

Guest Editorial

Employees' Obligation to Be Available to Employers: A (New) Pathway to Precariousness or a Source of Flexibility?

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Time plays a crucial role in the employment relationship whereby a worker, in exchange for remuneration, performs work under the direction or control of an employer. This relationship of subordination is not permanent since labour law, especially working-time regulations, has helped to delineate the boundaries between work time and personal time, which set out the temporal availability expected from the worker.¹

However, the employment relationships to which these working-time regulations apply have changed under the new models of work organization. These models, reflecting a quest for flexibility on the part of enterprises, are characterized by a just-in-time organization of production and work, a diversification of employment statuses, and a generalized use of communications technologies. Work hours and work schedules become unpredictable since they tend to correspond to the variable production needs of organizations. This unpredictability affects casual and on-call workers who have to report for work when requested by the employer, but also full-time or part-time workers who are regularly required to work beyond the agreed work hours.

This unpredictability requires employees to be available over and above the time they spend at work. This availability, it may be suggested, is even an essential condition for these new models of work organization to be efficient for enterprises. This extended temporal availability exists when employees must be reachable at all times by the employer and able to report for work as requested; when they are required to be available during specific periods to work if needed; when they are on a 'free' period break between two work shifts of split schedules corresponding to production needs; or when they are required to remain at or close to their workplace during their break or meal periods.

¹ A. Supiot, *Au-delà de l'emploi: transformations du travail et devenir du droit de l'emploi en Europe*, 96 (Flammarion 1999).

Whether or not they are at the workplace, these workers do not have full control over their free time because of work-related constraints.

These availability periods are not necessarily considered 'work time' under current working-time regulations when they do not lead to work being performed. Neither can they be considered 'free time' or 'rest time', since the employees' freedom and mobility are limited. Examined in terms of the binary opposition between 'work time' and 'personal time' that exists in labour regulation, these availability periods represent a sort of 'third time'² additional to work time and rest time.

This special issue of *The International Journal of Comparative Labour Law and Industrial Relations* aims to document and analyse this 'third time', which constitutes a form of employee subordination that is no longer necessarily confined to the workplace and is required outside work time even when no work is performed. The four articles in this special issue result from different but complementary multidisciplinary research processes and methods. The first article presents a theoretical framework used to analyse the post-industrial temporal regime characterized by the phenomenon of time porosity (É. Genin); the next two articles, based on empirical studies conducted in two industry sectors, examine how periods in which workers are under an obligation to be available are an integral part of these new models of production and work organization and the rules or strategies of actors specific to these industry sectors (L. Boivin, U. Coiquaud); and the last article explores the application of legislative labour standards to workers who are required to cope with this emerging phenomenon of third time (G. Vallée & D. Gesualdi-Fecteau).

Unlike the industrial temporal regime, which lays down a clear distinction between work time and personal time, the phenomenon of time porosity described by Émilie Genin in the first article refers to the interference between occupational and personal temporalities. Time porosity is bidirectional since work can interfere with personal activities, and personal activities can interfere with work. The author discusses the various forms of time porosity by drawing from her human resource management research on professionals and managers in France but also from studies pertaining to various other fields regarding less-qualified workers. The proposed theoretical framework allows us to situate the availability periods that constitute what we call the 'third time' as a form of time porosity characteristic of the post-industrial temporal regime. However, the concept of time porosity is more encompassing: for example, some cases of

² G. Vallée, *Les nouvelles formes d'emploi et le 'brouillage' de la frontière entre la vie de travail et la vie privée: Jusqu'où va l'obligation de disponibilité des employés?*, 15(2) *Lex Electronica* 1, 11 (Autumn 2010), http://www.lex-electronica.org/docs/articles_285.pdf (accessed March 1, 2016).

interference of work in personal activities result from individual practices that are now possible because of organizational and technological developments and that can be determined by other factors, such as the gendered division of labour. Other cases of interference of work in personal activities appear to be more clearly determined by organizational demands, for both qualified and less-qualified workers, when they stem from an implicit or explicit obligation to be available imposed on the worker. These latter cases of interference correspond to what is referred to as the 'third time' in reference to the binary conception that exists in labour regulation.

Louise Boivin's article examines the employee's obligation to be available to work in the context of home support services networks in Québec (Canada). These services, which were previously provided by public sector workers, are now partly delivered by private service providers used by the state. The author's case studies investigate two local networks involving private service providers. Comparing the situation of workers employed by private service providers with that of public sector workers, the author highlights the effect of the network-based organization of services on the extended temporal availability required from workers in private networks. This obligation is implicit because it is part of the work organization orchestrated by the network's 'brain organization'. On the one hand, it ensues from the fragmented and unpredictable nature of these workers' schedules, which are adjusted to the client's needs, varying from one day or one week to the next, and broken up over different periods of the day. On the other hand, it results from intervention plans established by the public agency, which are drawn up following an assessment of each client's needs and set the time required for each task to be accomplished by the workers. The funding of private service providers and the remuneration of workers are based on these intervention plans, which overlook the tasks performed by workers that are not included in the intervention plan, and underestimate the time required for the tasks specified in this plan.

Urwana Coiquaud's article examines Canadian unionized truck drivers working in the for-hire trucking industry at the interprovincial or international level, an industry that comes under federal legislation in Canada. This industry is unique in that it is governed by extremely precise rules regarding hours of work and hours of service for drivers. These rules take account of driving time but also, for example, waiting time or truck loading and unloading time, the length of which can be unpredictable, and establish, amongst other requirements, a daily maximum number of hours of service performed by drivers. Although these rules do not appear to leave any room for a third time in the driver's schedule, the author's empirical analysis shows that they are circumvented. An informal normative system that goes against the objectives of workers protection and public

safety regulations generates a third time. For example, the method of remuneration of long-haul drivers based on their mileage prompts them to convert their waiting time into off-duty time in order to increase the distance they can drive in a day and, thus, their remuneration. Despite the applicable regulations, the method of remuneration of drivers, the poor working conditions in this industry, and the tough competition are factors explaining these practices. These results show the limited effectiveness of purely normative solutions without taking into account the context of the industry, the situation of the actors and their interest in mobilizing the applicable law.

Guyline Vallée and Dalia Gesualdi-Fecteau's article has a different aim. Based on an empirical study conducted in Quebec (which includes a comprehensive analysis of judicial decisions and data collected from a Quebec administrative body) and an analysis of the debates surrounding the revision of the European *Working Time Directive*,³ the authors seek to determine whether the minimum standards relating to hours of work that emerged in the context of the industrial society still constitute a useful bastion for workers who are subject to an obligation to be available. The diverse situations in which an employee is under the obligation to be available, which are not limited to any particular employment status or specific occupations, have largely been ignored by law. A spatial conception of availability prevails in Quebec law as in European law: an employee who is under the obligation to be available is only deemed to be at work when at the workplace. The legal standards relating to remuneration, hours of work or the right to rest periods do not apply to the manifestations of the obligation to be available outside the workplace that do not lead to the performance of work. Moreover, the use of fixed methods of remuneration, unrelated to any measurement of actual work time, allows employers to bypass the implementation of minimum standards relating to remuneration for work, while ensuring increased availability on the part of employees. The typical legal standards governing the hours of work fail to grasp the extended subordination resulting from the obligation to be available. Debates surrounding the revision of the European Directive concerning the treatment of on-call time do not appear to address this failure.

In conclusion, to answer the question posed in the title of this special issue, the employees' obligation to be available is undoubtedly a source of flexibility for enterprises since it appears necessary for the smooth functioning of a just-in-time mode of work organization. Employees' temporal availability, which is much more extended than the time they spend at work, provides enterprises with a certainty,

³ EC, *Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 Concerning Certain Aspects of the Organisation of Working Time*, 46 Official J. E.U., L 299/9.

namely being able to mobilize as many workers as needed since these workers will be available. Conversely, this obligation to be available has the effect of transferring to the workers the risks related to the unpredictability and variability of work by requiring from them an extended temporal availability, often without compensation. The situation of these workers corresponds to several substantive dimensions of the concept of unacceptable forms of work put forward by Judy Fudge and Deirdre McCann.⁴ It is plausible that this finding is relevant in systems in which the conception of work time existing in the labour legislation is confronted with a post-industrial temporal regime deeply embedded in the new modes of production and work organization.

⁴ J. Fudge & D. McCann, *Unacceptable Forms of Work: A Global and Comparative Study*, 45–52 (International Labour Office 2015).