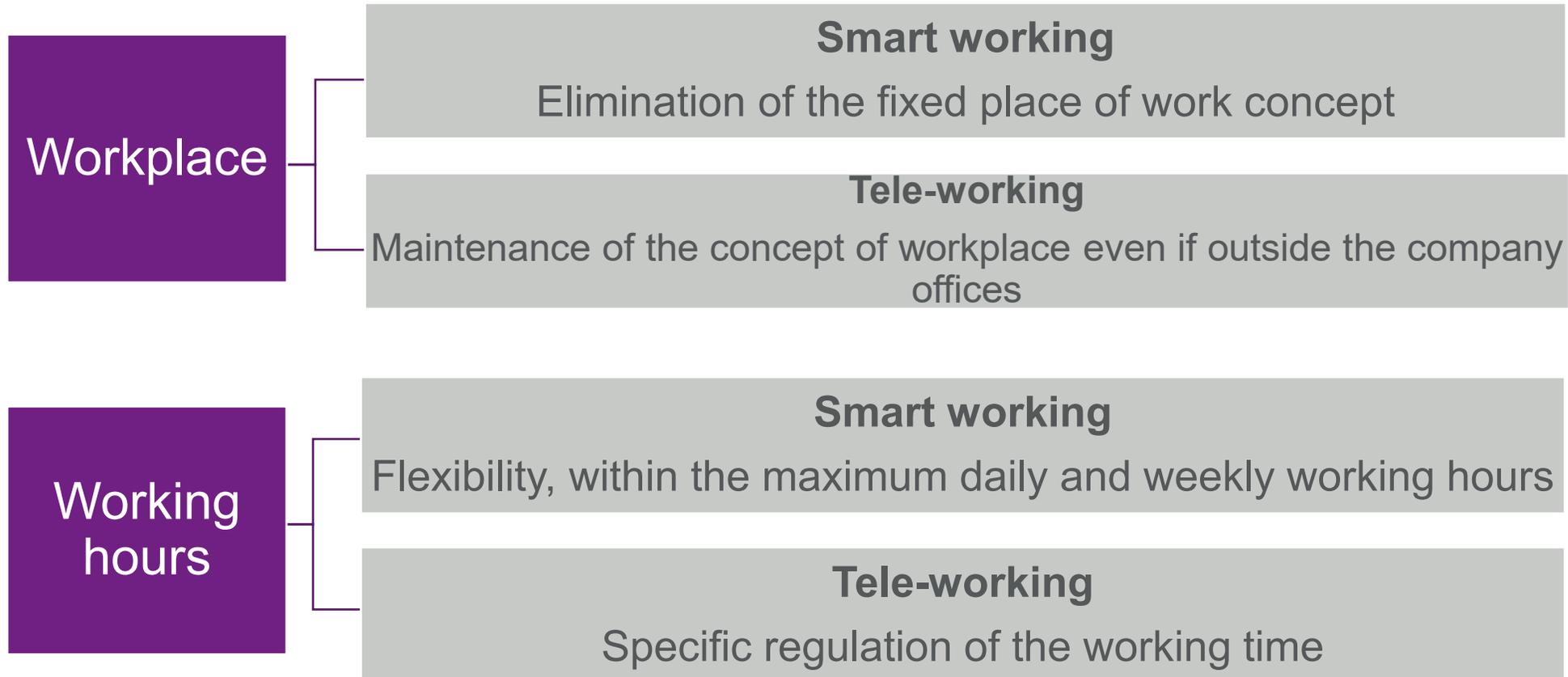
- (i) partly outside the company's premises;
 - (ii) without precise time or place of work constraints (notwithstanding the maximum daily and weekly working time limits resulting from the law and collective agreements);
 - (iii) with the possible use of technological instruments.
-
- Smart working is ruled by **Law 22nd May 2017 no. 81** which provides for the implementation of this type of remote working through **individual agreements between the employer and the employee**.
 - Furthermore, until **31st March 2022** (i.e. the alleged end of the State of national emergency), it is possible to use smart- working **even in the absence of an individual agreement with the employees**.

Tele-working: The main provisions

- Tele-working is defined as a form of **work organization and/or performance using information technology within the framework of an employment contract or relationship, in which the work, which could also be carried out on the company's premises, is regularly carried out outside the company's offices.**
- To implement tele-working, the employer and teleworker must separately agree on the following in writing:
 - Nature and type of work to be performed by the teleworker;
 - Teleworker's direct supervisors;
 - Manner in which the service is to be performed;
 - Working hours;
 - Health and safety;
- Tele-working is regulated at national level by the **Interconfederal Collective Bargaining Agreement dated 9th June 2004** (implementing the European Framework Agreement on tele-working of July 16, 2002).

National Collective Bargaining Agreements are allowed to adapt/integrate the principles and criteria of the Agreement of June 9, 2004.

Differences between smart working and tele-working



Common features between smart working and tele-working

- **Voluntary decision of the employees, as an agreement with him/her is necessary:** joining tele-working and smart working is a free choice of the employee (important: this principle was waived in the COVID-19 period only for smart-working, but not for tele-working).
- Agreement that in any case must provide for different items, depending on the kind of remote working (smart working – teleworking) and this has an impact on the right to disconnect

The right to disconnect: Entitled workers

- The right to disconnect essentially concerns **employees who perform their activities with smart working modalities and not also those who perform their activities with tele working.**

The right to disconnect: Art. 19 of Law no. 81/2017

- According to Art. 19 of Law no. 81/2017, in order to implement smart working the employer must enter into **an individual agreement** with the concerned employee.
- The agreement must necessarily regulate several aspects, among which the tools used by the employees and the technical and **organizational measures necessary to ensure his/her disconnection from the technological work equipment.**



Therefore, there is a regulation on the right to disconnect but the relevant content is let to the will of the parties.

The right to disconnect: Art. 19 of Law no. 81/2017

- The National legislation does not establish a real subjective right of the employee to disconnect from IT tools, opening, rather, only to **the possibility of regulating the terms through individual agreements** between the parties of the employment relationship
- An **individual agreement**, may not be able to protect the employee, considering the unequal bargaining positions of the parties of an employment relationship (also considering that up to 31 March 2022 no agreement is necessary)  better solution would have been to let the negotiation to the Unions
- In any case, it is provided **only for employees in smart working** (not self employees) and then not for tele workers or self employees
- Moreover, there is still a **lack of sanctions** to protect the right to disconnect.

Developments following the introduction of Art. 19 of Law no. 81/2017: The Italian Data Protection Authority Act No 453 of May 13, 2020

- “[...] *The spread use of smart working - generally necessitated and improvised by both employers and workers - has brought a significant proportion of the population into a situation where they are not always fully aware of the implications and any improper use must be prevented. [...]*”
- ***It should also be ensured - more clearly than already provided - that right to disconnect, without which there is a risk of nullifying the necessary distinction between private life space and work activity, thus nullifying some of the oldest achievements of traditional work.***
- *To ensure, therefore, that the new technologies represent a factor of social progress (and not regression), enhancing rather than compressing the freedoms affirmed in the field of work, it is essential to ensure their sustainability from the democratic point of view and compliance with certain inalienable principles”.*

2) Resolution of the European Parliament of January 21, 2021

- The European Parliament, with the **Resolution of January 21, 2021**, entitled “*Recommendations to the Commission on the Right to Disconnect (2019/2181(INL))*” considered that the European Commission, having assessed and addressed the risks of not **protecting the right to disconnect**, should adopt an EU directive on the issue.
- The European Parliament, in order to overcome a substantial legislative lack, has included the **digital disconnection within the fundamental rights of the individual**, charging the European Commission to issue an EU Directive in order to uniform the minimum regulatory requirements.
- **The right to disconnect is defined in the Resolution as the right of employees not to engage in work-related tasks or communications outside of working hours by means of digital tools, such as telephone calls, emails or other messages without running the risk of suffering negative consequences, such as dismissal and other retaliatory measures.**

3) Law no. 61 of May 6, 2021

- **For the first time in the Italian legal framework**, an employee working in smart-working is explicitly granted **the right to disconnect from the technological instruments and IT platforms used to carry out the work performance.**
- Indeed, **Law no. 61 of May 6, 2021**, converting Decree Law no. 30 of March 13, 2021, added paragraph 1-ter to Art. 2, which states as follows:

*“Without prejudice, for public sector employment, to the discipline of the institutions of smart working established by National Collective Bargaining Agreements, **it is recognized to the employee who performs the activity in smart working the right to disconnect from technological instruments and computer platforms, in accordance with any agreements signed by the parties and without prejudice to any periods of availability agreed.** The exercise of the right to disconnect, which is necessary to protect the employee’s rest time and health, cannot have consequences on the employment relationship or on pay”.*

4) Draft Law on the right to disconnect

- On October 8, 2020 a Draft Law was submitted to the Senate (**Senate Act no. 1833**) assigned to the Labour Commission and delegating to the Government the reorganization of the regulations on smart-working and the introduction of the right to disconnect for the psycho-physical wellbeing of employees and their loved ones.
- The Draft Law, which has not yet started to be examined by the Commission, establishes **specific details of the disconnection agreement** and specifically that **such agreement**, among others, shall:
 - i. identify the employee's rest times as well as the technical and organizational measures necessary to ensure the employee's disconnection from the technological work equipment;
 - ii. recognize, outside the agreed stand-by or work performance timeframes, the right to disconnect as the right of the employee who performs smart-working to disconnect from the technological tools and computer platforms in their possession, without this entailing negative effects of a disciplinary nature or reduction in pay;
 - iii. provide that the employer supervises the right to disconnection in order to allow the employee to recover psycho-physical energies, freely taking care of his affective and social relationships.

Moreover, ongoing discussions on the possibility to provide fines/sanctions in case of breach of the disconnection right by the employer.

5) The National Protocol on smart working

- On December 7, 2021 the National Protocol on smart-working was signed - as a result of an intensive debate with the Social Partners promoted by the Minister of Labour.
- The Art. 3, entitled “*Organization of smart working and regulation of **disconnection***”, provides the following:
 - “[...] *the smart working performance can be articulated in time slots, identifying, in any case, pursuant to the provisions of the regulations in force, the disconnection range in which the employee does not perform the work performance. Specific technical and/or organizational measures must be adopted to guarantee the disconnection range; [...]*”
 - ***in case of legitimate absences (e.g. illness, accidents, paid leave, vacations, etc.), the employee may disconnect his or her connection devices and, in the case of receipt of company communications, is not obliged to take them on before the expected restart of work***”.

Examples of right to disconnect clauses

- *“Outside ordinary working hours, you will have the right to disconnect from technological instruments and computer platforms. During this period, you have the right not to reply to any e-mails or telephone calls that you may receive, except for special and exceptional business needs of an urgent nature”.*
- *“Outside ordinary working hours, Employees shall have the right to disconnect from technological and telephone equipment and from IT platforms. The Employee will therefore have the right to switch off the computer and not answer any e-mails or telephone calls that he/she may receive, unless this has been requested in advance from time to time by the [Manager] for exceptional business needs of an urgent nature”.*
- Clauses that must be compliant and in line with the provision related to the **working hours**. An example of this kind of provision to be agreed in a smart working contract could be the following: *“As a general rule, working activities in Smart Working mode will be carried out in temporal correlation with the normal working hours applicable at the Company, without prejudice, therefore, to normal rest periods and the maximum daily and weekly working time limits deriving from the law and from collective bargaining”.*

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Scotland

Alison Weatherhead

Scotland

- December 2021 – Scottish Government announced their Public Sector Pay Policy for 2022-2023

“a requirement for all [public sector] employers to have meaningful discussions with staff representatives about the Right to Disconnect for all staff, discouraging an 'always on' culture”

“providing a balance between the opportunities and flexibility offered by technology and our new ways of working to support the need for staff to feel able to switch off from work”

- Scottish Government employees and those of Scottish Government agencies
 - “to be considered” by all public sector employers in Scotland
- Also looking at how:
 - Where and when work is defined and delivered and the impact on the wellbeing of the workforce.
 - Piloting of a 4 day working week.

Thank you

Moderator



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