MASTER THESIS

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„Organization of Working Time. A legal comparison between US and the EU."

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1.1. Labor law: its role and importance in general

'The fundamental principle of labour legislation is to guarantee the weaker party in the labour market protection and basic rights in order to be in a fair position when negotiating salary and working conditions.'[1] Seen from a historical perspective, the main aim of first labor laws was to punish and educate workers for participating in protests, and making sure that employees are obedient and loyal to their employer. If the contract of work was infracted, this usually resulted in court-ordered forced labor. Only in the 19th century the importance of labor law provisions was finally perceived. The need for a specific body of law arose, which would provide employees with at least minimum level of protection against the employer. It became clear that the governance of employee's working conditions couldn't be left alone to the market forces. Labor law became part of public protection, which contrasting with civil law, claim that both contracting parties are equal. Labor law attempts by means of collective agreements and legislation to adjust the inequality between employer and employee. Sources of labor law are very diverse. It would be wrong to claim that only provisions, issued by the State govern labor law areas. Moreover, in many jurisdictions labor laws are shaped by a great number of factors such as customs, work-place culture, collective agreements, employment contracts and employee manuals. Legislation covers areas, which are not protected by the instruments above, and only establish minimum standards.[2]

1.2. European Labor Law in general

European labor law and policies have been evolving permanently, since the founding of the European Economic Community in 1957. The initial six founding members and the following six enlargements turned it into a twenty-eight-country union with s strong position in the world's economy. Labor law in the European Union can be described as unique and multi faceted set of legal provisions. For the first time a charter (The Community Charter of the Fundamental Social Rights of Workers) was used to summarize the shared values and to create a commitment across the Member

[1] Daniel Blackburn, 'Labor Law: Its role, trends and potential' (2006). Labor Education 2006/ 2-3. No 143-144 <http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_111442.pdf> accessed 11 Mai 2016

[2] ibid.

States.[3] The open method of coordination (OMC) in the European Union stems from the employment strategy. It is a policy making instrument that has no legally binding power and must not be introduced to domestic laws.[4] The Treaty of Amsterdam institutionalized it and became the basis for formulating the unified employment policy. Later on it was defined as a part of the Lisbon strategy and used in the post the Lisbon Treaty period in the development of the European social and employment policy.[5]

Labor law is not harmonized at the European level. Thus, there is no European labor law per se. The term European Labor Law can be perceived in two ways. On the one hand, it can be comprehended as labor law of every individual Member State. On the other hand, in can be defined as the primary and secondary European legislation. The latter supplements national labor law provisions and simultaneously takes precedence over domestic law. The chief purpose of such labor law provisions is to enhance and harmonize living and working conditions in the European Union. Member States are allowed to maintain their domestic labor law provisions. The EU laws supplement individual national legislations concerning labor law, by setting minimum standards. This is achieved by adopting laws (directives) that set minimum requirements for specific areas. The Member States are allowed to have higher level of protection and offer more favorable provisions for workers.[6]

1.3. Legal Sources of the European Union

'The European Union has legal personality and as such has its own legal order, which is separate form international law. Furthermore, European Union laws has a direct or indirect effect on the laws of its Member States and, once on force, becomes part of the legal system of each Member State. The European Union is in itself a source of law. The legal order is usually divided into primary legislation (the Treaties and

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[3] Philippa Watson, *EU Social and Employment Law* (2nd edn, Oxford University Press 2014) 3
[4] 'Open Method of Coordination' (*EUR-Lex*, Glossary of summaries) <http://eur-lex.europa.eu/summary/glossary/open_method_coordination.html> accessed 25 Mai 2016
[5] Philippa Watson, *EU Social and Employment Law* (2nd edn, Oxford University Press 2014) 3
[6] Susan Mayne and Susan Malyon, *Employment Law in Europe* (Butterworths Law 2001) 3

general legal principals), secondary legislation (based on the Treaties) and supplementary law.' [7]

The European Social and Labor Law emanates from a variety of Union legal sources and political structures. The most essential also called 'the primary source' is the Treaty on the Functioning of the European Union (TFEU). Additionally to the Treaty, the general principles of law exist, which supplement the primary sources. The most significant are the principal of equality of treatment (prohibition of direct and indirect discrimination) and the principle of proportionality (regarding exercise of the power in the EU). Moreover, another legal source, which is characterized as subordinate to the Treaty, is secondary legislation (e.g. directives). All the above-mentioned legal sources fall into the category 'hard law'. Finally, there is also 'soft law', which lacks the legally binding force but still has a legal affect on various decisions and processes.[8]

Treaties build the legal foundation of the European Union and are the primary source of the EU law. After entering into force (*1.12.2009*), the Charter of Fundamental Rights was granted the same status.[9] According to the Article 288 TFEU, there are five types of legal instruments: regulations, directives, decisions, recommendations, and opinions.[10] Regulations are directly applicable in all Member States without any implementation measures and after entering into national legal system become entirely binding. Directives aim at a certain goal that must be achieved across the Union. National authorities are allowed to choose the method as well as the form how to transpose it into domestic law. Decisions by the European authorities are only binding for the persons or companies to whom it is addressed. Finally, recommendations enable institutions to publish its views and propose a line of action without imposing any legal obligation on those parties that it is directed at.

In addition to these mandatory provisions, there is a digest of soft law that has no legal or binding force. Non-binding acts involve resolutions, recommendations,

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[7] Udo Bux, 'Sources and scope of European Union Law' (*Fact Sheets of the European Union*, 2016) <http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf > accessed 18 Mai 2016
[8] Philippa Watson, *EU Social and Employment Law* (2nd edn, Oxford University Press 2014) 2.01.
[9] Udo Bux, 'Sources and scope of European Union Law' <http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf > accessed 18 Mai 2016
[10] Philippa Watson, *EU Social and Employment Law* (2nd edn, Oxford University Press 2014) 2.02.

frameworks, action programs, and charters. Moreover, soft law is non-justiciable but is not entirely without any legal effect. It consists of resolutions, recommendations and opinions, and two charters: the Community Charter of the Fundamental Social Rights of Workers and the Charter of the Fundamental Rights of the European Union.[11] Soft law acts are mostly used to create a commitment regarding a specific matter across the Union and targeting certain goals in the social and employment area.

Besides international conventions can be added to the list of legal sources. International conventions can be general or particular in its nature and provide information to policy and law making institutions. Conventions mostly serve as a source of social and employment rights and have been commonly referred to in preambles of a great number or directives.

Finally, the case law from the Court of Justice of the European Union (CJEU, former ECJ) forms another pillar of legal sources within the EU. The case law provides guidelines for the subsequent cases that deal with the same or similar issues. Previous decisions by the CJEU are not considered as a statement of law and are not binding[12], since it's mission is to ensure that 'the law is observed' 'in the interpretation and application of the Treaties.'[13]

National authorities such as courts and labor inspectorates are responsible for enforcing the European provisions at the national level. When a legal dispute arises before a national court, the case can be submitted by the local court to the European Court of Justice for interpretation. Such decisions are 'preliminary rulings'. The moment the ECJ delivers its decision on interpretation, the matter is being reverted to the national court to make its final decision based on the merits of the case.[14] The ECJ does not decide on the merits of the case. Its main function is to ensure that EU law is interpreted and applied in the same manner in every Member Country. Furthermore, the European Commission is another very important official authority with the responsibility to monitor, if EU directives have been transposed and incorporated into domestic legislation properly. If this is not the case, it may commence infringement

[11] Philippa Watson, *EU Social and Employment Law* (2nd edn, Oxford University Press 2014) 2.03.
[12] Alina Kaczorowska, *European Union Law* (3rd edn, Routledge 2013) 109
[13] Article 19(3) TEU
[14] Susan Mayne and Susan Malyon, *Employment Law in Europe* (Butterworths Law 2001) A1.3.11

proceedings.[15]

2. Historical Development

Definition of EU Competence: 'The EU's competences are set out in the EU Treaties, which provide the basis for any actions the EU institutions take. The EU can only act within the limits of the competences conferred on it by the Treaties, and where the Treaties do not confer competences on the EU they remain with the Member States'.[16]

2.1. The Ohlin Report of 1956

The Ohlin Report was drafted by a group of experts lead by the Professor Ohlin, which was appointed by the International Labor Organization to analyze the social aspects of the European co-operation. There were some concerns about how liberalization of trade, which would be resulted in by the creation of a common market, will impact the social aspects of the market. It was apprehended that the single market might disbalance the European economic development, which would be caused by moving capital and labor resources to the areas of the undeveloped Southern Europe, where production costs are significantly lower.[17] The Ohlin Committee shared the view that wages and social charges vary from country to country. Moreover, this social area should not be harmonized at the European level and that countries should be able to keep their local standards. The experts were of the opinion that increasing productivity will automatically improve the workers' living standards. Finally, the committee came to the conclusion that discrepancies in labor costs do not create any restrictions in establishing more free international markets. After establishing that any lack of harmonization of social and labor standards, the Ohlin Committee, underlined that should this not be the case and it would be necessary to align national norms, this could be done by the ILO and the Council of

[15] 'Court of Justice of the European Union (CJEU)' (*Official Website of the European Union*) <http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm> accessed on 23.10.2015

[16] 'Review of the Balance of the Competences between the United Kingdome and the European Union', Social and Employment Policy (*HM Government*, 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332524/review-of-the-balance-of-competences-between-the-united-kingdom-and-the-european-union-social-and-employment-policy.pdf> accessed 19 Mai 2016

[17] Philippa Watson, *EU Social and Employment Law* (2nd edn, Oxford University Press 2014) 36

Europe. Back then the ILO was already in the process of developing universal labor standards and in the meantime the Council of Europe was conceptualizing what later turned into the European Social Charter. Thus there was not need for the Union to develop another set of norms.

2.2. The Treaty of Rome 1957

The Treaty of Rome established the European Economic Community. Its main purpose was to create a common market delivering economical and political benefits. Even though, the Treaty contained a Title on social policy, it only conferred very little power upon the European institutions.[18] The founding Member States shared the view that social policy lays within the competence of national legislators and had only very little what today is called 'direct' effect. This was well reflected in Article 117 (now Article 136), which states 'Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained'.[19] Moreover, provisions of Article 118 (now Article 140) excluded the possibility to transfer powers from the Member State to the Union. Thus, it did not have legally enforceable rights.[20] The limited scope of this article is also evident in *Germany, UK and Others v. Commission case* [21] where it was held by the Court that the Article only give procedural power to the Commission to consult on subjects within its competence. The other provisions found in the Treaty (Article 119-122) were similarly limited in its scope.[22]

2.3. Three Schools of Thought

The legislative process has even more aggravated because of the different opinions of every Member State on what role the Union should play in the area of social and employment policy. As a result, there was a split of opinions among the Members to what powers should be conferred upon the Union regarding creating of the social and

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[18] Catherine Barnard, *EC Employment Law* (3rd edn, Oxford University Press 2006) 4
[19] ibid.
[20] Philippa Watson, *EU Social and Employment Law* (2nd edn, Oxford University Press 2014) 38
[21] Joined Cases 281/85, 283/85, 285/85, 287/85 Germany, *UK and Other v. Commission* [1987] ECR 3203
[22] Barnard (n 18) 4

employment policies as well as establishing legally binding rights and obligations in the respective fields of law.

The split of the opinion on this matter can be separated in to three schools of thought.

The first school of thought promotes an active role of the Union in the social sphere. Its advocates claim that the Union is obliged to take care of the social well-being of its citizens. Moreover, it should also support the collective economic interest within the framework of the single European market. Accordingly, the supporters promote creation of a Social Europe, which would result in not only economic progress but would also lead to advancement in living and working conditions.[23]

The second school of thought considers that the primary role of the Union is carrying for economic matters. This leads to the perception that the Union is only competent in the social field 'in so far as is necessary to realize the economic objectives of the Union notably to prevent distortion of competition arising out of divergences in production costs between Member States due to differences in national social standards, levels of health and safety protection, and other similar factors.'[24]

The proponents of the third school of thought are of the opinion that the Union has absolutely no competence in the social policy area. Social policy should be handled at the national level. There are no evident consequences on the production costs arising out of the differences in social standards or levels of health and safety protection. Thus, such provisions should be drafted domestically, according to national traditions and desires.

The second school of thought became the most favored in the Union. Each Member State is in power to create welfare standards, which the best reflect its national social values. The supra-national provisions are the means to provide possibilities for

[23] Philippa Watson, *EU Social and Employment Law* (2nd edn, Oxford University Press 2014) 40

[24] ibid.

economic equality, which would help to achieve the internal market and reflects the principal of proportionality.[25]

The social policy in the Union was evolving through different phases. In the early 80s the Union was mostly concentrating on achieving the free movement of persons. It was necessary to coordinate with all Members States and their national social schemes to assure that workers exercising they right to freely move within the Union are not biased in their welfare rights. There were some attempts to harmonize social security and to establish uniform health and safety standards. Unfortunately this did not yield any significant results. Despite various efforts in the social policy field, very little was actually happening.[26]

2.4. The Paris Summit

Upon accession of three new members in 1973 and due to dramatic changes in the social situation in Europe, the heads of government met in Paris. There was a big shift in approach to social sphere. The oil crises broke out because the oil exporting Arab countries placed an embargo on Europe, due to the war with Israel. This lead to great discrepancies between the economic growth and the standards of living among some union citizens. As a result, the EC Commission drafted the Social Action Program. It contained three main goals: 'the attainment of full and better employment in the Union, the improvement of living and working conditions, and increased participation by both employers and workers in industry.'[27] Even though it had no legislative power, which would enable it to achieve its targets, the Social Action Program still marks a very important period in the development of the European social policy. Until then there was no comparable precedential action in the social area. It led to adopting a variety of measures, which profoundly and positively improved the lives of Union citizens.[28]

The situation has changed in the early 80s, when the European Community was once again undergoing a period of economic stagnation and high levels of unemployment.

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[25] Philippa Watson, *EU Social and Employment Law* (2nd edn, Oxford University Press 2014) 40-41
[26] ibid 41.
[27] ibid 42.
[28] ibid.

Liberalizing and creating more flexible labor law provisions seamed like a good method to combat the poor economic situation. Once again the need to improve social standards was neglected. There were many directive proposals but the Council rejected the majority of them.[29]

2.5. Council Recommendation of 1975

The Recommendation endorsed a 40-hour week excluding the overtime.[30] This limit to the hours worked should be applied throughout all sectors. Moreover, the second provision entailed in the Recommendation was a four-week paid annual leave.[31]

2.6. Resolution of 1979

With the poor employment situation and its implications on the social and economic areas in the late 80s, the Commission was requested to place its focus on adjusting and reorganizing working time. This should entail ‘a cut in weekly working hours, longer annual holidays, more training leave, and less overtime and shiftwork’[32]. A Commission’s proposal led to the Council Resolution on the adaptation of working time[33].

2.7. The Single European Act 1986

The Single European Act (SEA) was adopted by the European Economic Community (later renamed to the European Community and in 1993 to the European Union) in 1986. It put the Member States in a time frame for their economic unification and the establishment of a single currency area as well as common foreign and domestic policies. The European integration was commenced after The Second World War, due to the troubled post-war economic and political situation, which included an immense oil crisis. Moreover, the next challenge was to sustain competitive power at the global level, because of the increasing pressure from the United States due to liberalization

[29] Philippa Watson, *EU Social and Employment Law* (2nd edn, Oxford University Press 2014) 42
[30] Recommendation of the Council 75/457/EEC of 22 July 1975 on the principle of the 40-hour week and the principle of four weeks' annual paid holiday [1975] OJ L199/32
[31] 75/475/EEC, OJ 1975, L199/32
[32] Theodore Hitiris, *European Union Economics* (5th edn, Financial Times Management 2002) 251
[33] Council Resolution of 18 December 1979 on the adaptation of working time [1980] OJ C2/1

of international trade. As a response governments across the Europe decided to rationalize and to merge their major economic and political differences. The SEA was a milestone in a achieving this goal. The economic provisions of the SEA laid the foundation for the beginning of the largest trading area. This was achieved by introducing the free movement of goods, capital, labor and services among the member countries, which is now known as 'the four freedoms' of the EU.[34] Furthermore, as a result of adapting the SEA, an article setting minimum requirements on health and safety at work was introduced to the EEC Treaty. The purpose of this article was: 'to improve workers' health and safety at work; to harmonize conditions in the working environment; to prevent 'social dumping' as completion of the internal market progressed; and to prevent companies from moving to areas with a lower level of protection in order to gain a competitive edge'. Despite the fact that the Community Social Charter of the Fundamental Rights of Workers of 1989 had no legal power, it still stressed out the importance of the social as well as economic aspects on the single market.[35]

Also the Treaty of Amsterdam has greatly contributed to fortifying the policy making in the areas such as employment, social policy and the environment. The main articles of the TEU were expanded and added the objective of advancing economic and social development and sustaining a high-level of employment. It also included a new Title on Employment (Title VI) with the goal to achieve 'coordinated strategy for employment and particularly for promoting a skilled, training and adaptable workforce and labor markets responsive to economic change'.[36] All member countries will be required to take into consideration the employment policy, when it comes to national practices, and align their actions with the Council. In addition, article 117 TFU will be altered so as to consider the general goals of the Community social policy ('the promotion of employment, improved living and working conditions, so as to make possible their harmonization while the improvement is being maintained, proper social protection, dialogue between management and labor, the development

[34] Peter Madsen, 'Single European Act (SEA)', *Encyclopœdia Britannica*, <http://www.britannica.com/topic/Single-European-Act> accessed 22 Mai 2105

[35] Susanne Kraatz, 'Health and safety at work', (2016) <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.10.5.html> accessed 20 Mai 2015

[36] Tina Weber, 'Amsterdam Treaty brings small advancements for employment and social policy' (1997) <http://www.eurofound.e uropa.eu/observatories/eurwork/articles/amsterdam-treaty-brings-small-advances-for-employment-and-social-policy> accessed 20 Mai 2015

of human resources with a view to lasting employment and the combating of social exclusion').[37]

2.8. The Community Charter of the Fundamental Social Rights of Workers

The Community Charter of the Fundamental Social Rights of Workers laid the foundation for the principles, on which the European labor law model is built and also influenced the development of the European social model. The Charter of the Fundamental Rights of the European Union continued to evolve and became legally binding after ratifying the Treaty of Lisbon in 2009. The creation of the Single European Market had impact on social consequences at different levels and the concerns were growing constantly. A concrete need for a new social program arose. Hence, a body of minimum social provisions was proposed by a working party of the Commission, which then turned in the final Charter.[38] The Charter contained twelve fundamental rights, which can be divided into four categories:[39] 'free movement of workers; rights of residence; frontier workers; and workers moving under a contract to provide services and social securities.' One of the twelve fundamental rights was Articles 7-9, which outlined improvement of living and working conditions.

The Charter represents a commitment by all Member States to design a set of legal provision, which covers social policy and labor law field. The European Commission launched a Social Action Program to enforce the Charter and to be able to achieve its goals. Even though the Charter had a declaratory character, it became crucial in creating initiatives in employment area as well as industrial relations policy, which resulted in drafting a great number of directives, such as the Working Time Directive, a directive regarding pregnancy and maternity, parental leave-just to name few. Moreover, the Charter foresaw how much potential the fundamental individual employment rights have, which are found in the Charter of the Fundamental Rights of

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[37] Tina Weber, 'Amsterdam Treaty brings small advancements for employment and social policy' (1997) <http://www.eurofound.e uropa.eu/observatories/eurwork/articles/amsterdam-treaty-brings-small-advances-for-employment-and-social-policy> accessed 20 Mai 2015

[38] 'Community Charter on the Fundamental Social Rights of Workers' (*Eurofound, 12 January 2011*) <http://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/community-charter-of-the-fundamental-social-rights-of-workers> accessed 27 Mai 2016

[39] Philippa Watson, *EU Social and Employment Law* (2nd edn, Oxford University Press 2014) 44

the European Union, which was adopted by the end of 2000.[40]

2.9. Framework Directive 89/391 On Health and Safety

The health and safety concerns find its genesis in the origins of the Community. Article 117 EEC stresses out the importance of enhancing working conditions and workers standards of living and simultaneously Article 118 EEC authorizes the Commission to advertise cooperation between the Member States on occupational hygiene topics. The Commission's viewpoint was that increased health and safety standards will impose larger costs on businesses at the beginning but in the long run the return on investment will be visible. Hence, it will improve competitiveness and decrease costs related to workplace accidents and work-related diseases.[41]

The Framework Directive was the most significant legislative measure adopted under the Social Action Program. It indicated the onset of a new approach to health and safety. However, the Directive 89/391/EEC is devoid of elaboration on technical requirements, which can be found in the parent Directive 80/1107/EEC[42] and is based on rather broad general principles of prevention.[43] Also the Framework Directive renders that subsequently a set of individual Directives will be issued to cover specific risks.[44]

Finally, the European Working Time Directive was passed to lay down the requirements of the organization of working time based on the principles of health and safety embedded in the Framework Directive.

[40] 'Community Charter on the Fundamental Social Rights of Workers' (*Eurofound*, 12 January 2011) <http://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/community-charter-of-the-fundamental-social-rights-of-workers > accessed 27 Mai 2016
[41] Catherine Barnard, *EC Employment Law* (4th edn, Oxford University Press 2006) 539
[42] Council Directive 80/1107/EEC of 27 November 1980 on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work [1980] OJ L 327
[43] Barnard (n 41) 551
[44] ibid 562.

2.10. The European Working Time Directive 93/104/EC

Article 24 of the Working Time Directive requires every Member State to inform the Commission about their transposition measures. Moreover, the Members are obliged to report to the Commission on a five-year basis on the practical implementation of the Directive, including the standpoint of the two sides of the industry at the domestic level. The majority of Member States have chosen a vast number of various legislative and administrative acts, in most cases collective agreements, to implement the directive into national law.[45]

The European Working Time Directive (EWTD) is a borderline between two areas: traditional health and safety measures and the rights that employed persons are conferred. Article 118a TFEU was used as the legal foundation for adopting the Working Time Directive 93/104/EEC and the Young Worker's Directive 94/33/EC. These two directives also built the fundament for the EU's Social Charter Action Program.[46]

Before the European Working Time Directive (93/104/EC) was enacted, there were some sectorial legal provisions on working time.[47] This included the Recommendation of the Council on the principle of the 40-hour week and the principle of four weeks' annual paid holiday as well as the Resolution of 1979 on the adaptation of working time. These legal non-binding acts were primarily aiming to decrease working time in order to create more jobs.[48] In 1989 the Community Social Charter marked a shift in the focus. Completion of the Internal Market eventuated in enhancement in the living and working conditions across the EU.

The Commission used Article 118a (new Article 137 EC) of the EEC as the legal basis to conceptualize a directive on working time. The main focus of the EWTD was not to create jobs but to improve worker's health and safety. In order to support this

[45] European Commission, Commission Staff Working Paper, Detailed Report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organization of working time ('The Working Time Directive'), Brussels (2010) 6
[46] Catherine Barnard, *EC Employment Law* (4th edn, Oxford University Press 2006) 533
[47] Francois Buscot, George A. Bermann and Katharina Pistor, *Law and Governance in the enlarged European Union* (1st edn, Hart Publishing 2004) 185
[48] See also Council Recommendation of 82/857/EEC of 10 December 1982 on the principles of the Community policy with regard to retirement age [1982] OJ L357/27, which aspires to increase job creation within the Community

decision, the Commission cited a large number of studies which oftentimes delivered the same conclusion: weekly working time, which exceeds 50 hours, in the long run, can be harmful to individual's health and safety at the workplace. Furthermore, those studies found that a working week of more than six days can result in 'health problems including fatigue and disturbed sleep, and that longer working hours substantially increased the probability of accidents at work'.[49] The weekly working time is limited in the Directive 93/104/EC to 48 hours and the reference period is four months. Moreover, it also places limits on the night work. Furthermore, it ensures that every worker is entitled to daily, weekly rest breaks and a minimum annual leave. The Directive applies to both private and public sector, with the exception of transport industry, activities of doctors in training and certain specific activities.[50]

Health and safety issues have been a major concern of the Community since the beginning. Article 117 EEC (now Article 136 EC) seeks for advancement in working conditions and standards of living of workers. Moreover, Article 118 EC (now Article 137 EC) promotes that objectives of the Community should be 'the promotion of employment, improved living and working conditions, so as to make possible their harmonization while the improvement is being maintained, proper social protection, dialogue between management and labor, the development of human resources with a view to lasting high employment and the combating of exclusion'.[51] The Commission justified its decision by stating that despite the temporary financial burden for improving the health and safety standards, in the long-term it will result in visible positive effects. The outcome will be a smaller number of work accidents and fewer cases of occupational diseases. Hence, this will result in reduction of costs for businesses and will enhance its competitiveness without endangering the job situation in the market.[52]

2.10.1. Main provisions of the WTD

The European Commission has always had an obligation under the Treaty to provide legal provisions for workers health and safety. In 1990 it has formally proposed a specific legislation, which resulted in drafting the European Working Time Directive

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[49] Catherine Barnard, *EC Employment Law* (4th edn, Oxford University Press 2006) 534
[50] Article 1(3) of Council Directive 93/104/ EC
[51] Article 136 EC
[52] Catherine Barnard, *EC Employment Law* (4th edn, Oxford University Press 2006) 539

(EWTD) in 1993.[53] The Working Time Directive 2003/88/EC is the consolidated version of the former Directive 93/104/EC and its amended version Directive 2000/34/EC. The ultimate goal of the Directive is to decree minimum health and safety requirements for the organization of working time.

The EWTD obliges its Member States to confer certain rights upon workers, including: '(i) a limit to working weekly hours, which must not exceed 48 hours on average, including overtime, (ii) a minimum daily rest period of 11 consecutive hours in every 24 hours, (iii) a rest break during hours if the worker is on duty for longer than six hours, (iv) a minimum weekly rest period of 24 uninterrupted hours for each 7-day period, in addition to the 11 hours' daily rest, (v) paid annual leave of at least 4 weeks per year, (vi) extra protection for night work'.[54]

The Directive takes into account the need for flexibility and enables longer reference periods to comply with its provisions. Moreover, it permits derogations from the rules on rest periods, the duration of work at night and the reference periods. Furthermore, the EWTD also allows national laws to derogate from the Directive in specific sectors or under certain circumstances. As a result, derogations must be compensated adequately by providing additional periods of rest and ne necessary safety measures must be sustained. Autonomous workers are the only ones excluded from the purview of the Directive and can entirely derogate from the rules prescribed in the Directive. There is no possibility to derogate from the 48-hour working week limit. Member States can however allow employees to opt-out from this maximum. In order to make use of the opt-out right, employer must obtain a consent by the employees. Employee's refusal to work overtime cannot have any negative impact on the employment relationship.[55] The EWTD is strongly reflected in a vast majority of

[53] European Commission, 'DG for Employment, Social Affairs and Equal Opportunities, Study to support an Impact Assessment on further action at European level regarding Directive 2003/88/EC and the evolution of working time organization, Executive summary' (2010), 2 <https://www.google.at/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjmsqeAof3NAhVMWhQKHUI9BdwQFggdMAA&url=http%3A%2F%2Fec.europa.eu%2Fsocial%2FBlobServlet%3FdocId%3D6485%26langId%3Den&usg=AFQjCNGntpfayJCu495Ak8-q97-Gy2DrJg&sig2=Z7g3UipluQmwyCUmlo2-Kg> accessed 15 Mai 2016

[54] Jorge Cabrita and Yolanda Torres Revenga, 'Opting out the European Working Time Directive' (2015) 1 <http://www.eurofound.europa.eu/de/publications/customised-report/2015/working-conditions/opting-out-of-the-european-working-time-directive> accessed 15 Mai 2016

[55] European Commission, 'DG for Employment, Social Affairs and Equal Opportunities, Study to support an Impact Assessment on further action at European level regarding Directive 2003/88/EC and the evolution of working time organization, Executive summary' (2010), 2 <https://www.google.at/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahU

international standards and provisions focusing on 'safety and health', including conventions of the International Labor Organization.[56]

In addition, the entitlement applying to workers all over the EU to limited working hours is embedded in the Charter of Fundamental Rights of the European Union as well.[57]

What is more, the case law of the European Court of Justice has held in many cases (for instance Dellas (C-14/04), BECTU (C-173/99)) that provisions, laid down in the EWTD pertaining to maximum working time, paid annual leave and minimum rest periods 'constitute rules of Community social law of particular importance, from which every worker must benefit as a minimum requirement necessary to ensure protection of his safety and health'.[58]

2.10.2. Entitlements and limits

The English version of the Directive distinguishes between limits and entitlements. Limits are covered by the provisions addressing working time and night work. Employers should not allow any of the workers to go beyond those limits, only except where such behavior is subject to derogations, or where suitable offer the individual opt-out. On the contrary, entitlements are the rest provisions: rest breaks, daily, weekly and annual rest periods. A request by the employer to carry out work duties during such periods is not lawful. Then again if an employee chooses to do so, this is

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KEwjmsqeAof3NAhVMWhQKHUI9BdwQFggdMAA&url=http%3A%2F%2Fec.europa.eu%2Fsocial%2FBlobServlet%3FdocId%3D6485%26langId%3Den&usg=AFQjCNGntpfayJCu495Ak8-q97-Gy2DrJg&sig2=Z7g3UipluQmwyCUmlo2-Kg> accessed 16 Mai 2016

[56] European Commission, 'DG for Employment, Social Affairs and Equal Opportunities, Study to support an Impact Assessment on further action at European level regarding Directive 2003/88/EC and the evolution of working time organization, Executive summary' (2010), 2 <https://www.google.at/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjmsqeAof3NAhVMWhQKHUI9BdwQFggdMAA&url=http%3A%2F%2Fec.europa.eu%2Fsocial%2FBlobServlet%3FdocId%3D6485%26langId%3Den&usg=AFQjCNGntpfayJCu495Ak8-q97-Gy2DrJg&sig2=Z7g3UipluQmwyCUmlo2-Kg> accessed 16 Mai 2016

[57] ibid.

[58] ibid.

not considered wrongful and rests on the employee.[59]

Daily rest and breaks at work (Article 3 and 4)

Every worker must be granted a minimum eleven-consecutive-hour daily rest period for each 24-hour period. Even though this implies that a workday consists of 13 hours, employers are not allowed to regularly impose such long working hours due to the principle of 'humanization of work'.[60]

If daily working time is longer than six hours, every worker has a right to break at work. Detailed information on duration and terms on which an in work-rest must be taken is decreed in collective agreements or by national legislation. In the *MacCartney v. Overley House Management*[61] case the claimant brought a claim against her employer for being denied entitlements under the EWTD. She was not granted neither a daily rest period nor in-work rest breaks, even though she provided her services at the retirement complex 24 hours on the site for four days a week. The Employment Appeal Tribunal (EAT) confirmed that Mrs. MacCartney was denied her right to daily and at work rest periods under the Directive since 'on-call' time is qualified as working time (the EAT cited SIMAP and the ECJ's decision). She was lawfully entitled to an uninterrupted daily rest and also was supposed to know when the start is, so she were able to use it as she sees fit.[62]

Weekly rest (Article 5)

Weekly rest is another entitlement provided additionally to the daily rest. Every worker must be entitled a minimum uninterrupted weekly rest period of 24 hours, to which are to be added the 11 hours' daily rest referred in Article 3. Hence, the weekly rest should be at least 35 consecutive hours, once every 7 days on average over 14 days. Under certain circumstances the weekly rest might be reduced to 24 hours. Originally Sunday had to be included in calculating the weekly rest period. UK has successfully challenged this provision in the *Working Time*[63] case. The Court held that

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[59] Catherine Barnard, *EC Employment Law* (4th edn, Oxford University Press 2006) 537-538
[60] ibid 540.
[61] *Maccartney v. Overley House Management* [2006] IRLR 514.
[62] See additionally *Gallagher v. Alpha Catering Services* [2004], EWCA Civ 1559; [2005] ICR 673, [2005] IRLR 102
[63] Case C-84/94 *UK v. Council* [1996] ECR I-5755. See also e.g. Case C-169/91 *Stoke on Trent v. B & Q* [1992] ECR I-6457; Case C-312/89

the Council did not manage to reason why of all days Sunday is more likely to be linked to health and safety of workers than any other day of the week. The outcome was annulment of the respective provision.[64] Another important case is *Antonino Accardo and Others v Comune di Torino*[65]. Article 18 of the Directive allows Member States to derogate from Article 3 by the means of collective agreements. In such cases it must be made sure that the workers concerned are either granted appropriate compensatory rest periods or if this is not possible, a certain level of appropriate protection must be provided by the employer.[66] A legal action was brought by the municipal police officers against their employer for the non-compliance with the weekly rest provisions of the EWTD.[67] Derogations from the Directive are optional. Collective agreements must comply with the principal of legal certainty. Scope of application of Article 17(3) does not necessarily exclude occupations that are not listed in Article 17(2). Moreover, it is not possible to rely on national provisions, derogating from the respective article, if the relevant provision of the Directive has not been successfully transposed into national law. Hence, the municipal police officers were unlawfully deferred from their right to a decent weekly rest.

Annual leave (Article 7)

Basic provisions

The basic rule is that every worker is entitled to at least four weeks of paid leave on an annual basis. This provision must conform to domestic legal provisions regulating conditions for such entitlements and rules under which such leave is allowed. This

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[64] Catherine Barnard, *EC Employment Law* (4th edn, Oxford University Press 2006) 540
[65] Case C-227/09 *Antonino Accardo and Others v. Comune di Torino* [2010] I-10273
[66] Article 18, EWTD
[67] Case C-227/09 *Antonino Accardo and Others v. Comune di Torino* [2010] OJ C 346: The local police officers were working in shifts for 7 consecutive days and the compensatory weekly rest was withheld from them, due to a collective agreement, which allowed such derogation. The defendant (The Comune di Torino) argued that police officers are excluded from the scope of applicationof the Working Time Directive. Hence the derogation of Article 17 is not applicable in this situation. The Court held that if a certain occupation is merely not listed in Article 17 (2), it does not automatically mean that the article excludes such occupation/industry. After a careful consideration the Court said that activities of municipal police officers do fall within the scope of the Directive. Moreover, such national provisions are violating the requirements of Article 5. Another issue was Italy's failure to transpose the derogation provisions properly and refuse individuals their right to a weekly rest. Even though that the obligation arising from the WTD is binding on all authorities (also courts) in a Member State, the domestic law (e.g. a collective agreement) cannot be interpreted in a way 'to favor the application of collective agreements derogating from the rules transposing Article 5 of those directives.'

provision constitutes a ‘particularly important principle of Union social law’ and it is extremely important that workers are actually able to make use of this right. The EWTD prohibits a replacement of the annual leave with a payment in lieu. An exception is made to cases, where an employment contract is terminated.[68] The importance of Article 7(2) was interpreted in the *Federatie Nederlandse Vakbeweging*[69] case. Article 7 is the only substantive provision in the directive, where no derogations are permitted. The question that was submitted for the preliminary ruling was, if aggregation of several periods of leave, which are carried forward to the following years, and are not being taken in the course of a given year, can be eligible for redemption in the subsequent year.[70] The purpose of this provision is for workers to have some time off from work, spend it with their families and to recuperate. The impact of this provision remains even if the annual leave is taken during a later period of time.[71] The Court ruled that Article 7 (2) of the directive excludes the replacement of the annual leave with payment in lieu, where the yearly rest period is carried over to a subsequent year.[72]

Remuneration during the annual leave period is equal to the ‘normal remuneration received by workers’ when they are on active duty.[73] Thus the compensation consists of basic salary, performance-based payments that are intrinsically linked to the job tasks under the employment contract and professional as well as status-related elements (e.g. qualifications, duration of employment).

Under the purview of the directive part-timers and atypical contractors are also entitled to a four-week annual leave. The calculation of the entitlement follows on a pro-rata basis. Notwithstanding it is not expressly defined in the directive, the Court has interpreted the provision in such a manner. ‘Part-time workers shall not be treated in a less favorable manner than comparable full-time workers’ and for the computation of the entitlements ‘the principle of pro rata temporis’ should be applicable.[74] Moreover, in the *BECTU*[75] case the Court held that national legislation

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[68] Catherine Barnard, *EC Employment Law* (4th edn, Oxford University Press 2006) 541
[69] Case C-124/05 *Federatie Nederlandse Verbeweging v. Staat der Nederlanden* [2006] ECR I-3423
[70] Case C-124/05 *Federatie Nederlandse Verbeweging v. Staat der Nederlanden* [2006] ECR I-3423 paras 24-25
[71] ibid para 30.
[72] ibid paras 33-35.
[73] Case C-155/10 *Williams v. British Airways* [2011] ECR I-000, paras 21-23
[74] Case C-313/02 *Nicole Wippel v Peek & Clopenburg GmbH & Co. KG* [2004] ECR I-9483, para 11

imposing preconditions for entitlement to paid annual leave, which prevents workers from the entitlements conferred upon them by the directive, not only denies their personal rights conceded by the directives' provisions but it also opposes its objectives.[76] The British national law violated the EWTD in two aspects: (i) the entitlement to the paid annual leave only arises, when one is continuously employed for at least 13 weeks[77], (ii) UK exceeded the transitional period for transposing the directive into national law and were granting a three-week paid annual leave until late 1999.[78]

Rolled up holiday pay

The European Court of Justice has ruled that 'rolled up' holiday is unlawful, since it contradicts the Directive. Holidays must be remunerated in addition to the normal pay for work. The worker must be paid exactly at the time, when he or she takes his or her annual rest period, like the term ('paid annual leave') itself states. Rolled up holiday pay leads to depriving workers from paying the worker for the annual leave, when the leave is actually taken and incorporating the holiday payment in the hourly rate. The minimum of four weeks of paid annual leave cannot be replaced by payment in lieu, save on termination. The practice of 'rolled up' holiday pay would effectively mean that the minimum period of paid annual leave is eligible for redemption. Nevertheless, the Directive prohibits such substitution.[79]

In the conjoined ECJ cases of *Robinson-Steele v RD Retail Services, Clarke v Frank Staddon Ltd and Caulfield & others v Hanson Clay Products Ltd*[80] the unlawfulness of 'rolled up' holidays was put under scrutiny. The Advocate's opinion stated that such arrangement per se, where a worker's holiday pay is included in the enhanced hourly rate paid to workers, rather than paying at the time when the leave is taken, is not unlawful. However, the employer must somehow ensure that the annual leave is

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[75] Case C-137/99 *BECTU* [2001] ECR I-4881
[76] ibid para 48.
[77] ibid para 24.
[78] ibid para 20.
[79] Osborne Clarke, 'Rolled up Holiday Pay – Guidance from the European Court of Justice' (2006) <http://www.osborneclarke.com/media/filer_public/ef/ff/efff7054-9b0a-4c86-8bd0-b084b559ac77/upstream-july-200620060713.pdf> accessed 5 Mai 2016
[80] Joined Cases C-131/04 and C-257/04 *C.D. Robinson-Steele v R.D. Retail Services Ltd* [2006] I-02531

actually taken. Moreover, the holiday pay must be transparent and the growth of the normal hourly rate must be visible.

The ECJ held in its decision that such arrangements are unlawful and not compatible with the Directive. Thus the Court ruled out such possibility. The Court supported its opinion by saying that according to the definition of 'paid annual leave' workers are entitled 'to receive their normal remuneration for that period of rest'[81]. Moreover, the Court of Justice also ruled out the possibility, which was used by a great number of employers, rolling up the holiday pay on a weekly or monthly basis by a cheque. The Court's decision was based on the fact that Article 7 precludes such practices because it could lead to a set-up, where the annual paid leave is substituted by an adequate allowance. The negative impact would primarily be visible among low earning workers, who would rather choose to forgo leave and carry on with their work duties. Hence, holiday payments must be granted during the time, when holidays are taken and staggered payments are unlawful.[82]

The effect of long-term sick leave and maternity leave

Another important question is whether the annual paid leave will be added to the period of maternity leave or a long-term sick leave, when these two periods overlap. The *Merino Gomez*[83] case considered this issue regarding maternity leave.[84] The factory workers could take their annual leave only during a period specified by the employer. During the company holiday period Mrs. Gomez was on a maternity leave and upon her return, she was denied her right to take the yearly holiday. Maternity leave has a totally different purpose than the annual paid leave and aims to protect a relationship between a mother and a child.[85] Hence the Court ruled, that if a maternity leave coincides with a workforce's annual leave, the requirements of the Directive are not fulfilled.[86] If a woman would lose her right to a statutory annual leave due to a maternity leave, this would lead to discrimination based on sex. According to the Sex

[81] Joined Cases C-131/04 and C-257/04 *C.D. Robinson-Steele v R.D. Retail Services Ltd* [2006] I-02531 para 50
[82] ibid.
[83] Case C-342/01 *Merino Gómez v Continental Industrias del Caucho SA* [2004] ECR I-2605
[84] Catherine Barnard, *EC Employment Law* (4th edn, Oxford University Press 2006) 544
[85] Case C-342/01 *Merino Gómez v Continental Industrias del Caucho SA* [2004] ECR I-2635
[86] ibid para 33.

Equality Directive 2006/54/EC[87] employers must provide female workers a possibility to take their annual paid leave during the period other than their maternity leave.

The standpoint of British courts regarding long-term sick leave was that since a workers has not been fulfilling his or her duties, therefore he or she was not entitled to take the paid annual vacation, which serves the purpose to provide workers with a rest period from work. The Court of Justice was of different opinion. Once again the Court claimed that the purpose of a paid annual leave and a long-term sick leave is not the same. In *Schultz-Hoff and Stringer* and later in *Dominguez* [88] case the Court held that 'the purpose of paid annual leave is to rest and enjoy a period of relaxation and leisure' and the purpose of a sick leave is to recover from the illness. The Court ruled that Member States have the right to preclude workers from taking the annual leave during the sick leave[89]. However, eligibility to take annual leave does not cease to exist by the end of the leave year, if a worker was not capable to make use of it due to incapacity to work. Furthermore, the Court said that the provision of Article 7(2) precludes national provisions or practices, which upon termination of an employment contract, refuses to pay for the not taken paid annual leave, since a worker was on an a leave of absence for the whole part of the leave year or of a carry-over period. As a result, the worker was not able to exercise his right under the Directive.

In the *Dominguez* case the Court ruled that Member States are not allowed to differentiate between workers on leave of absence and workers who actually worked, for the purpose of calculating the annual entitlement and so preconditioning the worker's right. Further, sickness does not effect the worker's entitlement to a minimum of four weeks paid holiday[90]. Consequently, workers are allowed to accrue paid annual leave while being on a long-term sick leave. The Court's decisions in *Schultz-Hoff*, *Stringer*, *Pareda* and *Dominguez* cases are for the benefit of workers but at the same time a big concern was expressed by employers. The possibility to accrue

[87] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204

[88] Case C-350/06 *Schultz-Hoff v. Deutsche Rentenversicherung Bund* and Case C-520/06 Stringer and Others v. Her Majesty's Revenue and Customs [2009] ECR I-179

[89] Case C-282/10 *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique, Préfet de la région Centre,* [2012] ECR I-000. Ms Dominguez brought a claim against her employer for a payment in lieu because of her inability to take the annual paid leave, due to her absence after an accident, which happened on her way to work. She argued that it is a work-related accident and her time away from work should be added for the calculation of her paid leave.

[90] Case C-282/10 para 30

long periods of annual leave due to a long-term sickness imposes a high financial burden on business. Thus, Advocate General decided to support both sides of the industry and to place a limit on the overaccrued periods of annual leave, so it cannot be carried-over indefinitely.[91] In *Schulte*[92] case the ECJ recognized that national rules limiting the carry-over by workers, who have been on a long-term sick leave, to 15 months after the end of the leave year does not constitute a breach of the WTD provisions.

Working time (Article 6)

Under Article 6 the average weekly working time should not exceed the 48-hour maximum, which includes overtime. The reference period is four months. For the purpose of calculating working time sick leave and annual leave must be kept neutral.

The scope of the Directive must be interpreted very broadly and the list of provisions from which Member States are allowed to derogate is exhaustive. The Member States are not allowed to unilaterally umpire the scope of the Directive, while preconditioning or placing restrictions to the implementation of workers' rights.[93] This was confirmed by the Court in *Pfeiffer*[94] case. Moreover, the Court ruled that in order to deviate from the upper 48-hour weekly limit, an individual consent by the worker is required and only a reference in the employment contract to a collective agreement, which allows such derogations, is not sufficient.[95] Furthermore, the Court held that on-call time must be regarded as working time while calculating the weekly working maximum.[96] Finally, it was concluded by the Court that 'the 48-hour upper limit on average weekly working time, including overtime, constitutes a rule of Community social law of particular importance from which every worker must benefit, since it is a minimum requirement necessary to ensure protection of his safety and health'.[97] Thus national provisions derogating from the weekly maximum working time are not compatible with the requirements laid down in the Directive.[98]

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[91] Case C-214/10 *KHS AG v. Winfried Schulte* [2011] ECR I-000
[92] ibid.
[93] Joined Cases C-397/01 to C-403/01 Pfeiffer v. Deutsches Rotes Kreuz [2004] I-8913.
[94] ibid paras 52 and 57.
[95] ibid paras 75 and 84-85.
[96] ibid paras 92-95.
[97] ibid para 100.
[98] ibid.

It is constituted as an infringement of Article 6(b), if a national provision allows a job transfer of an employee against his or her wishes because he or she inquired to adjust the average weekly working time and secure compliance with the Directive. A refusal by an employee to work longer hours may not lead to any financial detriment or penalties.[99] In the *Fuß*[100] case it was a matter of whether an employee can be transferred to a different position within the same company, just because he asked his employer to comply with the maximum working time provision and refused to work overtime. Mr. Fuss was working 54 hours per week, including 24-hour shifts (including on-call time at the workplace). In his claim he asked for reparation for the excess hours in form of compensatory time off or a financial compensation for the overtime.[101] In addition, the Court confirmed that the EWTD confers rights on individuals, on which they can rely. This led to a conclusion that Mr. Fuß can demand reparation for the loss and damages he sustained working overtime due to the breach of Article 6.[102]

First of all, it is important to define what can be constituted as working time. Article 2 contains a list of definitions that are important for the interpretation of the Directive. The definition of 'working time' (Article 2 (1)) includes three elements: '(i) any period during which the worker is working, (ii) at the employer's disposal, and (iii) carrying out his activities or duties, in accordance with national laws and/or practices'. The criteria must be seen as cumulative but the third requirement carries less weight than the other two. This standpoint of the ECJ can be found in various cases regarding working time, especially in the emergency services: *SIMAP*, *CIG*, and *Jaeger*.[103] The Court adjudicated that on-call time, during which workers stay at the premises of the employer, is qualified as working time.[104] 'Time spent on call by doctors in primary health care teams must be regarded in its entirety as working time, and where appropriate as overtime, within the meaning of the directive if they are

[99] Gregor Thüsing, *European Labor Law* (Hart Publishing 2013) 142
[100] Case C-243/09 *Günter Fuß v Stadt Halle* [2010] I-09849
[101] ibid para 23.
[102] ibid paras 50 and 59-60.
[103] Catherine Barnard, *EC Employment Law* (4th edn, Oxford University Press 2006) 547. Also see: Case C-303/98 *SIMAP* [2000] ECR I-7963, Case C- 241/99 *CIG v. Sergas* [2001] ERC I-5139, Case C-151/02 *Jaeger* [2003] ERC I-8389
[104] In the *Jaeger* case: as a junior emergency doctor Mr. Jaeger spent a great number of hours carrying his on-call duty. According to the German law 'on-call' duty is to be regarded as a rest period, except where one actually carries out his professional duty. He would stay at the hospital and would only perform his duties, if a need arises. The remainder of time was at his free disposal. (C-151/02 *Jaeger* paras 31 and 36)

required to be present at the health center'.[105] In addition, the 'inactively' spent time at work cannot be deducted from the total time spent on-call and be qualified as a rest period.[106]

The Court has once again confirmed in *Dellas*[107] case that on-call duty counts as working time and must be considered while calculating the 48-hour working week. The national law in France has developed a special 3 to 1 ratio method to reflect the periods of inactivity in the calculation of pay and overtime. The Court explained that even though the EWTD does not entail any provisions on remuneration of working time, it does have a provision on maximum weekly working time. Since the weighting method does not reflect the 'real' hours worked and could reach a number of 60-hours per week. This would contradict the Directive. It only provides two categories working time and rest periods, so when interpreting its provisions, one cannot come to conclusion that there is an intermediary category, within which the inactive on-call duty would fall.[108]

Finally, the Court held that intensity of work is not among the elements defining 'working time' and that physical presence at any place determined by employer, irrespective the inactivity periods, qualifies in its entirety as working time.[109] On the contrary, the Court underlined that the periods of on-call time, where workers in the primary care services are not required to stay at the premises of the workplace, are not qualified as working time, with an exception for the periods, where the professional duty was actually carried out.[110]

Although the Directive permits a multitude of derogations from Article 16(b), there are only three possible derogations from the maximum weekly working time provision: (i) Article 17 (1) – 'autonomous workers', (ii) 'doctors in training' –

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[105] C-151/02 *Jaeger* para *52, see also* Case C-303/98 *SIMAP* para 50 and Case C-241/99 CIG paras 33-34
[106] Catherine Barnard, *EC Employment Law* (4th edn, Oxford University Press 2006) 548
[107] Case C-14/04 *Dellas* [2005] ECR I-10253
[108] Catherine Barnard, *EC Employment Law* (4th edn, Oxford University Press 2006) 548
[109] European Commission, Commission Staff Working Paper, Detailed Report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organization of working time ('The Working Time Directive'), Brussels (2010) 41 <https://www.google.at/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjDjufzq_3NAhVEOhQKHdrlA7cQFggdMAA&url=http%3A%2F%2Fec.europa.eu%2Fsocial%2FBlobServlet%3FdocId%3D6426%26langId%3Den&usg=AFQjCNHJkFW6VQ0lC7fyuNG-iNc3eS5PxA&sig2=Ls6j-ppAlldS2DgqEfErUg> accessed 25 Mai 2016
[110] Case C-303/98 *SIMAP* [2000] para 50

Member States are allowed to derogate from this provision during the transitional period, (iii) Article 22 (1) – 'individual opt-out', which presupposes individual consent of the worker concerned.[111]

2.10. 3. Opting-Out

One of the main provisions in the Working Time Directive is the weekly 48-hour working time including overtime. However, the Directive allows Member States to deviate from this provision and not apply the 48-hour weekly limit. There are three types of such derogations:

- Derogations are linked to certain roles such as managing executives or other persons with autonomous decision-taking powers, special activities or situations, shift and split work, and doctors in training. These exceptions are outlined in the Article 17 of the Directive 2003/88/EC. If Member States decide to use the opt-out right, so self-employed workers do not fall within the scope of Article 6 and have no maximum limit for hours worked.
- By means of collective agreements. Both sides of the industry may decide to have different legal provisions at the national level. The only provision of the EWTD, which allows no derogation from it, is the maximum of 48 hours weekly working time.
- Article 22 (1) states that in some cases Member States are permitted not to apply the maximum of working time, if workers' health and safety is protected adequately and there is a mutual consent. This deviation only is applicable to the 48-hour limit and not to any of other provisions, contained in the

[111] European Commission, Commission Staff Working Paper, Detailed Report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organization of working time ('The Working Time Directive'), Brussels (2010) 59-60 <https://www.google.at/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjDjufzq_3NAhVEOhQKHdrlA7cQFggdMAA&url=http%3A%2F%2Fec.europa.eu%2Fsocial%2FBlobServlet%3FdocId%3D6426%26langId%3Den&usg=AFQjCNHJkFW6VQ0lC7fyuNG-iNc3eS5PxA&sig2=Ls6j-ppAlldS2DgqEfErUg> accessed on 25 Mai 2016

EWTD.[112]

Generally, the Directive sets no explicit limits on the amount of hours worked, for workers that choose the opt-out option. It also does not provide any limits on the period of time over which the deviation from the maximum working time will be effective. Workers are able to agree on working unlimited number of hours for an indefinite period of time. Yet the European Commission has identified implicit limits, which can be found in the European Commission Staff Working Paper about the EWTD. First of all, the maximum weekly working time cannot exceed 78 hours. This limit can be traced back to the calculation of the minimum periods of daily and weekly rest. As a matter of fact, the European Commission recognized this issue and included an absolute maximum limit in its proposal for the amendment of the WTD in 2004. The proposal indicated: 'no worker works more than sixty-five in any one week, unless the collective agreement or agreement between the social partners provide otherwise'. Second of all, the limit involves the principles of health and safety of workers. Article 22(1) letter d prescribes that 'for reasons connected with safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours'. The reasons affecting safety and health of workers are not concretely defined in the Directive but the Commission challenged in this case the opting-out possibility. It said that it is unclear what consequences the extending of the 48-hour working week might have on workers in the long run and if it is compatible with the health and safety principles underlying the Directive.[113] Moreover, there are no indications in the directive, weather the working hours limit is applicable per worker or per contract. If the limit is to be applied per worker, it means that regardless the number of employers, the total amount of hours worked must comply with the respective provision. On the other hand, if this provision applies to each contract, each employment relationship would have to comply with the 48-hour limit, irrespectively how many hours one works. The same problem pertains to the opt-out provision.

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[112] Jorge Cabrita and Yolanda Torres Revenga, 'Opting out the European Working Time Directive' (2015) Eurofound, 2-3 <http://www.eurofound.europa.eu/de/publications/customised-report/2015/working-conditions/opting-out-of-the-european-working-time-directive> accessed 15 Mai 2016.

[113] Jorge Cabrita and Yolanda Torres Revenga, 'Opting out the European Working Time Directive' (2015) Eurofound, 1 <http://www.eurofound.europa.eu/de/publications/customised-report/2015/working-conditions/opting-out-of-the-european-working-time-directive> accessed 15 Mai 2016

The Court has also underlined that the provision of Article 22 has no legal effect whatsoever, if a Member State fails to pass any measures to transpose the use of opt-out in the national legislation. This results in that the 48-hour weekly limit stays in place, even if a worker has consented to exceeding the upper weekly working time limit.[114]

All in all, there is clear evidence on the support on application of the directive and the opt-out, in constant. If the possibility presents, the opt-out should be applicable per worker and not to individual employment contracts. The total number of working hours should be calculated in order to see, if the directive's provision has not been violated. The Charter of Fundamental Rights, which has the force of law, applies to workers and not employment contracts. Secondly, accumulating long working hours in various jobs might have significant effects on workers safety and health. With no records available it will be extremely difficult to keep track of working time. Finally, such practices are not necessarily a reflection of the main purpose of the Working Time Directive.[115]

There are three types of the opt-out provisions:

i. Generalized use – opt-out is used across all sectors of activity or occupation.
ii. Limited use – opt-out might be used only in certain sectors or by certain occupations. Mostly such opt-out provisions cover the health and emergency sectors or can be related to activities that require a large part of on-call time.
iii. Opt-out is not allowed – most of the Member States do not avail any derogations from the weekly maximum of 48-hours.[116]

[114]Case C-429/09 *Fuß II*, para 33

[115] Jorge Cabrita and Yolanda Torres Revenga, 'Opting out the European Working Time Directive' (2015) Eurofound, 4 <http://www.eurofound.europa.eu/de/publications/customised-report/2015/working-conditions/opting-out-of-the-european-working-time-directive> accessed 15 Mai 2016

[116] Jorge Cabrita and Yolanda Torres Revenga, 'Opting out the European Working Time Directive' (2015) Eurofound, 5-6 <http://www.eurofound.europa.eu/de/publications/customised-report/2015/working-conditions/opting-out-of-the-european-working-time-directive> accessed 15 Mai 2016

2.11. The Charter of Fundamental Rights

Once the Lisbon Treaty entered into force, the Charter became legally binding and its provisions were granted the Treaty rank in the Union's legal order. It was officially adopted by the Member States in 2007.

The Charter entails a great number of social and employment law rights. Article 31 provides a provision on fair and just working conditions. The provision explicitly addresses working time rights:

- 'Every worker has the right to working conditions which respect his or her health, safety and dignity.
- Every worker has a right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave'.

According to the explanation on the drafting of the Charter, Article 31 was adopted under using a combination of the Working Time Directive, Article 2 of the European Social Charter and also respecting the workers rights granted in the Community Charter.

The Charter is only applicable in the cases, where its provisions are addressed to the institutions of the EU and to the Member States, when implementing the Union law. Since those are based on the Treaties of the European Union they must be exercised and defined accordingly to the limits, which are provided by the founding Treaties.
The rights conferred by the Charter may be restricted, if it is required by the general interest of the Union, or if there is a need to protect the rights and freedom of others. Limitations can only be placed on the Charter taking into account the principle of proportionality.[117]

3. International Labor Organization (ILO)

Fundamental principles of occupational health and safety

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[117] Philippa Watson, *EU Social and Employment Law* (2nd edn, Oxford University Press 2014) 22

Occupational health and safety is concerned with environmental hazards arising in or from the workplace and how it affects worker's health and well-being. Recently the importance and scope of the area occupational health and safety has been increasing immensely, due to social, political, technological and economical changes. Globalization is though still the largest influencing factor, shaping the landscape of health and safety at work. The significance of worker's protection from occupational illness and work-related injuries is embodied in the preamble to the Constitution of the ILO, and has been one of the major concerns since the establishment of the ILO in 1919.[118]

Working hours build a fundament for safe and humane working conditions. The first Convention by the ILO was on working hours and stipulated a daily maximum of 8 hours and an upper limit of 48 hours of weekly work.[119] The ground for limiting working hours was an attempt to promote better 'work-life balance' and reduce the risk of occupational illnesses and work injuries. The Convention No. 30[120] has reinforced the principle of limiting working time. It has become a basis for many national provisions regarding working time. Both Conventions No. 1 and No. 3 allow derogations from those limits but only in a limited number of cases.[121] Later on, the Recommendation No. 116[122] was drafted, which proposed a reduction in working hours from 48 to 40 hours per week.

ILO Convention No. 14[123] and Convention No. 106[124] on Weekly Rest provide that every worker has a right to a 24-consecutive-hour weekly rest period. Employers may deviate from this provision and agree to exceptions or alternative arrangements after consulting with trade unions or other workers representatives.[125]

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[118] Benjamin O. Alli, *Fundamental Principals of Occupational Health and Safety, International Labor Office* (2nd edn, ILO 2008) vii-viii

[119] International Labor Organization Convention No.1 (1919), *Hours of Work (Industry) Convention,* Article 2

[120] ILO Convention No. 30 of 1930 on *Hours of Work (Commerce and Offices)*

[121] E.g. Convention No. 1, Article 6 (1) letter a. However, if an employer decides to derogate from the maximum daily or weekly working time, a proper record of hours worked in excess must be kept (Article 8 (1) letter c.)

122 ILO Convention No. 116 of 1962 on *Reduction of Hours of Work Recommendation*

123 ILO Convention No. 14 of 1921 on *Weekly Rest (Industry)*

124 ILO Convention No. 106 of 1957 on *Weekly Rest (Commerce and Offices) Convention*

125 ibid Article 7(4)

ILO Convention No. 132[126] on Holidays with Pay provides that every worker is entitled to a paid annual leave of at least three weeks in every year of service.[127]

ILO Convention No. 183[128] on Maternity Protection provides that every woman has a right to a maternity leave following childbirth.

As a tripartite agency, the ILO connects governments, employers and employee representatives from all over the world and has 187 member Countries. The ILO aims to create common labor standards, policies and programs, promoting better work environment and equal opportunities.[129] The ILO has significantly contributed in many important events and still keeps reforming and improving occupational standards worldwide. A great number of international and national legal regulations refer to the fundamental principles of the ILO. For instance, the sixth recital of the Working Time Directive mentions that the principles of ILO should be taken in account with regard to the organization of working time.

4. Labor Law in the U.S. in general

Labor and employment law has taken over a role, which importance has been growing for the last decades. New laws at the federal level such as the Family and Medical Leave Act and various state enactments emerge. They contribute not only to creating new rights and obligations for both employees and employers but also create new issues and ambiguities. Already established laws such as Fair Labor Standards Act have been amended substantially or supplemented by new legal provisions. Decisions by court keep constantly changing the scope of the laws with the attempt to define or clarify the equivocal parts of it. For the past almost 70 years there has been a clear trend in the development of the labor law. Employees should be granted greater rights and those of the employers should be limited. Still the power inequality between the two sides of the industry is greater than in many other industrialized nations.[130]

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126 ILO Convention No. 132 of 1970 on *Holidays with Pay Convention*
[127] ibid Article 3(3)
128 ILO Convention No. 183 of 2000 on *Maternity Protection*
[129] International Labor Organization, 'About the ILO' <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm> accessed 8 June 2016
[130] David E. Strecker, *Labor Law: A Basic Guide to the National Labor Relations Act* (CRC Press Taylor and Francis Group 2011) 2-3

4.1. Development 1870-1980

After declaring its independence from Britain, a new country started emerging. The Constitution of United States was created in 1878. The government held most of the legislative power in its own hands. Regulating the interstate commerce was one of the government's powers.

The development of unions was taking place inconsistently and at a very slow pace. 'The American Federation of Labor' (AFL) was formed in 1881 with attempt to secure higher wages, better working conditions and shorter working hours for its members. In the last century, the power and importance of the American unions has been diminishing dramatically. This was a result of the changing economic landscape, which shifted away from manufacturing industry towards white-collar industries. Another reason for decreased numbers of union memberships was employers threatening to outsource work because of being part of a union. Thus, activities challenging management would lead to losing one's job. A more innovative constitutional approach to legislation regulating employment conditions and terms appeared in 1898, during the case *Holden v. Hardy*, 169 US 366. The Supreme Court ruled that a state placing limits on working hours for workers in underground mines did not violate federal constitution. Even though a state law limiting the working hours was upheld in many cases for the purposes of health protection, the Supreme Court held that it cannot be applied to bakers, since it restricts ability of selling one's labor. It was only during the Great Depression when the Supreme Court for the first time withdrew the federal impediments to social-economic legislation.[131]

4.1.1. New Deal and Roosevelt's Presidency

The New Deal marks a great change in the American history of policy making. The economic collapse in the U.S. resulted in creation of many new legislations and policies. As a result, the federal government found itself in the center of the country's political authority. The chief goal of the New Deal was to restore the economic situation and

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[131] Alvin L. Goldman and Roberto L. Corrada , 'United States of America', *International Encyclopedia of Labor Law and Industrial Relations* (Walters Kluwert Law & Business 2014) 70-71 <https://www.kluwerlawonline.com/toc.php?area=Looseleafs&mode=bypub&level=6&values=Looseleafs~~IEL+Labour+Law~National+Monographs~United+States+of+America> accessed 8 April 2016

become once again a powerful country at the international playfield. This plan changed the American social and economic policy forever.[132]

The American labor landscape was also severely influenced by the New Deal. Above all the following legislations shaped the labor law area:

- National Industrial Recovery Act (NRA) of 1933- NRA was a part of the first 99 days of the Roosevelt’s plan. Its purpose was to renew the whole industry by increasing wages, decreasing working hours and to gain control in unbridled competition. The respective provision was created to endorse recovery and changes, give more support for industrial relations (unions bargaining power), to establish a limit for work hours and minimum wages, and prohibit industrial child labor.[133]
- The Wagner Act of 1935- The Wagner act enabled employees to negotiate with employers through unions of their choosing. Moreover, it established a Labor Relations Board, which served as a forum in dispute resolution. The Act also supported the American Federation of Labor. The bill was submitted to the Congress by the Senator Robert F. Wagner. The goal of the law was to forbid unfair labor practices by employers. Later on the Wagner Act became the National Labor Relations Act (NLRA).
- The National Labor Relations Act of 1935. Before the NLRA came into force, American workers had the possibility to join trade unions and to stop working in the case of industrial disputes. However, the employers were allowed to fire workers due to the union membership or participation in strikes. During the economic recession it became more difficult for employees to find a new job than for employers to find a new hire for an open position. Thereby, in the early 30s only 10 percent of the working persons were members of trade unions.[134]
- The Fair Labor Standards Act of 1938.

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[132]Dictionary of American History, ‘New Deal’, *Encyclopedia* (2003) <http://www.encyclopedia.com/topic/New_Deal.aspx >accessed 8 April 2016

[133] ‘National Industrial Recovery Act’ <http://www.u-s-history.com/pages/h1663.html > accessed 8 April 2016

[134] ‘National Labor Relations Act’ <http://www.u-s-history.com/pages/h1612.html>accessed 8 April 2016

During the Roosevelt's presidency (1934) another important decision was made and U.S. joined the International Labor Organization (ILO). The ILO Constitution establishes rights and principles on governing international principles of social justice, human and labor rights.[135] The U.S. has ratified 14 ILO conventions. Moreover, the Declaration of 1998 provides that irrespective to the conventions ratified by member countries, the core principles and rights of the ILO organization must be respected. This applies to both federal and state law in the USA.[136]

4.1.2. Fair Labor Standards Act of 1938

The Fair Labor Standards Act or Wages and Hours Act was passed by the U.S. Congress during Franklin Roosevelt's (1933-1945) presidency.[137] The New Deal was a series of experimental projects and programs aiming to restore the economic situation in US. Roosevelt was voted as the President of the USA during its most severe economic downturn, which was caused by the crash of the stock market. The Great Depression lead to at least one-quarter of the American workforce being unemployed.[138] FLSA was a milestone in the American legislation, which has significantly contributed to the development of the labor law movement. It laid down national minimum living standards for employees engaged directly or indirectly in interstate commerce, operations of certain size, and public agencies. It affects all types of employees in the private sector as well as in the federal, state and local governments.[139] Two major provisions of the FLSA were the first minimum wage (25 cent per hour) and a maximum workweek of 44 hours, which was revised in 1940 and reduced to 40 weekly hours threshold.[140] Furthermore, for the purposes of tracking overtime, it was necessary to develop standards for keeping records

[135] 'International Labour Organization (ILO) Constitution' (*American Society of International Law*) <http://www.eisil.org/index.php?sid=4ails&id=592&t=link_details&cat=198>accessed 1 June 2016

[136] David Weissbrodt and Matthew Mason, 'Compliance of the United States with International Labor Law', 1845-1846 <http://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1372&context=faculty_articles> accessed 2 June 2016

[137] 'Fair Labor Standards Act of 1938', *Gale Encyclopedia of U.S. Economic History* (1999) <http://www.encyclopedia.com/doc/1G2-3406400301.html> accessed 15 April 2016

[138] 'New Deal' (2009) <http://www.history.com/topics/new-deal> accessed 15 April 2016

[139] 'Fair Labor Standards Act of 1938', *Gale Encyclopedia of U.S. Economic History* (1999) <http://www.encyclopedia.com/doc/1G2-3406400301.html> accessed 15 April 2016

[140] Jonathan Grossman, 'Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage' (1978) *Monthly Labor Review* 101, no. 6, 22-30 <http://www.jstor.org/stable/41840777>accessed 15 April 2016

of hours worked and wages paid. However, probably the most significant achievement of the FLSA was banning child labor under the age of fourteen.[141]

The Fair Labor Standards Act has been amended multiple times since its entry into force. The changes included inter alia expanding the scope of application; increase in minimum wage; redefining regular work time and augmenting overtime rate as to induce hiring new workers, instead of overloading poorly paid workers and providing equal pay opportunities for men and women.[142] The FLSA provisions are enforced by the Wage and Hour Division of the U.S. Department of Labor.[143]

Scope of application

It covers employees and businesses that are engaged in the interstate commerce.[144]There are two types of coverage: 'enterprise coverage' and 'individual coverage'.[145]

Enterprise coverage

It applies to employees that work for a certain type of business or organization, which falls within the scope of application of the FLSA. Such enterprises must employ a minimum of two employees and:

- 'has annual sales or business done of at least $500,000'
- irrespective business volume, the FLSA is also applicable to hospitals, businesses providing medical or nursing care for residents, schools and preschools, and government agencies. [146]

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[141] Theda Skocpol and Kenneth Finegold, 'State Capacity and Economic Intervention in the Early New Deal' (1982) *Political Science Quarterly* 97.2, 255-78 < https://www.google.at/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjarIWFsf3NAhVOkRQKHQdHAH0QFggjMAA&url=https%3A%2F%2Fwww2.southeastern.edu%2FAcademics%2FFaculty%2Fjbell%2Fskocpolnewdeal.pdf&usg=AFQjCNEGXqjjrNsYhkEPtg2O9uocTVec8Q&sig2=6IwWW4t_w0MBZ_bhPB5tHQ> accessed 20 April 2016

[142] 'Fair Labor Standards Act', *The Columbia Electronic Encyclopedia,* 6th edn. <http://www.infoplease.com/encyclopedia/business/fair-labor-standards-act.html> accessed 15 April 2016

[143] Robert E. Weir, *Workers in America: A Historical Encyclopedia,* Vol. 1 (Greenwood Publishing Group 2013) 249

[144] Gerald Mayer, Benjamin Collins and David H. Bradley, 'The Fair Labor Standards Act (FLSA): An Overview', Washington, DC: Congressional Research Service (2013), 2 <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2171&context=key_workplace> accessed 17 April 2016

[145] ibid.

Individual coverage

The FLSA protects individual workers who are ‘engaged in commerce or in the production of goods for commerce’. For instance, employees covered are the ones, who work in production facilities that later on will export products to other states, handle records for transactions among states or travel permanently to other states for the work purposes. Moreover, domestic service workers such as full-time baby-sitters or housekeepers are covered as well.[147]

Exemptions

According to the FLSA the majority of employees in the U.S. must be paid at least the federal minimum wage for the time worked and any time that extends the 40-hour threshold must be compensated at the premium rate (150%). Nevertheless, Section 13(a)(1) and 13(a)(17) of the FLSA exempts certain employees from minimum wage and overtime pay. Such employees are bona fide executives, administrative, professional, computer and outside sales employees. Manual laborers or other ‘blue color’ workers are not exempt from the FLSA regulations.[148] The job title alone is not adequate to determine whether an employee can be qualified as having an exempt status non-exempt. There is a list of predetermined minimum test requirements that is provided by the Department of Labor. These prerequisites cannot be modified or reduced, in order to determine, if an employee can be categorized as exempt or non-exempt.[149]

During the period from 1980 to 2008 in the United States, the main political trend was to reduce the government’s role and involvement in economic activities as well as employment relationships. The situation took a different turn in 2009 when the

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[146] Gerald Mayer, Benjamin Collins and David H. Bradley, ‘The Fair Labor Standards Act (FLSA): An Overview’, Washington, DC: Congressional Research Service (2013), 2 < http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2171&context=key_workplace> accessed 17 April 2016

[147] ibid.

148 29 C.F.R. Part 541, Vol. 69, No. 79 (*Rules and Regulations*, 23 April 2004) < https://www.google.at/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwiOqbvPuf3NAhUEXhQKHbCRBHgQFggdMAA&url=https%3A%2F%2Fwww.dol.gov%2Fwhd%2Fovertime%2Fregulations.pdf&usg=AFQjCNG1LEOwPGqhRtYURAawto4UbIUGIA&sig2=QqwOmvaZFgHa8KS31GuYAQ > accessed 20 April 2016

[149] ibid.

Democratic Party regained the major control in both houses. This resulted in government attempts to retrieve its influence in the economy, including the labor market.[150]

Collective bargaining in US has a very weak role. The main body of law governing collective bargaining is the National Labor Relations Act (NLRA). The main goal of collective bargaining is to set ground rules for employment conditions.[151] Since early 1970s there have been some attempts to expand the rights that are conferred upon unions. Unfortunately it yielded no results. With regard to individual employment rights, no new employment protection laws were repealed since late 1970s. The reason for this is that the President is responsible for nominating federal judges and oversees the process of enacting new laws. Moreover, a vast majority of existing legislations were re-interpreted in the way that rights of employees and unions were narrowed, and the rights of employers were expanded. The Americans with Disability Act (ADA) was passed in 1990 to protect the rights of employees with disabilities. Despite that, The US Supreme Court has been interpreting its coverage so narrowly, that most American employees with disability do not fall under the protection of the respective Act.

Another suitable example is the Family Medical Leave Act, which was enacted in 1993. FMLA is federal law in the United States. While the U.S. economy was recovering from the Great Depression, the National Industrial Recovery Act (NIRA) was passed to help to rebuild and boost the national economy. Even though NIRA was de-legalized because it was held for unconstitutional, the most of its provisions were transferred into the FLSA.[152]

4.1.3. Family Medical Leave Act of 1993

The Family Medical Leave Act (FMLA) allows for certain employees to take up to 12 weeks per year of unpaid, job-protected sick leave. It requires that group health benefits

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[150] Roger Blanpain, Greg J. Bamber and Phillipe Pochet, *Regulating Employment Relations, Work and Labour Laws (International Comparison between Key Countries)* (Kluwer Law International 2010) 31.
[151] Cornell University Law School, Legal Information Institute, 'Collective Bargaining'<https://www.law.cornell.edu/wex/Collective_bargaining> accessed 31 April 2016
[152] Gerald Mayer, Benjamin Collins and David H. Bradley, 'The Fair Labor Standards Act (FLSA): An Overview', Washington, DC: Congressional Research Service (2013) <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2171&context=key_workplace> accessed 17 April 2016

are being maintained as if one would continue to work, while the employee is on the leave. The main goal of the FMLA is to allow employees to keep a balance between work and family.

FMLA covers employers in public and private sectors. Companies in the private sector must employ at least 50 employees for a minimum of 20 workweeks in the current year or in the pervious year. This includes joint employers and successors of employers covered by the FMLA. [153]

In order to qualify for the mandated leave, one must be currently working for by the act covered employer and fulfill the following criteria:

- ‘have worked for that employer for at least 12 months; and
- have worked at least 1,250 hours during the 12 months prior to the start of the FMLA leave;
- and, work at a location where at least 50 employees are employed at the location or within 75 miles of the location.’ [154]

Some states have passed equivalent legislations authorizing additional family and medical leaves or extending the period laid down in the FMLA. Moreover, the federal leave law only applies to employers with a minimum of 50 employees and who work on the full-time basis. Small businesses and atypical workers (e.g. part-timers) are automatically excluded from the scope of the FMLA. A few states have reduced the employee threshold e.g. District of Columbia requires the employer to have a minimum of 20 employees. In addition to, the federal FMLA leave is only applicable to immediate family, parent, spouse and child.[155] The definition of ‘family’ must be interpreted very narrowly. In 2010, the Department of Labor elucidated the definition of ‘son and daughter’. Since then, some states have broadened the definition of family at the state-level FMLA, e.g. District of Columbia: ‘Related to the worker by blood, legal custody, or marriage; person with whom the employee lives and has a committed relationship; child who lives with employee and for whom employee

[153] Wage and Hour Division, ‘The Family and Medical Leave Act’ (*United States Department of Labor*) <http://www.dol.gov/whd/regs/compliance/1421.htm> accessed 31 Mai 2016
[154] ibid.
[155] ‘FMLA’, *World Heritage Encyclopedia* <http://www.gutenberg.us/articles/fmla > accessed 31 Mai 2016

permanently assumes and discharges parental responsibility.'[156]

An employee is entitled to take a sick leave only if suffering from a serious health condition, which are e.g. childbirth, adopting a child, foster care, care for an immediate family member.[157] The cases are explicitly listed in the FMLA. Although the list of what qualifies as a 'serious health condition' is considered to be exhaustive, it leaves room for interpretation. Sometimes earaches or a light cold might also be qualified as 'a serious health condition'.

Under The FMLA employees have three options how to exercise their right to take a leave of absence: take a leave on an intermittent basis (in separate blocks), a reduced work schedule leave (the usual number of working hours is reduced), or in one consecutive block of time. A reduced schedule leave is available only for a limited period of time, during which the employee usually switches from full-time to part-time.[158] Both types of leave can only be taken for the cases of medical necessity.[159] Employer may demand to provide a medical certification issued by a health care provider in order to support the need for leave and have proof that a serious health condition exists. The

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[156] 'FMLA', *World Heritage Encyclopedia* <http://www.gutenberg.us/articles/fmla > accessed 31 Mai 2016

[157] 29 Code of Federal Regulations §825.113 "Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves:

- any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility; or
- a period of incapacity requiring absence of more than three calendar days from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider; or
- any period of incapacity due to pregnancy, or for prenatal care; or
- any period of incapacity (or treatment therefore) due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.); or
- a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal diseases, etc.); or,
- any absences to receive multiple treatments (including any period of recovery therefrom) by, or on referral by, a health care provider for a condition that likely would result in incapacity of more than three consecutive days if left untreated (e.g., chemotherapy, physical therapy, dialysis, etc.).

[158] 'Intermittent leave or reduced leave schedule' (*Cornell University Law School*, Legal Information Institute) <https://www.law.cornell.edu/cfr/text/29/825.202> accessed 31 Mai 2016

159 See also: 29 CFR Part 1910 - Occupational Safety And Health Standards:
Subtitle B Regulations related to labor. For more information see § 825.202 and § 825.306 "Content of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member."

employer must grant the employee the minimum of 15 calendar days to obtain the medical certification.[160]

The FMLA only entitles employee to unpaid leave. However, the law permits an employee or it might be requested by the employer, to use accrued paid vacation or sick leave, to cover some or the whole FMLA leave period.[161] The substitution of paid leave for unpaid FMLA leave will be counted against the 12-week entitlement, if both parties are properly notified at the beginning of the leave. Notifying in writing that an absence is designated as FMLA leave is an essential component because the employer is not able to count leave as FMLA leave retroactively. The retroactive designation of leave is only possible, if the employer was not informed about the reason for the leave and the leave is still in progress or within two days upon employees return to work. Internal company's policies governing use of leaves might put some limits or constraints to which extent the substitution of accrued paid leaves is allowed.[162]

Since during the leave employee's job must be protected, all the health benefits, while on leave, must be maintained, as if the employee was actively employed.[163] Other benefits, such as cash payments by the employer in lieu of group health insurance coverage, does not need to be sustained during periods of unpaid FMLA leave. Notwithstanding, some job-related benefits such as seniority leave will stop accruing during the period of unpaid leave, since such benefits do not arise while employees are on any kind of unpaid leave. When employee returns back to work after sick leave, he or she must be reinstated to his or her original job, or at least to an equivalent position. This means that the job must be identical to the original job regarding remuneration, benefits and other employment terms and conditions.

[160] 'The Family Medical Leave Act' (*United States Department of Labor*, Wage and Hour Division (WHD)) <https://www.dol.gov/whd/regs/compliance/1421.htm> accessed 2 June 2016

[161] Sheng Hengst Brian H. Kleiner, 'Implications of the Family and Medical Leave Act for organisations' (2002), Managerial Law, Vol. 44 Iss 1/2, 11 <http://www.emeraldinsight.com/doi/pdfplus/10.1108/03090550210770777> accessed 2 June 2016

[162] ibid.

[163] Lisa M. Cal Brian H. Kleiner, 'California's recent paid family leave law' (2005), Equal Opportunities International, Vol. 24 Iss 5/6, 65 <http://www.emeraldinsight.com/doi/pdfplus/10.1108/02610150510788178> accessed 2 June 2016

Furthermore, utilizing one's right to take an FMLA leave cannot lead to any losses of employment benefits to which the employee was entitled before taking the leave.[164]

FMLA allows under limited circumstances to refuse to reinstate the so-called highly-paid 'key' employees. This is only permitted, if restoring the employee would cause 'substantial and grievous economic injury' to business operations. The employer must give a written notice to the 'key' employee, stating the reason for denying restoration of his or her original job. In addition, the employer is obliged to provide the employee with an opportunity to return to work after the leave ends. Hence, upon return the employee must either be reinstated in his or her old position or be offered an equivalent.[165]

In 2004 California was the first state mandating a paid leave of absence program (The California Family Rights Act (CFRA)) to care for family members. CFRA uses FLMA as legal basis. There are work and earnings conditions that must be met, in order to be eligible for the family and medical leave. Paid leave programs ensure that eligible employees receive a proportional wage replacement for the time away from work. Californian workers can receive up to 6 weeks paid family leave and additionally have access to medical leave benefits between 26 and 52 weeks.[166] Workers maintain 55 % of their weekly remuneration for both types of leave.[167] Unlike the FMLA, the paid family leave in California does not offer job protection upon return. There is a possibility to maintain job protection, if an employee takes his paid family leave simultaneously with the FMLA (or with the extended state-FMLA). Employees excluded from the FMLA or in need for a longer than 12-week leave unfortunately are not able to receive job protection.[168] Moreover, the CFLA covers all business, regardless the number of employees working at the company. However, the 'small' businesses are not obliged to

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[164] 'The Family Medical Leave Act' (*United States Department of Labor*, Wage and Hour Division (WHD)) <https://www.dol.gov/whd/regs/compliance/1421.htm> accessed 2 June 2016
[165] ibid.
[166] 'Paid Leave in Four States: Lessons for Montana Policy Makers and Advocates' (2015) (*Montana Budget and Policy Center*), 7-8 < http://www.montanabudget.org/paid-leave-lessons-for-montana/> accessed 3 June 2016
[167] ibid.
[168] 'Paid Leave in Four States: Lessons for Montana Policy Makers and Advocates' (2015) (*Montana Budget and Policy Center*), 7 < http://www.montanabudget.org/paid-leave-lessons-for-montana/> accessed 3 June 2016

reinstate employees upon return.[169] Similarly like under the FMLA the employers are allowed to demand to use up the accrued paid leave before taking the CFLA family leave. Such provision prevents employees from indefinite accumulation of leave entitlements and the combination of FMLA/CFLA does not grant a longer than 12-week leave of absence. [170]

4.1.4. Paid sick leave

As it has been mentioned earlier in this paper, there is currently no federal law mandating employers to pay for sick leave. However, there have been some changes regarding entitlements in the sick leave policies. There is a great number of companies that offer voluntarily their full-time employees some paid sick leave but coincidentally the majority of U.S. employers still do no offer any paid sick leave plans. Several states and localities started enacting legislations requiring specific employers to provide paid sick leave. Below are a few jurisdictions that have already passed laws mandating employers to provide paid sick leave.

California

In July 2015 California enacted the Healthy Workplaces, Healthy Families Act that demands employers to provide paid sick leave. Employees will receive one hour of paid sick leave for every 30 hours worked. The bill allows an annual limit of three days paid sick leave. In contrast to some other Californian leave laws; small employees are not exempt from the bill. It applies to all employees who at least have worked thirty days per year. The term ‘employee’ includes also part-time, temporary, seasonal and out-of-state employees.[171]

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[169] Lisa M. Cal Brian H. Kleiner, ‘California’s recent paid family leave law’ (2005),Equal Opportunities International, Vol. 24 Iss 5/6 p. 68-69 <http://www.emeraldinsight.com/doi/pdfplus/10.1108/02610150510788178> accessed 4 June 2016

[170] ibid.

[171] James Paille, ‘Sick Leave Entitlement Changes for 2015: Is Your State on the List?’ (Thomson Reuters 2015) <https://tax.thomsonreuters.com/blog/cs-professional-suite/cs-payroll-solutions/sick-leave-entitlement-changes-for-2015-is-your-state-on-the-list/> accessed 4 June 2016

District of Columbia

Companies employing a minimum of 100 employees must grant its workers one hour of paid sick leave for every 37 hours of work. The maximum number of days for the leave is seven days per working year. The entitlement to paid sick leave arises and starts accruing from the first day of employment and can be claimed after have worked for 90 days.[172]

The New York City

Businesses with at least five employees are mandated to provide five days of paid sick leave for employees who work at least eighty hours per year. Companies, which employ up to five employees, must provide these with unpaid sick leave. The regulation allows employees to accumulate a maximum of 40 hours of paid sick leave annually. The regulation also covers the following topics: '(a) employee notification to the employer of the need to use sick time; (b) employer demands for medical notes; (c) rate of pay; (d) joint employer liability; and (e) minimum hour increments that must be used for sick leave.'[173]

4.1.5. Rest and Meal Breaks

The Fair Labor Standards Act (FLSA) is the federal law governing rest and meal breaks. However, the FLSA does not mandate employees to allow short rest and meal breaks. Employees may offer some time-off voluntarily, which triggers certain rules. Federal law states that short breaks are considered as working hours and must be compensated adequately. Even though employees are not working during this periods of time, such time-off from work must be compensated as normal working hours. What is more, such breaks must be taken into account while calculating employee's eligibility for overtime pay. In certain situations FLSA regards to bona fide meal breaks. Commonly it is a break, which lasts for longer than 20 to 30 minutes. This refers to time during which employee is completely relieved from his or her duty. These hours are not considered as working time and are not required to be

[172] James Paille, 'Sick Leave Entitlement Changes for 2015: Is Your State on the List?' (Thomson Reuters 2015) <https://tax.thomsonreuters.com/blog/cs-professional-suite/cs-payroll-solutions/sick-leave-entitlement-changes-for-2015-is-your-state-on-the-list/> accessed 4 June 2016

[173] ibid.

compensated.

Bona fide sleep periods are perceived in a similar matter. It applies to employees, who work for a period longer than 24 hours. The employer and the employee might agree to sleep periods (at least five hours) at the workplace. Such time slots are not compensable. However, according to the law, if employee's working time lasts less than 24 hours, he or she is entitled to a sleep break, which must be compensated adequately. [174]

In some states it is mandatory to provide a rest or meal break. Such breaks usually last for 10 minutes and are required, if employees work for designated time frequencies. Vermont has a short restroom break for every four hours of work. Other states mandate meal breaks after designated periods of work. In California one is entitled to at least one 30-minute meal break after working for six hours. In Delaware, employee is entitled to have a meal break every 7.5 consecutive hours. Such breaks are only compensable, if they involve work-related activities. There is no federal or state law requesting to compensate such officially required meal breaks.[175]

New York State

Employees in the New York State are entitled to a daily thirty-minute meal break, after have been continuously working for 6 hours. Employees working shifts from 11 a.m. until after past 7 p.m. are entitled to an additional twenty-minute break between 5 p.m. and 7 p.m. The employee must be completely relieved from his or her duty during the lunch break.[176]

4.1.6. Working Time

FLSA contains provisions on working time. In general it applies to all the hours actually worked. However, it does not provide any daily or weekly limit for hours by employees

[174] 'Rest and Meal Breaks' (*Shegerian & Associates, Inc*.) <http://www.shegerianlaw.com/practice-areas/rest-and-meal-breaks/> accessed 6 June 2016
[175] ibid.
[176] 'Fair Labor Standards Act' (New York University, Human Resources 2009) <https://www.nyu.edu/about/policies-guidelines-compliance/policies-and-guidelines/fair-labor-standards-act.html> accessed 7 June 2016

older than 16 years of age. There is only an upper limit for hours worked in some sensitive industries e.g. health care.[177] The FSLA mandates that covered employees receive a premium rate (one and one-half times their regular rate) for every hour, which exceeds the 40-hour weekly or 8-hour daily limit.[178] The overtime liability provision only covers non-exempt employees.[179] The FLSA contains a record-keeping provision. To comply with the record-keeping regulation, employers are mandated to keep a record of all hours worked in access to 40-hours per week. The record-keeping rule is only relevant for non-exempt workers.[180]

As in most other countries, in the USA one can choose between working full-time and part-time. Part-time is usually considered anything up to 30 weekly hours. The standard federal workweek is 40 hours. In some cases 40-hour week is considered as a part-time work model. Traditional working hours are Monday to Friday from 9 am to 6 pm. The lunch break is one hour and there are two additional 15-minute breaks.

Waiting or on-call time

A period during which an employee is waiting to engage in his or her duty, will be qualified as working time. For example, a fireman reading a book and waiting for the alarm to go off. Even though the employee is technically inactive and not fulfilling his or her duties, it still has to be counted as working hours because such waiting time periods are integral part of the job.[181]

There is no general rule when it comes to on-call time. It needs to be decided on the case-by-case basis what constitutes on-call time. A distinction needs to be made between 'engaged to wait' and 'waiting to be engaged'. If employer directs an

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[177] Allard E. Dembe, 'Factors shaping the development of working time regulation in the United States and Europe.' (2011), International Labor Review, Vol. 150, No. 3-4, 427 <http://onlinelibrary.wiley.com/store/10.1111/j.1564-913X.2011.00126.x/asset/j.1564-913X.2011.00126.x.pdf?v=1&t=iqmj03si&s=9fcdd1aad34c98bd8afbcefd8b3295f135908055> accessed 10 June 2016

[178] Frank C. Pierson, 'Regulation of Wages and Hours of Labor', *Dictionary of American History* (2003) <http://www.encyclopedia.com/doc/1G2-3401804441.html >

[179] 'Fair Labor Standards Act (FLSA)' (*Kansas State University*, 2014) https://www.k-state.edu/policies/ppm/4200/4220.html accessed 13 July 2016

[180] Kelly Collins Woodford, 'United States wage and hour law: an updated primer for foreign companies' (2004), Equal Opportunities International, Vol. 23 Iss 6, 18 <http://www.emeraldinsight.com/doi/pdfplus/10.1108/02610150410787666> accessed 10 July 2016

[181] 'Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA)' (*United States Department of Labor*, Wage and Hour Division (WHD)) <http://www.dol.gov/whd/regs/compliance/whdfs22.htm>accessed on 27 June 2016

employee to stay on-site or close to it, the employee is not able to dispose his or her time freely. Such employee is categorized as 'engaged to wait' and is entitled to a compensation for the periods of inactivity even though the employee was not engaged in any work-related activities.[182] One example is a hospital employee, who has to stay in the on-call room. On the contrary, if an employee can leave work premises and is released from his or her duty, this constitutes that one can use such time for his or her personal purposes. Such idle time is categorized as 'waiting to be engaged' and is noncompensable.[183]

The case-by-case test that is applied to determine, if on-call time is compensable involves analyzing whether employee can dispose his or her time freely. The US Supreme Court used this test for the first time in *Skidmore v Swift 323 US 134* case. Firefighters brought a group action against their employer under the FLSA to recover overtime pay. Employees worked a usual 40-hour week and received their salaries on the weekly basis. Occasionally, they were required to stay overnight (off-the-clock) to respond to fire alarms. The alarms were rare and for each answered alarm the employees were paid additionally. However, the rest of the time spent at the arranged room on the premises was not compensated. The Court held that the firefighters are not due overtime pay because they are allowed to spend this time pursuing whatever activities they wish. The decision was affirmed by the Court of Appeals.[184] The Supreme Court continued its reasoning in *Armour & Co. v. Wantock, 323 U.S. 126* case. In the same year another group of firefighters in Chicago brought a lawsuit under FLSA for overtime pay. The soap factory demanded its employees to stay on the site after clocking out in case of emergency. They were working for 24 hours and then had 24 hours off. However, the employees were paid only for 8 hours of actual work and the 15 hours spent on standby were not compensated.[185] The Court held that standby time is demanded by the employer and employee must stay in the premises,

[182] 29 CFR §785.17 On-Call-Time: An employee who is required to remain on call at the place, designated by the employer or so close to such designated place and cannot use the time effectively for his or her own purposes is working while 'on call'. An employee who is not required to remain at the employer's premises but is merely required to stay at home or with company officials where he may be reached is not working while 'on call'.

[183] Doug Hass, 'Properly Compensating Employees for On Call Time' (2015) http://dayshift.com/2015/12/11/flsa-faq-properly-compensating-employees-for-on-call-time/1293/ accessed 27 June 2016

[184] 'Skidmore et al v. Swift & Co' (*Cornell University Law School*, Legal Information Institute) <https://www.law.cornell.edu/supremecourt/text/323/134> accessed 28 June 2016

[185] Alan Crone, 'Case Briefs. Determining Hours Worked' <http://www.overtimepaylaw.us/determining_hours_worked.html> accessed on 28 June 2016

hence is not able to dispose his or her time unrestrictedly. Thus this constitutes compensable working hours.[186]

Similarly the same test was applied in *Pilkenton v Appalachian Regional Hospitals Inc. 336 F. Supp. 334 W.D VA* case. Employees were expected to be close by the work premises (within a 20-minute radius) and be constantly available for work. The Court once again confirmed that such work time is qualified as 'being engaged to wait' and therefore employees are entitled to compensation for their on-call time. In *Bright v Houston Northwest Medical Center Survivor, Inc. 934 F2d 671* Mr. Bright as a biomedical equipment repair technician was required wear a beeper and was on-call for 24 hours a day. Moreover, he had to be at work within 20-30 minutes after receiving a signal on his beeper but according to his employer such working time was not compensable. Usually Mr. Bright would be called four to five times per week. During his non-duty time he was capable to conduct all the necessary personal affairs. The time when he was not engaged in work was qualified as 'waiting to be engaged' and thus not entitled to payment.[187]

According to the federal law it is permissible to pay employees a lower hourly rate for on-call and other types of 'non-productive' time. The rate cannot be below the federal minimum wage. Any such agreement must be in writing and requires employee's consent. The hourly rate must be set prior to job performance. All such working times must be properly recorded. Furthermore, if such work results in overtime hours, the employee is eligible to overtime payment.[188]

Commuting and Travel Time

The Portal-to-Portal Act of 1947 is an amendment to the FLSA and provides a list of activities, which limits employer's liability to pay for certain pre-work, past-work as well as commuting time.[189] The Act entails a list of activities, which can be divided into three

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[186] Monty Navarro, 'Opinion Letters- Fair Labor Standards Act' (2008), FLSA2008-8NA <http://www.dol.gov/whd/opinion/FLSANA/2008/2008_05_23_08NA_FLSA.htm> accessed 28 June 2016

[187] Janette Levey Frisch, 'Do You Have to Pay for Your Employees' On-Call, Travel or Training Time?' (2014) <http://theemplawyerologist.com/2014/01/23/do-you-have-to-pay-for-your-employees-on-call-travel-or-training-time/> accessed 28 June 2016

[188] 29 C.F.R. §778.318(b)

[189] 'Portal-to-Portal Act of 1947' (*Thomson Reuters*) <http://us.practicallaw.com/6-508-0673> accessed 13 July 2016

categories: work, work-related or not work-related activities. Under the Act home-to-work and work-to-home time is not compensable. Once the employee arrives at work, any other time spent getting to another business site will be considered as a work-related activity.[190] The Appeal Court for the 6th Circuit held in the *Chao v. Akron Insulation and Supply Inc. No. 05-3647* case that all hours worked must be compensated. After conducting an audit at the Akron Insulation it was found out that the company has violated the overtime pay and the recordkeeping provisions under the FLSA. Akron Insulation refused to pay its employees for the hours spent on the business site before and after working and travelling between the business places on the site. Any time that is 'integral and indispensable to the principal activities' must be paid accordingly.[191] Similarly, in the *Burton v County of Hillsborough No. 05-1-247 case* the time spent driving to job sites to inspect the subcontractors as well as picking-up and returning the company vehicle to the employer-designated parking site is considered as compensable working time.[192]

A business trip that is required by the employer will be partially compensated. Getting to and from the airport is qualified as commuting time and is not eligible for any compensation. Once the employee is at the place, e.g. airport or a train station, the working time starts counting. The time one spends doing business is counted as working time. If an employee is kept away from home overnight, travel time is only work time when it overlaps employee's typical work hours. Such time is deemed as substitution for usual work activities. In such situations travel time must be paid for both regular and non-working days (Saturday and Sunday). However, under the FLSA time spent traveling outside the regular working hours under direction of employer when employee is a passenger on a plain, bus, train or car is not qualified as 'working hours' and is not compensable. [193]

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[190] ibid.

[191] Lisa Guerin, 'What Counts as Working Time Under the FLSA?' <http://labor-employment-law.lawyers.com/wage-and-hour-law/portal-to-portal-act.html> accessed 29 June 2016

[192] *Kenneth L. Burton v. Hillsborough County, Florida, No. 05-10247 (11th Cir. 2006)* <http://law.justia.com/cases/federal/appellate-courts/ca11/05-10247/200510247-2011-02-28.html > accessed 29 June 2016

[193]'Compensable Time under the FLSA' <http://www.gross-gross.com/legal-issues/compensible-time-under-flsa/> accessed 4 July 2016; also see 29 CFR §785.13.

Training Time

The question arises if trainings offered by the employer can be counted as working time and must be compensated accordingly under the FLSA. The Department of Labor has laid down four requirements, which must be met in order for time spent on 'training' not to be compensable. The criteria is listed as follows:

- 'the training must be outside "normal working hours"
- the training must be truly voluntary
- the training must be not "directly related" to employee's position
- the employee must not perform work for employer during the training'. [194]

Moreover, pre-employment and prior to work onboarding trainings are usually noncompensable. All trainings required to attend by the employer, work or position-related, to maintain or close qualification gaps etc. are qualified as work and must be paid.[195]

5. Summary and future perspective

Working hours vary from Member State to Member State and are significantly higher in new Member States, which leads to the conclusion that there is still no evidence of convergence regarding working time within the EU. However, the coherence can be found between prosperity and hours worked. The higher the income is, the more workers lean towards opting out for more spare time. Another important factor is favorable tax schemes and well developed welfare regimes. Additionally, the WORKS[196] project has provided evidence, how 'global value chain restructuring' affects the organization of working time through companies. Businesses strive for more economic success, which leads to increase in job intensity and longer working hours. It is mostly present in the knowledge-based industries, where in order to prove

[194]Robert J. Tribeck,'Wage & Hour Issues: When is Time Spent in "Training" Compensable?' <http://www.rhoadssinon.com/updates-publications-78.html> accessed 4 July 2016

[195] Janette Levey Frisch, 'Do You Have to Pay for Your Employees' On-Call, Travel or Training Time?' (2014) <http://theemplawyerologist.com/2014/01/23/do-you-have-to-pay-for-your-employees-on-call-travel-or-training-time/> accessed 4 July 2016

[196] Bettina-Johanna Krings, Linda Nierling, Marcello Pedaci and Mariangela Piersanti, 'Working time, gender and work-life balance' (2009) <http://www.femtech.at/sites/default/files/working_time_0.pdf> accessed 28 June 2016

your competence and ability to compete with others, one has to offer his services 24/7. The further it gets away from such central organizational elements towards the fringe, for instance, freelancers, contingent workers etc. the more flexible the work becomes and the percentage for atypical employment contracts increases. All this points out that in the near future we will not be able to see significant cuts in working time, only the proliferation in diversity and atypical working arrangements. There is a large number of economic and social factors that suggest that there is no convergence in this regard whatsoever.[197]

Organization and regulation of working time in the European Union has social, economic and political effects on both private and public sectors. The Working Time Directive (2003/88/EC) is a framework that provides common minimum standards across the EU. The goal is to protect workers from health and safety hazards, which are linked to immoderate and inadequate working hours, and to assure that appropriate resting times and recovery periods are granted to everyone. Article 31(2) of the Charter of Fundamental Rights of the European Union once again stresses out the importance that 'Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods, and to an annual period of paid leave'. Recent shift in economic, political, technological and socio-demographic situation is tremendously changed the working time landscape. The European Commission is fully aware of this and has launched a review of the Directive 2003/88/EC in 2010. Unfortunately after two extensive discussion rounds no agreement was reached.[198]
All these changes suggest that employers wish to have more flexibility but workers want to have more workplace protection.[199]

The future of the organization of working time and of the Working Time Directive remains unclear. There are though a lot of indications that there is a need for a greater emphasis on the work-life balance and more flexible working hours. On the one hand, the economic factor related to long working hours stays very present but on the other

[197] 'Study to support an Impact Assessment on further action at European level regarding Directive 2003/88/EC and the evolution of working time organization' (2010) (*Deloitte*) 4-5
[198] 'Working Time Directive' (*Official Website of the European Commission*) <http://ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=205> accessed 29 June 2016
[199] European Commission, 'Review of the Working Time Directive' (2011), MEMO/11/789 (*Official Website of the European Commission*) <http://europa.eu/rapid/press-release_MEMO-11-789_en.htm> accessed 29 June 2016

hand, individuals start realizing how important health is and that there is more to life than only trying to make a living.

The U.S. is the only economically advanced country that does not legally mandate employers to provide any paid leave. It also offers no paid public holidays. Many employees feel intimidated to take the leave because of the negative repercussions it may cause or might face a dismissal.[200] America needs a revised family leave policy, which would ensure that every employee during the leave is financially secured. Moreover, entitlements under the FMLA are preconditioned. This means before an entitlement to a paid leave arises, employee must have worked a set number of hours. Part-time workers are automatically excluded from the FMLA. For instance, the Family Leave Insurance in Washington has followed a different approach and laid down a different requirement. An employee must have accumulated 680 working hours prior to taking the leave. This enables part-time workers, or the ones who work less, or even have changed jobs recently to still be qualified for the family leave. The lack of statutory provisions causes inequality of any kind of benefits in the U.S. and aggravates disadvantages for less-advantaged groups such as part-timers, low earning workers and employees in small size enterprises.[201]

Furthermore, there is an obvious need for a federal daily and weekly maximum working time. U.S. is one of the last industrialized countries, where workers clock so many work hours. The country continues to have no regulations explicitly limiting daily or weekly working time. While the increasing number of hours worked by an average American employee and the growth of overtime work helps the economy to thrive, it has taken its toll on many individuals, their health and private life. In the United States there is only very limited employment protection. Refusing to work overtime can lead to dismissal. Thus many workers are forced to work longer hours then they would actually like. Currently the only disincentive for employers for not demanding even a greater number of overtime is the premium overtime rate for the

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[200] 'Paid Leave in Four States: Lessons for Montana Policy Makers and Advocates' (2015) (*Montana Budget and Policy Center*) < http://www.montanabudget.org/paid-leave-lessons-for-montana/> accessed 3 July 2016

[201] Rebecca Ray and John Schmitt, 'No-vacation Nation USA- A comparison of leave and holiday in OECD countries' (2007), No.3 < http://www.law.harvard.edu/programs/lwp/papers/No_Holidays.pdf> accessed 14 July 2016

non-exempt employees.[202] Extremely high social expenses per capita mirror the severity of the situation and the urgent need for new legislations on paid sick and family leave, maximum working hours, limiting overtime and providing employees with more job securities.

[202] Helene Jorgensen and Lonnie Golden, 'Mandatory Overtime in the U.S. Economy' (2002) (*Economic Policy Institute)* <http://www.epi.org/publication/briefingpapers_bp120/> accessed 13 July 2016

Annex

Abstract:
The major purpose of this master thesis is to take a closer look at the organization of working time and the entitlements that arise in connection with working time in the U.S. and in the EU. This thesis describes two very different legal systems, which result in entirely different standards, limits and entitlements when it comes to working time and employee protection at workplace. This master thesis addresses central questions such as maximum weekly working time, daily and weekly rest periods, annual leave, long-term sick leave and maternity leave. The goal is to provide an overview of the current situation in the area 'organizational health and safety'.
The results illustrate that there are no federal laws in the U.S. that mandate an upper limit for working hours, rest periods, paid sick leave or paid annual leave. In contrast, the EU has established a set of minimum standards that must be implemented in all Member States. Usually there is no possibility to derogate from such provisions but the Member States are always allowed to provide more favorable regulations for workers at the national level, which leads to a greater level of workers protection compared to the U.S.

Zusammenfassung:
Das Hauptziel dieser Masterarbeit ist es die rechtlichen Rahmenbedingungen bezüglich Arbeitszeit und Ansprüchen, welche aus einem Arbeitsverhältnis entstehen, in den USA und der EU zu vergleichen. Diese Masterarbeit analysiert zwei sehr unterschiedliche Rechtsordnungen, was zu dem Ergebnis führt, dass die Standards, Beschränkungen und Ansprüche grundverschieden sind.
Das Resultat zeigt, dass es in den USA keine Mindeststandards wie z.B. maximale tägliche Arbeitszeitgrenzen, bezahlter Urlaub, Entgeltfortzahlung im Krankenstand usw. für Arbeitnehmerinnen gibt. Im Gegensatz dazu gibt es in der EU z.B. die Richtlinie 93/104/EG, die Mindestvorschriften für bestimmte Aspekte der Arbeitszeitgestaltung vorschreibt. Es handelt sich um Minimumstandards, die in jedem Mitgliedstaat umgesetzt werden müssen und häufig gelten Verbote von solchen Regelungen abzuweichen. Die Mitgliedstaaten haben natürlich die Möglichkeit günstigere Regelungen für die Arbeitnehmerinnen anzuwenden. Dies sorgt dafür, dass

Arbeitnehmerinnen in der EU im Allgemeinen besser geschützt sind, als diejenigen in den USA.