OVERVIEW AND U.S. PERSPECTIVE

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This paper offers an overview of the various national reports prepared for this project with emphasis on what might be of special interest to Americans, and especially American labor-management arbitrators, respecting the relevant law and developments in other countries. It also offers some observations respecting U.S. legal standards applicable to decisions concerned with the effects electronic technology has upon resolving employment disputes. Although references are made to approaches of various countries regarding specific issues, these references are not intended as a substitute for learning the details from the accompanying national reports.

North American labor arbitrators have four basic areas of responsibility. They ascertain the facts; interpret the parties' collective agreement; based on the facts and standards of conduct mutually accepted by the parties, decide whether the grievant was wronged; and determine the proper remedy based on that decision. When parties have not mutually adopted explicit rules that specifically govern a particular dispute, labor-management arbitrators must fall back on default principles based on normative behavior. Two broad provisions, found in most collective bargaining agreements in the United States and Canada, are: (a) the "just cause" standard for determining whether behavior constituted misconduct and, if so, whether the sanctions imposed were within the bounds of reasonableness, and (b) the "reasonableness" test as separately applied to rules of conduct unilaterally adopted by an employer.

A labor-management arbitrator has an obligation to discover the standards of normative behavior (customary conduct that is generally accepted as fair and reasonably prudent[1]) not from within her or his own conscience, but by examining the behavior of reasonable parties

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1. "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." Tex. & Pac. Ry. Co. v. Behymer, 189 U.S. 468, 470 (1903) (Justice Holmes speaking for the Court); *see* D. DOBB, THE LAW OF TORTS 393-94 (2000).

interacting in good faith in a work environment.[2] Notions of normative behavior inevitably are influenced by cultural and subcultural values and patterns of conduct. Because labor markets are regional, and even national, in North America, if the standards of conduct respecting the disputed activity have not been clearly established by past practices in the individual bargaining unit, the search for normative expectations should expand to examine similar settings in the industry; the craft, trade, or profession; or even the overall labor market.

When new technologies substantially alter the work environment, work methods, or work relationships, it may not be possible in the short run to find ample guidance respecting normative behavior, even within national boundaries. Because new electronic technologies often result in work that is globally transferable; work that involves coordination and communication among workers in distant parts of the world; and work tasks using the same hardware, software, and applying the same performance techniques, it is particularly appropriate to seek guidance from other systems respecting labor relations and employment practices in other countries regarding the impact of electronic technology on workplace disputes.

Accordingly, the present comparative study of the legal impact of new workplace technologies may provide, among other things, a needed broadened perspective for discovering normative standards for arbitral decisions. It may also offer similar guidance for administrative agencies and courts in the United States and other countries, including labor courts, engaged in interpreting the broad language often used in labor protective legislation and collective agreements. Additionally, as so often is the case with comparative studies, the descriptions and commentaries in the various national reports reveal some contrasting approaches whose very differences indicate variations in conceptual frameworks for the law of the shop and raise questions concerning the possible superiority of certain solutions developed by other systems.

I. TELEWORK

Several of the national reports observe that teleworking can be defined in various ways and can occur in a variety of off-site settings.[3]

2. United Steelworkers of America v. Warrior & Gulf Co., 363 U.S. 574, 581-82 (1960) (The Court referred to this as the common law of the shop).

3. For detailed examinations of the variations, *see*, *especially*, the reports for Germany, Japan, and Sweden in this collection, Armin Hoeland, *A Comparative Study of the Impact of*

However, the setting that raises the most difficult definitional issues is when work is performed in a worker's own home.

Telework at home poses special difficulties due to the problems of balancing household autonomy and privacy interests against such employer interests as ensuring the security of property entrusted to workers, ascertaining whether work is performed in the prescribed manner, and obtaining accurate reports regarding the efforts to be compensated. The complexity of the issue is increased by the need to additionally balance household and employer interests against certain governmental interests, such as ensuring that workplaces are safe and healthy, engaged in legitimate enterprises, and that employees are adequately compensated for their time and efforts.

A. The Status of Teleworkers

Because at-home telework potentially intrudes upon household autonomy and privacy, a threshold issue is whether there should be constraints on an employer's authority to require that work be done at the employee's home or whether workers should be privileged, at least in some situations, to elect to work at home. The latter issue becomes particularly important when the worker's capacity to perform at the workplace is medically impaired, but the impairment is more easily surmounted at the worker's home.

The impact of recent advances in electronic technologies have not yet been comprehensively addressed by specific legislation directed at resolving the status of teleworkers in the systems covered by the national reports.[4] Nevertheless, at the level of the European Union, and in a few of the national systems covered by the reports, some of the above issues have been resolved through national, sector, and even enterprise collective agreements aimed at employment involving persons who are linked to their jobs, clients, or customers through electronic Internet and intranet media.[5] Other reports explain that

Electronic Technology on Workplace Disputes: National Report on Germany, 24 COMP. LAB. L. & POL'Y J. 147 (2002); Hideyuki Morito, *The Impact of Electronic Technology on Workplace Disputes in Japan*, 24 COMP. LAB. L. & POL'Y J. 195 (2002); Reinhold Fahlbeck, *Electronic Technology and Work: A Swedish Perspective*, 24 COMP. LAB. L. & POL'Y J. 257 (2002).

4. The Spanish report suggests that this may soon change due to pending legislative proposals. Salvador del Rey Guanter, *New Technologies and Labor Relations in Spain: Some General Issues*, 24 COMP. LAB. L. & POL'Y J. 243 (2002).

5. As explained in the Belgian and Italian reports, European Union guideline agreements pertaining to such workers have been adopted in consultation with union and management representatives. Roger Blanpain, *Some Belgian and European Aspects*, 24 COMP. LAB. L. & POL'Y J. 47 (2002); Marco Biagi & Tiziano Treu, *A Comparative Study on the Impact of Electronic Technology on Workplace Disputes: National Report on Italy*, 24 COMP. LAB. L. & POL'Y J. 177 (2002). A national agreement is described in the Belgian report, an example of a

the resolution of employment conflicts caused by the new technologies is dependent on interpretation and application of more general legislation that either addresses the general situation of at-home workers or that distinguishes independent contractors from employees. In addition, it is evident that within a single legal system, deciding whether an at-home worker has employee status sometimes varies, as is the situation in Finland, depending on which employment standard statute is being invoked.

Overall, the reports show that, whether controlled by a general statute or by collective agreement, if the person who performs work at home is subordinate to or dependent upon the party that pays for the worker's time or activity, the worker is entitled to standard employment benefits such as paid vacation, holidays, and time off for illness, and minimum wage and overtime pay protection.[6] This suggests that, in most of the systems covered by the reports, the result is determined by the functional nature of the relationship rather than by its contractual trappings.

A more basic question that must be examined, however, is whether either party to the employment relationship has a right to insist that work be performed at home. A few of the reports state that the arrangement must be acceptable to both sides.[7] Others state that such arrangements must be voluntary on the part of the employee.[8] The French report bases this conclusion on the Declaration of Human Rights, a legal source that may bring a considerable additional number of jurisdictions into this group.

The Australian report says that an employee who is an at-home caregiver can require the employer to allow at-home work if business necessity does not prevent it from doing so, and the German report observes that an employee can insist on the at-home work opportunity if it is offered to others who are similarly situated. On the other hand,

sector agreement is described in the Italian report and an enterprise agreement is described in the Australian report. Ronald McCallum & Andrew Stewart, *The Impact of Electronic Technology on Workplace Disputes in Australia*, 24 COMP. LAB. L. & POL'Y J. 19 (2002).

6. However, the Australian report indicates that its courts are prone to treat contractors who, in fact, are dependent on a single source of work as "independent" and, therefore, not within the scope of employee protections. *See* McCallum & Stewart, *supra* note 5, at 25.

7. *See* the reports for Australia, Belgium, and Italy (both with respect to the European Union agreement), and Finland. *See* Blanpain, *supra* note 5; Biagi & Treu, *supra* note 5; McCallum & Stewart, *supra* note 5; Annti Suviranta, *The Impact of Electronics on Labor Law in Finland*, 24 COMP. LAB. L. & POL'Y J. 93 (2002).

8. *See* the reports for France, Germany, and Sweden. The German report also notes that the employer cannot make a unilateral change in such work arrangements. Jean-Emmanuel Ray & Jacques Rojot, *A Comparative Study of the Impact of Electronic Technology on Workplace Disputes*, 24 COMP. LAB. L. & POL'Y J. 117 (2002); Hoeland, *supra* note 3, at 155; Fahlbeck, *supra* note 3, at 261.

the Spanish and Japanese reports conclude that business necessity can justify compelling an employee to work at home, though in the case of Japan, this conclusion is modified by the right to resist that order if it would be unduly burdensome to the employee.

The foregoing suggests that, at the very minimum, there is a normative standard that limits the authority of employers to compel at-home work only in situations in which it can justify that insistence by business necessity. Given the large number of reported jurisdictions that impose an absolute barrier to this type of invasion of the sanctity of the home, it would be fair to say that the minimum consensus standard for mandatory at-home work is reflected in the Japanese approach of rejecting even business necessity as a justification if the intrusion is unduly burdensome. For example, it would be reasonable to argue that this norm is violated where, despite "business necessity," the employee shows that she cannot work at home because she lives in a small apartment shared with an invalid parent.

However, because, as discussed below, some physical intrusions into the home are inevitable if the employer is to fulfill its responsibilities for the employee's safety and welfare, there is good reason to go beyond the above described Japanese approach and accept as normative a broader rule against imposing at-home work requirements unless there is truly voluntary assent by the worker. Unless the law's protection of the sanctity of the home is to be subordinated to maximizing enterprise profits, "business necessity" is an inappropriate basis for justifying invasions of personal and family domains. It is submitted, therefore, that, as contrasted with business interests, only substantial public interests in safety and health, of the sort courts are supposed to weigh when asked to issue a search warrant, ought to be accepted as a normative standard for weighing whether employers should be permitted to mandate that work be performed at home. And, as observed in the French report, the legal merit of this approach is supported by the Declaration of Human Rights.

U.S. law has done little to resolve questions concerning the unique situation of at-home teleworkers. Minimum and overtime pay regulations adopted under the Fair Labor Standards Act impose extensive procedural and substantive constraints on the production of goods by at-home workers, but do not apply to the service-type employment of the sort that is under discussion.[9] And, while on its

9. 29 CFR Pt. 530 (2004).

face the Occupational Safety and Health Act extends to the at-home work environment, the enforcement agency has adopted an official policy of not inspecting at-home workplaces that are in the nature of office facilities.[10] (It should be noted that such enforcement in the United States would be no more burdened by the constitutional prohibition against non-consensual governmental searches than is enforcement respecting work performed at the employer's own facility inasmuch as the Supreme Court has held that a court-issued search warrant is required for safety and health inspections at the employer's facility if the employer refuses entry.[11]) The same policy, however, requires employers to maintain records of work-related home office injury or illness if the employment establishment is subject to recordkeeping requirements at other facilities.

One area in which there are significant developments respecting the application of U.S. legal standards to the use of electronic technology in the context of at-home work concerns the Americans with Disabilities Act.[12] That law requires, among other things, that employers reasonably accommodate a disabled worker if the accommodation will enable the worker to perform the essential job tasks. Several cases have examined the question of whether and when that responsibility requires an employer to allow and assist an employee to work at home if the worker can do the job there, but not at the employer's facility. The federal appellate courts have split in answering this question. One has concluded that the absence of on-site supervision makes such an accommodation so unreasonable that the question cannot even be submitted for fact-finding on the question of reasonableness; others have ruled that because such work arrangements often have an employer's blessing and modern technologies often permit adequate supervision of at-home office work, each case must be decided on its individual facts.[13]

10. Department of Labor, Occupational Safety and Health Administration, Directive No. CPL 2-0.125, issued Feb. 25, 2000.

11. *See* Marshall v. Barlow's Inc., 436 U.S. 307 (1978).

12. 42 U.S. 12101 *et seq*. (2000 ed.)

13. *See* Kvorjak v. Maine, 259 F.3d 48 (1st Cir. 2001) (dismissed for claimant's failure to offer evidence sufficient to demonstrate that the essential aspects of the job could be performed at home). *Compare* Humphrey v. Memorial Hospitals Ass'n, 239 F.3d 1128 (9th Cir. 2001), *cert. denied*, 122 U.S. 1592 (2002) *and* Langon v. Dept. of Health and Human Services, 959 F.2d 1053 (D.C. Cir. 1992) (both favorable to the employee's claim for relief) *with* Vande Zande v. Wisconsin Dept. of Admin., 44 F.3d 538 (7th Cir. 1995).

B. Benefits Regulations and Standards Relating to Remuneration

Determination of the question of whether at-home teleworkers are covered by employment benefits regulations and standards does not directly implicate household privacy or autonomy interests. Employees at a remote location can electronically "sign-in" when work begins and "sign-out" when it ends and report on work progress as it proceeds. Of course, the need to balance employee interests against employer needs can develop at the stage of engaging in enforcement investigations as, for example, in challenging a claim that an employee was ill or in determining whether the employee was working or was using work time for leisure or personal pursuits. However, the resulting issues arising out of investigation and proof are unlikely to differ from those posed when work is performed at the employer's facility. In addition, several of the reports describe a variety of electronic techniques that can be used to minimize employer intrusiveness into the home when obtaining or monitoring data respecting work effort or work hours. Accordingly, the reports indicate that once at-home work is characterized as subordinate employment, the various legal systems extend normal remuneration-related employment standards protections to those workers.

Of particular interest to American readers respecting the application of employee protection standards is Professor Howells' report[14] explaining that, in New Zealand, "independent contractors" who, in fact, are dependent on a principal are protected as though they are employees—an approach advocated by some U.S. commentators.[15]

C. Security Checks and Safety and Health Protections

In contrast with benefits relating to remuneration, the question of the extent to which health and safety standards can be enforced or security checks of equipment, data, and programs can be carried out in the context of at-home telework very clearly presents a conflict between personal or household interests on the one hand, and employment responsibilities on the other.

There appears to be general acceptance of the proposition that an employer of at-home teleworkers has a responsibility to provide safe

14. John M. Howells, *Electronic Technology and Workplace Issues: The New Zealand Situation*, 24 COMP. LAB. L. & POL'Y J. 225 (2002).

15. B. Goldstein, et al., *Enforcing Fair Labor Standards in the Modern Sweatshop*, 46 UCLA L. REV. 983 (1999)

equipment and appropriate safety and health training respecting the use of that equipment. In some instances, such as in Italy, the reports note specific additional responsibilities including ensuring that the teleworkers have required opportunities to take breaks from work.[16] Similarly, the Swedish report observes that the employer's responsibility extends to assuring that the equipment is ergonomically sound—a consideration of particular significance in light of the various repetitive motion and vision fatigue ailments often suffered by those who must observe computer monitors and manually input data or manipulate programs or programming variables for extended periods.[17]

The approach to the practical problems of allowing oversight inspections are more varied. The Finnish report observes that, in that country, employers have no duty to supervise a worker's compliance with safety and health rules when work is done at home.[18] Other reports assert that employers of such workers have an oversight responsibility, but observe that inspection entry can only be with the worker's consent. The Swedish report[19] notes, however, that in some circumstances government inspectors have a right to enter, and the Italian report[20] says that some collective agreements entitle the employer to enter to oversee safety and health conditions.

One solution to the issue of physical intrusion into the homes of workers is for employers to condition such work arrangements on the workers consenting to a reasonable schedule of such inspections. So long as a worker truly volunteers to work at home, making consent a condition of that employment arrangement is consistent with recognizing the worker's right to protect the sanctity of the home. However, as observed in the Belgian report, a combination of mandatory at-home employment plus conditioning employment on "consent" to enter the home for safety and health oversight, or substituting collective consent for individual consent, would sacrifice the values of individual and family autonomy and privacy to the god of market maximization.[21] Accordingly, if the former values are truly paramount in a nation's culture, if the law exists to serve society rather than to facilitate the fury of ever expanding economic activity,

16. Biagi & Treu, *supra* note 5, at 183.
17. Fahlbeck, *supra* note 3, at 263.
18. Suviranta, *supra* note 7, at 95-96.
19. Fahlbeck, *supra* note 3, at 263.
20. Biagi & Treu, *supra* note 5, at 186.
21. Blanpain, *supra* note 5, at 55.

then the normative principle should protect a worker's right to freely select or reject an at-home work arrangement.

D. Costs of At-home Work

When work is performed at home, the employer is potentially relieved of some costs of doing business. This will not happen, however, if the shifted costs are reflected in a comparable increase in the remuneration paid to the worker. The reports show that, generally, employers pay for the equipment, equipment maintenance, and insurance, sometimes as a result of responsibilities specified in a collective agreement, often simply as a practical necessity.[22]

It may be difficult to ascertain whether some operating costs in fact have been offset by wage or benefits adjustments. Thus, several of the papers, such as the German report, explain that this problem can be and has been resolved by agreements for direct reimbursement of employee's at-home work place maintenance expenses for such things as electricity and telephone service.[23]

The Fair Labor Standards Act prescribes how one aspect of the cost of at-home work must be distributed in the United States. If the at-home worker is an employee, as contrasted with an independent contractor, the worker's expenses for obtaining and maintaining work tools, such as computers and modem hook-ups, must be deducted from the amount of pay received by the worker in ascertaining whether pay meets the minimum wage and overtime premium standards.[24]

II. ISSUES ARISING OUT OF THE TECHNOLOGY

Regardless of where work is performed, the seeming "invisible" nature of techniques of electronic data collection, analysis, and communication presents a variety of problems due to the increased difficulty in overseeing work activities by using the traditional methods of watching and listening while work is performed or inspecting the quality and quantity of the work products.

22. *See*, *e.g.*, the Australian and Swedish reports and the Belgian report respecting the European Union agreements. *See* McCallum & Stewart, *supra* note 5, at 30; Fahlbeck, *supra* note 3, at 262-263; Blanpain, *supra* note 5, at 51. The Finnish report explains that shifting the costs to employees can be judicially rejected on grounds of fairness, *see* Suviranta, *supra* note 7, at 104-105.

23. Hoeland, *supra* note 3, at 162.

24. Schultz v. Hinojosa, 432 F.2d 259 (5th Cir. 1970). *See also*, BNA, WAGES AND HOURS MANUAL 91:513.

A. Electronic Monitoring of Performance and Communications

Employers have two interests in monitoring employee data collection, communication, and analysis activities. One is to oversee the quality and quantity of such work activity or inactivity. The other is to prevent misuse of the employer's equipment, facilities, and time. In the United States, a 2000 survey of 700 human resource managers showed that 62% of their companies monitor Internet use at least some of the time and 12% monitor it constantly. Also, 58% of their companies monitor e-mails some of the time and 7% monitor all e-mails.[25]

In the earlier stages of introducing electronic technology into the workplace, in order to generate greater enthusiasm for working with such tools and encourage workers to enhance their computer-related knowledge and skills, employers often intentionally provided software and Internet access, such as games and Web search opportunities, that were not directly job related. In time, access to such equipment, links, and programs has become a valued fringe benefit for many employees because it substitutes for or supplements their investments in such tools and access media for personal and even family needs and entertainment. In addition, for many workers, such access during breaks or down-time from assigned tasks, which often are very tedious or flow erratically, provides needed relaxing diversions; it also may help stimulate work-related creativity. Nevertheless, some workers undoubtedly give greater priority to such diversions and personal activities than to their assigned tasks and some use their access in disruptive or destructive ways that jeopardize workforce cohesiveness (such as engaging in intranet sexual harassment or transmitting copyrighted material without consent), breach the security of the employer's confidential information (such as bypassing firewalls, not safeguarding passwords, or, simply, revealing secrets to unauthorized persons), or expose the employer to third party liability for injuries caused using instrumentalities the employer placed at the worker's disposal (such as creating software viruses or transmitting child pornography).

Some national legal systems prohibit employer monitoring of data collection, communication, and analysis only if the employee has a reasonable expectation of privacy. In such systems, therefore, special emphasis is given to the employer's responsibility to alert

25. *Most Employers Monitor Workers' Use of Internet and E-Mail, Survey Finds*, 17 INDIV. EMPLOYMENT RIGHTS (BNA) 13 (2001).

workers to the mechanisms to be used in collecting and storing information, the reasons for that use, and the potential consequences of violations. An additional requirement under such regimens may be to require the employer to obtain the employee's "consent" to monitoring.[26]

Unless the employee has a right to reject such a request without suffering any consequences, consent, of course, functionally is nothing more than the worker's confirmation of receipt of the required notification. The alternative is for the employer to prohibit all uses that are not business related. In such situations, employers may justify a need to engage in monitoring the frequency and identity of links involved in employee network and e-mail flow in order to confirm that use is confined to business needs. If there is fear of breaches of confidential information, additional monitoring in the nature of keyword searches of messages may also be necessary. A number of reports indicate a normative standard that is receptive to such employer concerns.

For example, the Canadian report explains that data revealing an employee's computer activity not only is acceptable evidence, but may even be required evidence in disciplinary situations involving assertions of misuse of employer equipment or communication networks.[27] Nevertheless, we are told that such decisions balance employer interests in accessing the content of employee communications against employee privacy and dignity expectations. The legal approach in New Zealand appears to be roughly comparable to the industrial relations standards enforced by Canadian labor arbitrators.

Some reported legal systems draw more rigid lines respecting invasion of the content of electronic communications. The Finnish report, for example, indicates that although the volume of e-mail and Internet activity may be monitored, the identity of the participants and the contents of the communications, if confidential, are constitutionally protected.[28] The French and German systems require employee notification regarding monitoring policies and works council consultation respecting the purposes and procedures for such intrusions.[29] However, it appears that, if justified, both allow for

26. *See*, *e.g.*, the Canadian report and the European Union agreements described in the Belgian and Italian reports. Paula Knopf, *Free Speech and Privacy in the Internet Age: The Canadian Perspective*, 24 COMP. LAB. L. & POL'Y J. 67 (2002); Blanpain, *supra* note 5, at 59-60; Biagi & Treu, *supra* note 5, at 181.

27. Knopf, *supra* note 26, at 77-79.

28. Suviranta, *supra* note 7, at 107-108.

29. *See* Ray & Rojot, *supra* note 8, at 134; Hoeland, *supra* note 3, at 167-168.

collection of data identifying the communications traffic, but generally prohibit non-consensual examination of the content. The Swedish system is similar, although the report mentions the possibility of court authorized monitoring of a communication.[30] The Japanese system also permits some content investigation pursuant to duly adopted plant rules, prior notification, and demonstrated business necessity or apparent serious criminal activity.[31] The European Union agreements also call for prior notification of employees respecting monitoring activity and the consequences of discovered violations. They additionally require that the degree of monitoring intrusiveness not be disproportionate to the purpose to be served by the monitoring.

Restrictions on monitoring in Belgium reflect a goal of deterring future wrongdoing through final warnings against continued misconduct rather than allowing immediate penalties upon discovering apparent violations.[32] In contrast, employers subject to Australian federal regulation may be even more restricted inasmuch as monitoring activities must receive administrative approval under a law designed to give a high priority to privacy interests.[33]

Are there normative principles within the above spectrum of approaches to the issue of monitoring? At the minimum, what emerges is a basis for contending that workers should be informed of the monitoring policy, it should not be imposed without prior consultation, and should not intrude into the content of communications without clear business justification. Practical considerations certainly recommend the first of these norms. Because the knowledge that conduct is being monitored can be expected to deter wrongdoing, the potential deterrent affect of being informed that there will be monitoring should be enough to make this a prerequisite to a reasonable monitoring program.

In the United States, of course, the federal Electronic Communications Privacy Act[34] and the Stored Communications Act[35] provide additional guideposts for labor arbitrators and other tribunals who must assess questions concerning an employer's monitoring policies or practices when those issues arise under reasonableness or just cause provisions in American collective agreements. In a few

30. Fahlbeck, *supra* note 3, at 264-268.
31. Morito, *supra* note 3, at 208.
32. Blanpain, *supra* note 5, at 63.
33. McCallum & Stewart, *supra* note 5, at 34.
34. 18 U.S.C. §§ 1367, 2510-2513, 2515-2521, 3117, 3121-3127 (2000 ed.).
35. 18 U.S.C. §§ 2701-2711 (2000 ed.).

states, additional privacy statutes[36] may also be applicable in some circumstances as well as the common law of privacy. The elements for claims under these sources may add another reason for providing prior notice of monitoring because the scope of liability under the common law of privacy and under the federal statutes is limited to those situations in which the person making the claim had an expectation that the communication would not be intercepted.[37]

In the context of American labor-management relations, at least, since monitoring affects the conditions of employment, there should be no question respecting the need for prior consultation with the bargaining unit representative in situations in which one is certified or recognized.[38] However, in the United States, employee consultation would not be required outside the context of unionized establishments.

Additionally, in the United States accepting as normative a standard that includes the requirement of business justification would appear to be appropriate since that standard is a minimum basis for those intrusions that are judicially recognized exceptions to the restrictions imposed by the federal Electronic Communications Privacy Act.[39]

When devising or reviewing the reasonableness of a monitoring program in the United States, another consideration should be the distinctions that courts have held are made by the federal Electronic Communications Privacy Act and the Stored Communications Act[40] respecting interception of a transmission as contrasted with retrieval of e-mails and other materials downloaded from the intra or Internet and stored in a databank. Basically, the courts hold that the Privacy

36. *See*, *e.g.*, J. Kesan, *Cyber-Working or Cyber-Shirking?*, 54 FLA. L. REV. 289, 301-02 (2002).

37. *See*, *e.g.*, Kee v. City of Rowlett Texas, 247 F.3d 206 (5th Cir. 2001); Wesley v. WISN Division-Hearst Corp., 806 F. Supp. 812 (E.D. Wisc. 1992); Kesan, *supra* note 36, at 297, 302. A party's prior consent to interception of an electronic communication removes liability under the federal Act unless the interception is for criminal or tortious purposes. 18 U.S.C. § 2511 (2000 ed.); United States v. Workman, 80 F.3d 688, 692-693 (2d Cir. 1996).

38. *See*, *e.g.*, Colgate-Palmolive Co., 323 N.L.R.B. 515 (1997); Talsol Corp., 317 N.L.R.B. 290 (1995) (respectively, holding that an employer cannot install video surveillance or adopt a drug testing program without first negotiating with the incumbent exclusive bargaining representative). *See also* S. Robfogel, *Electronic Communication and the NLRB: Union Access and Employer Rights*, 16 LAB. LAW. 231, 235 (2000).

39. Arias v. Mutual Central Alarm Service, Inc., 202 F.3d 553 (2d Cir. 1999); Berry v. Funk, 146 F.3d 1003 (D.C. Cir. 1997).

40. 18 U.S.C. §§ 2510-2522, 2701-2711 (2000 ed.). Unlike most of the statutes and national collective agreements described in the national reports, these federal statutes were adopted largely to protect individuals and enterprises in personal and business transactions; although applicable to employment relations, they were not specifically adopted to govern that relationship.

Act's restrictions on interception do not apply once an e-mail has been sent and read. Accessing the sent or read message falls within the more relaxed restrictions respecting stored information. Similarly, in the situation of the Web site searches, although interception of the search request would be subject to the restrictions of the Privacy Act, once the search result is downloaded from the cybernet, it is stored and subject to the less protective provisions of the Stored Communications Act.[41]

On the other hand, under U.S. law, even if an employer's content monitoring of stored messages or Internet downloads is allowed under the federal electronic technology privacy laws, if the subject matter involves concerted activity relating to terms and conditions of employment, or union business, the National Labor Relations Act's and Railway Labor Act's protections may prohibit the employer from scrutinizing the contents of such materials for surveillance purposes.[42]

B. Liability for Cost, Maintenance, and Security of Electronic Properties

Several of the national reports examine the question of liability for the cost, maintenance, and security of electronic equipment and programs used by an employee and most report that, as a matter of practice, collective agreement, or law, these are employer responsibilities. As previously observed, in the United States, federal law prohibits an employer from imposing such costs on workers if the net compensation is below minimum wage or overtime pay requirements. State laws more generally restrict what types of deductions may be made from an employee's pay and often prohibit making such deductions for unintentional loss or damage to the employer's property. However, these restrictions do not necessarily limit employee liability for such losses; rather, they prevent the

41. Konop v. Hawaiian Airlines, Inc., 302 F.3d 868 (9th Cir. 2002). The Stored Communications Act's non disclosure provisions contain a series of exceptions, many of which protect most employer access to information that is in an employee data base contained in employer provided equipment. For example, an exception to the Act's protection permits access with authorization. Since employers can condition employee use of the data storage equipment upon the employer being entitled to such access, employers can easily ensure freedom from the restraints of this statute. Another exception to the Act's restrictions allows disclosure with the lawful consent of the originator, addressee, intended recipient or the subscriber of remote electronic communications. The employer normally is in the last category. And still another exception applies to access to protect the rights or property of the provider of the service. Accordingly, so long as the employer has a legitimate business purpose or has obtained consent (which probably may be implied from the forewarnings given to employees), the employer can access data stored in the employee's "account."

42. *See id. See also* Robfogel, *supra* note 38, at 249-50.

employer from using self-help to determine the extent of such liability and collect what might be owed.

In Finland, where employees are responsible for loss or damage of the employer's property, that responsibility is tempered at the low-end by not imposing employee liability for minor losses and at the high-end by placing a reasonableness limit on the liability.[43] Of course, practical considerations of the employee's normally very limited financial resources, or the prospects of bankruptcy law intervention, may impose that limit in all jurisdictions, including the United States.

C. Access to Workers Through Employer's Electronic Communications Facilities

The right of workers to communicate with labor organizations, works councils, and government regulatory agencies by means of the employer's intranet or Internet is less well-defined in the reporting countries than might have been expected. However, it appears that generally some access is protected either by law, contract, or has simply become a matter of accepted practice. The trend may be reflected in the Spanish report, which notes that, although a high court decision rejected the right of worker representatives to access employees using the employer's Internet, Web site, or bulletin board, collective agreements and proposed legislation are moving in the direction of nullifying that decision.[44] At least one country's law would seem to limit such contacts to periods, such as breaks or meals, when employees are not required to be engaged in work tasks.[45]

The German report notes an interesting distinction in that country between the works council's probable legal right to employer-supplied equipment and access for such communications, but the lack of such a right on the part of labor organizations.[46] However, as a practical matter, it must be remembered that generally in Germany works council members hold their positions as a result of union sponsorship; hence, considerable coordination is to be anticipated.

Current caselaw in the United States supports the proposition that if the employer tolerates employee use of e-mail access for non-work purposes, it cannot forbid or punish employee use for union organizing or for criticizing the employer in messages to coworkers of

43. Suviranta, *supra* note 7, at 109.
44. del Rey Guanter, *supra* note 4, at 249-250.
45. *See* Morito, *supra* note 3, at 218.
46. Hoeland, *supra* note 3, at 169-172.

the same employer.[47] Commentators have offered persuasive reasons why, regardless of the employer's normal restrictions on use of its equipment and network links, the right to engage in concerted activity should outweigh the employer's normal property interests in situations in which employees and unions want to make moderate use of the employer's intranet and the like to communicate with a widely dispersed workforce, especially if work is performed at the employees' homes.[48]

D. Responsibility for Training and Retraining

The rapidity with which job knowledge and skills become obsolete in the world of electronic data collection, analysis, storage, and communication creates a new set of pressures on employees. Perhaps the most interesting observation respecting training and retraining responsibilities is found in the German report, which notes that a court has held that the prohibition against age discrimination requires employers to train older employees in new technologies.[49]

Mandatory paid training requirements have not been generally adopted, but there appears to be a trend toward strengthening employee training opportunities. Finland imposes a duty to retrain so that workers do not lose jobs as a result of technological changes.[50] Spain provides similar protection.[51] Swedish employers additionally have a duty to help workers advance themselves in their careers and employees have a right to take extended leaves of absence to further their studies.[52] The Japanese government encourages continuing training by subsidizing vocational training leaves granted by employers.[53] The Swedish report[54] indicates that some employers are doing this voluntarily, a situation that also exists by collective agreement in New Zealand.[55] Similarly, Italian unions and government entities have collective agreements that broadly require providing training opportunities to meet career advancement needs.[56]

47. The Guard Publ. Co., 2002 N.L.R.B. Lexis 70 (2002); Media General Operations, Inc., 2002 N.L.R.B. Lexis 205 (2002); Timekeeping Sys., Inc., 323 N.L.R.B. 244 (1997); E.I. Du Pont & Co., 311 N.L.R.B. 893 (1993).

48. Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1, 56-58 (2000).

49. Hoeland, *supra* note 3, at 173-175.

50. Suviranta, *supra* note 7, at 112.

51. del Rey Guanter, *supra* note 4, at 255-256.

52. Fahlbeck, *supra* note 3, at 275-277.

53. Morito, *supra* note 3, at 220.

54. Fahlbeck, *supra* note 3, at 276.

55. Howells, *supra* note 14, at 230, 241.

56. Biagi & Treu, *supra* note 5, at 186.

In Germany, this is a subject for resolution through works council agreements.[57]

American employers, especially those in high tech businesses, report that employer-provided training that enhances worker employability is one of the most effective ways to retain workers.[58] Nevertheless, no clear basis has been found for demonstrating that U.S. employers have recognized a normative expectation that they have this responsibility.

III. CONCLUSION

The very nature and value of the new electronic technologies that have created the Information Age greatly increase the extent to which work is globally transferable. At the same time, the work of those who create, service, and operate these new technologies requires heightened levels of coordination, communication, interaction, and interchangeability among workers in distant parts of the world doing tasks that use the same hardware, that often share the same software, and that apply the same performance techniques and standards. This globalized workforce, therefore, shares a community of interests that inevitably will be reflected in modifications of labor relations and employment practices.

History indicates that when such conditions exist, common transnational workplace norms, standards, and rules will emerge. This happened centuries ago with respect to the work of merchant seafarers. And, in the past century, similar substantial developments took place respecting the work of airline flight crews, professional athletes, and other performers and support personnel in mass entertainment industries. The national reports prepared for this study reveal that such changes are taking place respecting the impact of electronic technology on workplace disputes. Such changes are reasonable and will be accelerated to the extent that decision-makers consciously seek guidance in the solutions to common disputes that are being adopted in other legal systems.

57. Hoeland, *supra* note 3.

58. *Noncash Incentive Help Keep Workers, Poll Show*, 160 LAB. REL. REP. (BNA) 503 (1999).