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COMMENT: Nightwork trends

Although much has been written about the health dangers of working at night and EU Directives establish a framework of legal restrictions on the duration of night work and who can work at night, there is little reliable data on its incidence. What data exists ignores the informal economy and employment without valid work visas, and such practices commonly take place at night. It is also a time when those with a formal primary job seek tax-free employment, especially during weekends.

Evening work (between 6pm and 10pm) and night work (after 10pm) are significant times for employment in many sectors of the economy. The hospitality sector is busiest during the evening, whilst utilities, transport, and continuous production industries require almost equal numbers on night shifts to day shifts. Although manufacturing employment is declining due to greater automation in much of the economically developed world,

the gig economy is expanding fast with Uber drivers, pizza delivery and 24-hour supermarkets all on the increase.

Official statistics based on employer surveys tend to heavily under-record employment at night. A more trusted pan-EU source of data are 'Labour Force Surveys' (LFS) that are based on interviews with individuals in their own homes. Such surveys generally collect data about work patterns, but – almost by common design – no country freely publishes night work data. In the UK it took a freedom of information request to the Office for National Statistics last year by the Trade Union Congress (TUC) to release the data. What this indicates is surprisingly at variance with other published labour force survey data for Europe as a whole.

The TUC re-analysis of LFS data shows that there has been a significant overall increase in night working between 2011 and 2016

from 8.8% to 11.8% of the UK workforce. However, the change in night working over the same period for men was 4.5% to 14%, whilst its incidence for women declined from 15.3% to 9.4%.

The spread of night working was fairly even between different age groups, but with a slight peak in the 25–29 and 40–49 age cohorts. However, between 2011 and 2016 the growth of night working was not spread equally by region. It ranged from +57.7% in Northern Ireland and +30.3% in London to -12.7% in Scotland and -5.9% in the east of England.

According to Eurostat, the two countries with the highest incidence of regular night work as a proportion of all employed persons are Slovakia (16.7%) and Malta (10%). At the other end of the scale are Poland (2.3%), Croatia (2.5%), Portugal (2.7%) and Lithuania (2.8%). Overall in the EU the average level of regular night work has fallen from 7.7% in 2006 to 6.1% in 2015, but the Eurostat analyses also reveal a sharp downward trend in UK nightwork – contrary to that revealed by the LFS data obtained by the TUC.

The LFS data for continental countries has undoubtedly been ‘massaged’ by statistical agencies and, in any case, significantly under-records the actual incidence of casual night work, especially in locations such as resorts where night working extends into the early hours of the morning in the tourist industry. Moreover, the higher the level of the income tax ‘take’ and social security contributions, the greater will be the incentive to undertake undeclared work.

There are no statistics available indicating the incidence of ‘on-call’, ‘stand-by’ and ‘zero-hour’ contractual arrangements. Much of these forms of employment will cover night periods, especially when unexpected problems arise in operations such as breakdowns and security emergencies. One trend which is adding to working time is the growth of around-the-clock texting and emailing of staff. Although legislation is being introduced in, for instance, France to limit this practice, it is impossible to prevent employees voluntarily responding to communications whenever they are sent. For many people in professional and managerial positions such communications are received when they are at home asleep, with the sender expecting a quick response. This is particularly a problem associated with home-based working arrangements and globalised operations.

GLOBAL: The taxing question

One of the biggest issues facing companies operating across borders is in which country should their geographically mobile staff pay income tax and social security contributions.

A great deal depends on the nature of the geographical mobility and the countries concerned. Generally, an individual’s actual nationality is irrelevant to the issue about where they are taxed. The main exception to this rule is the USA which seeks to tax all its nationals wherever they reside, but even here there are special rules in respect to cross-border employees working in Canada.

In the US and Canada the 1984 Totalisation Agreement states that if you live in one country and are sent to work in the other country for less than five years, you continue

to pay social security in your home country. Only if you work longer than five years – or you are hired in the other country – will you pay social security in the host state. However, claims for social welfare benefits can still be made from the home state.

In the rest of the world – apart from transport workers such as HGV drivers and airline flight crews, which we do not deal with here – there are three principal types of employed cross-border worker. Generally different rules apply in each case.

The first type of worker is the expatriate who settles in a host country permanently, or for any period in excess of six months. In the EU, they will normally pay both social security and tax in their host country, although certain transitional concessions may be made for the tax paid. If the employee is an EU citizen working in another EU country for up to two years, they are allowed to arrange payment for social security to continue in their home (or former EU) country for up to two years. Some host countries also require tax to be paid for all worldwide income in their jurisdiction. If the home country threatens to also charge tax on any of the same income, then it will be necessary to resort to the appropriate double taxation agreement to sort it out.

The second category of cross-border worker is the employee posted to complete an assignment in another country for up to six months. Special rules apply to the terms and conditions of posted workers in the EU and prior notification of a job posting normally has to be given to the host country's labour inspectorate. The posted worker will generally continue to pay both their income tax and social security in their home country, although the criteria for tax residency in the

EU is no longer purely defined in terms of a 183-days-per-year residency threshold. Other factors can be applied to determine if income is subject to the host country tax regime. This means that in some countries where the tax authorities operate in a draconian manner, such as France, it may be very difficult to avoid the payment of tax once tax officials are aware of employees working in the country. They can also insist that the employing entity register a company in France so that they can also be assessed for other tax obligations.

Finally, there is the complex and uncertain issue of cross-border workers. These are people who live in one country but commute across a national border to work in another country each day or on a very regular basis. Such workers in much of Europe have been hindered in the last year by the re-imposition of border controls within the EU Schengen area. Fortunately, in the EU there are special rules for the payment of social security, whereby cross-border commuters always pay their social security in the country where they work, but have a right to claim most social benefits in the country where they live. The main exception is unemployment benefit where employment is intermittent due to temporary lay-offs. In this case, the benefit is payable in the host country. Income tax, on the other hand, is subject to bilateral agreements between countries and will vary throughout Europe. In general, however, employees pay income tax in the host (work) country - but are still required to submit an income tax annual return in their home country.

Further afield there are few countries outside Europe where there is a significant volume of daily cross-border commuters. India has

hostile border regions with both Pakistan and, to some extent, Bangladesh and - in any case - small companies are not obliged in India to register for social security. Where social security is paid, the foreign worker can claim a deduction of up to INR150,000 (US\$2310) per annum from their taxable income in India.

In Africa, the growth of Botswana's mining wealth has meant an influx of foreign workers to the country and even cross-border workers from South Africa (in spite of delays and demands made by corrupt border guards and South African police). An individual is subject to Botswana income tax on all income they receive or accrue from any source in Botswana, which means work undertaken there. There is no social security in the country, so cross-border workers must make their own provisions in South Africa.

In South America few countries have safe and stable border areas and therefore cross-border commuting is not very common. The biggest issue is cross-border migration, especially for Mexico - which has a major problem along its southern border where the volume of illegal migration is growing fast. Reciprocal arrangements for social security and income tax are not major issues for these countries where the grey economy is generally much larger than the formal economy and affluent individuals are able to financially persuade officials to overcome any tax difficulties.

NORWAY: Working alone

A new report from the Fafo Research Foundation in Oslo highlights the health and safety issues associated with working alone.

A quarter of all Norwegian workers work alone for 75% of their time and this can give rise to psychological problems amongst some people and greater risks when accidents occur. In fact, 40% of all fatal work-related accidents, and a high proportion of violence from clients and third parties, happen when a worker is alone. That is why lone working is specifically regulated under the Working Environment Act (2015) which requires employers to assess the consequences and risks of employee isolation.

Employers also need to consider the possibility of bad decision-making by lone workers, especially as many such workers are not just carrying out simple semi-skilled tasks. In fact, those in professional, scientific and technical activities are amongst the most frequent workers operating alone.

PHILIPPINES: Labour-only contract ban

Labour Secretary Silvestre Bello III has placed a total ban on labour-only contracting and 'endo' schemes. He has also tightened the framework for lawful contractual agreements.

Labour-only contracts involve an arrangement where a company supplies workers to a 'principal' company, but remains their employer. The workers undertake regular jobs but the contractor has no control over them - or obligation to provide an identifiable service. 'Endo', or '555', schemes are contractual arrangements that automatically terminate at the end of 5

months so that employers can avoid treating contractors as regular employees and need not provide them with additional benefits.

Bello's Department Order (DO) prohibits the channeling of work through a 'cabo' (someone operating in the guise of a labour organisation who supplies workers to an employer), an in-house agency or an in-house cooperative. It also outlaws contracting out work to cover tasks not being completed due to a strike or lockout, or to replace union members or discourage union membership.

Employers will not be able to use contractors/subcontractors to perform work done by regular workers, or to require a period of such employment before being hired as a regular worker. It bans the use of post-dated resignation letters, repeated contracts of limited duration, waivers relieving the employer from applying labour standards or paying any future compensation claims, or requiring a worker to become a member of a co-operative of other workers.

Furthermore, the DO requires that fixed-term labour contracts, or subcontracts, must be for the same duration as the overall service agreement, unless the agreement can be readily defined in terms of phases that require distinct job skills. The employee must be made aware of this phasing at the outset of their assignment.

The new departmental order also reduces the contractor registration period from three to two years and quadruples the registration fee. 200 more labour law compliance officers are to be appointed to monitor the new

restrictions and their target will be to visit 90,000 establishments a year.

ROMANIA: Further union concession

The Romanian Minister of Public Consultation and Social Dialogue, Gabriel Petrea, has announced that he intends to repeal part of the Social Dialogue Act so that national collective agreements can be reintroduced.

National collective agreements in Romania were made unlawful by the Social Dialogue Act back in 2011. Since then collective agreements have been lawful at a company and sectoral level, but now sectoral agreements are only binding if employers' associations that sign them have in membership, companies employing more than half the employees in the sector concerned. They can only be extended to all companies in the sector if there is a request from the signatories and the proposal is approved by the national tripartite council.

This announcement is the latest move by the new coalition government that came into power in January 2017. It seeks to further avert the intense pressure from trade unions that built up under the previous government concerning public sector pay levels. It also follows a 19% increase in the statutory minimum wage at the end of January 2017.

USA: Laws in the pipeline

A wide range of legal reforms in California are now in the pipeline and can be expected to be enacted this year.

A law banning employers from asking candidates about their criminal history (even about any prior arrest without conviction) would leave any consideration of a criminal record until a job offer had been made. Only then would it be possible to withdraw the offer – with a resulting opportunity for the successful candidate to challenge the change of heart.

An Opportunity to Work Act would impose an obligation on employers with 10+ employees to offer overtime to non-exempt workers before taking on new employees or contractors.

Also in prospect are - the extension of 12 weeks' parental leave to companies with 20–49 employees; a facility to give all military veterans preference over all other candidates; an expansion of family leave rights and its extension to 24 weeks; repeal of certain unpopular labour code rules which allow civil actions; a method for employers to mitigate DLSE actions against them for unpaid wages; a prohibition against employers asking for a job candidate's salary history; and a facility for a retail employer to change a non-exempt employee's work schedule to a 10-hour day within a 40-hour workweek during the Christmas period, without having to seek approval from other employees.

Pay, Tax and Benefit Trends

FINLAND: Over the three months to January 2017 gross wages and salaries in Finland's private sector grew, on average, by 3.6% compared to a year earlier. Labour costs in Finland's private sector rose by 1.7% over the year to the 4th quarter of 2016.

GERMANY: In 2016 the average gross hourly earnings of female employees in Germany were 21% lower than for male employees. Around three quarters of this gap can be accounted for by the sectors and occupations in which women work, their poorer career advancement, their relative lack of qualifications in some fields, and their higher representation in part-time and casual employment. If adjustments are made for these factors, then the earnings gap between male and female workers is reduced to 6%.

GREECE: With unemployment running at 23.5% and only 45.3% of the employed workforce working full time, the Greek economy is failing to recover from the crisis that began seven years ago. In fact, at 45.2%, youth unemployment in Greece is now even greater than in Spain - and those most affected are women. Officially, labour costs fell over the year to Q4 2016 by 0.5%, but in reality the fall in salaries since the end of 2015 has been over 5%. Companies are even beginning to issue supermarket vouchers instead of pay. Since being forced last December to pay employees via bank transfer, there are many unconfirmed reports of employers requiring employees to pay the company part of their salary back in cash or face termination.

HUNGARY: Average gross monthly earnings rose in the business sector by 9.1% to 286,500 (US\$1004.56) over the year to January 2017. Net average after-tax earnings also rose 9.1% over the same period.

ICELAND: Iceland is set to become the first country in the world to ask employers to prove, as a matter of course, they offer equal pay. The government is submitting a proposal to The Alþingi (parliament) requiring all employers with 25+ people to prove wages are subject to equivalent value, irrespective of gender, race, nationality, and even 'aptitude'.

IRAN: The workers' minimum wage in Iran has been raised by 14.5% to 9.3 million rials (US\$286.91) per month. The Supreme Labour Council also agreed a living monthly wage of 24.8 million rials (US\$768.65), based on a family averaging 3.5 members.

ISLE OF MAN: Workers aged 25 and over are set to receive a minimum £7.50 (US\$9.4) per hour from 1st June – a 50p increase – bringing the rate in line with the UK. Workers aged between 16 and 17 will see an increase in their hourly rate of 30p, whilst 18 to 24s will receive 20p more per hour.

Other Global HR News in Brief

CANADA: Alberta's Labour Minister, Christina Gray, has launched a review of the Employment Standards and Labour Relations Codes. Neither measure has been fundamentally changed in over three decades and there is concern that, in particular, the legal framework for maternity/parental leave and also collective bargaining may be out of step with the rest of

Canada. Those with businesses in the Province have until 18th April to [submit their views](#) about any necessary reforms.

CANADA: A board of enquiry for the Nova Scotia Human Rights Commission has found that the trustees of a welfare insurance fund indirectly discriminated against a disabled claimant when they refused to finance the prescription of medical marijuana. The board was careful to point out that any future case alleging discrimination would require interpretation of the specific benefit plan. But the case underlines the problems faced by organisations if they seek to oppose 'medical opinion', especially when it condones the use of such a dangerous narcotic as marijuana. [Skinner v. Board of Trustees of the Canadian Elevator Industry Welfare Trust Fund.]

CHINA: All employers in Shanghai are from this week onwards required to apply for employment permits via the the new online management system for foreign workers. The new policy applies to both foreign employees who currently hold a Foreign Expert Licence or an Employment License – as the two categories are being merged into a single "Alien Employment Permit" from April 1st 2017.

FRANCE: The French major retailer Auchan has just signed a global framework agreement with Union Network International (UNI). This commits the company to uphold a set of workers rights based principally on ILO conventions across its 2,625 retail outlets in 17 countries. If FedEE members wish to apply a set of global standards they may now do so through FedEE's [Code of good HR policy and practice](#).

GERMANY: Companies employing 200 or more people in Germany will soon have to comply with the Transparency of Remuneration Act. This requires employers to respond to a request from any employee to reveal average remuneration in respect to any comparator group (in the same workplace) containing six or more fellow employees of the opposite sex. This comparison can include two additional components – such as bonuses and benefits in kind. In companies with works councils this must be submitted via the council. Fortunately, even when challenged, an employer may put forward arguments disputing any justification for job comparability. However, if the employer concerned does not meet the request, a court will be able to assume unequal treatment exists. In addition, companies with 500+ employees must report in 2018 on how they promote women and maintain equal pay. This reporting obligation will thereafter exist every three to five years, depending on collective bargaining arrangements.

INDIA: The Hyderabad High Court has ruled as unconstitutional and discriminatory the practice of retiring workers early on medical grounds and their replacement by a male dependant. The case against Singareni Collieries Company Limited was based on Articles in the constitution (14 and 16) that deal with equal opportunities. The court not only found that the practice was unlawful by constituting “employment by succession” (and, in doing so, discriminated against female and disabled dependants), but that it was not based on medical invalidity. This is because the employees were regarded, because of their age, as ‘unfit’ for the kind of underground work they undertook. This could have been resolved by redeployment.

NEW ZEALAND: The Employment Relations Amendment Act 2016 introduced a series of changes related to an employee’s working hours, shift cancellations and secondary employment. These changes must be reflected through new employment contracts with effect from April 1st 2017, otherwise they cannot be enforced against an employee. The most important change deals with an employee’s availability through zero-hours contracts. From April 1st 2017, availability must be predetermined and justified on reasonable “need” grounds, combined with guaranteed hours and compensation.

NEW ZEALAND: New Zealand has become the first western country to sign a cooperation agreement with China as part of China’s ‘Belt and Road’ initiative. The initiative, which comprises the ‘silk road’ belt and the maritime global silk road, aims to build a trade and infrastructure network linking China to the world. More flights will operate between the two countries and from 8th May 2017 the New Zealand immigration office will extend the issue of multiple-entry business visas from three to five years for Chinese visitors.

SPAIN: Companies wishing to transfer highly qualified professions from outside the EU to Spain must do so through senior personnel who are legally resident in Spain or another EU country. Spain’s Large Companies Unit (UGE) must be provided with proof to back up the signature on the application. It remains also necessary for the company to have established a power of attorney between them and the representative signatory prior to any application being submitted.

SWITZERLAND: Later this year Swiss citizens will vote in a referendum concerning new immigration restrictions on EEA nationals. The Bill passed by the federal parliament in December allows the government to impose a requirement for employers to give priority to Swiss nationals if the unemployment rate in specific occupations exceeds a threshold level. It will then be obligatory for employers to inform the regional employment agency of all relevant vacancies and to interview candidates put forwards by them to fill the positions. The outcome of the interviews will then be communicated to the agency. Only if no suitable candidate can be found will it be possible to recruit an EEA national. Immigration rules for other foreign nationals are already based on annual quotas and will remain unchanged.

UNITED KINGDOM: One of the biggest costs to the UK of Brexit, that could potentially greatly damage the economy, is the loss of payments through the EU's common agriculture policy. Although the UK pays 13bn euros to the EU each year it immediately gets back 4bn through rebates to farmers. In addition, UK rural communities receive 5.2bn euros through the rural development fund. In total, 55% of UK farm incomes come from the CAP. This is of greatest benefit to small farmers and those in less productive upland areas. It also finds its way to the rest of the UK economy. Although the UK government has intimated that it would use some money saved from EU contributions to set up its own scheme to help farmers, it remains highly likely that the UK will be forced to buy its way out of the European Union and may well use any ultimate savings made to fund other

fashionable schemes from powerful interest groups that are less beneficial to the overall economy.

USA: The Governor of Wisconsin has proposed that new procedures apply to claims under the state Fair Employment Act (WFEA) and Family and Medical Leave Act (WFMLA). The proposal has yet to be passed by the state legislature, but if it is accepted - then employers and employees could face penalties if they decline an out-of-court settlement award and later find that they are judicially awarded a lower sum. This, for instance, could leave a claimant with a bill for all the employers' legal costs in disputing their claim.

USA: The US House of Representatives voted to repeal a law that was due to come into effect at the end of this year that would have required ISPs to gain permission to share personal information. The removal of this safeguard may have implications for the 'privacy-shield' procedures that were established to take over from 'safe harbor' as a means for companies in Europe to send personal data – especially concerning employees – to the USA.

USA: A second executive order banning immigration from a number of Islamic countries has been temporarily blocked by federal judges in Maryland and Hawaii. It now remains uncertain how far the new US administration can go to control immigration. The 4th Circuit court has set oral arguments in the Maryland case for 8th May.

Dates for your diary:

April 1st 2017: **New Zealand's** Employment Relations Act comes into force

April 16th 2017: Catholic and Orthodox Easter

May 28th 2017: **Italy** referendum on labour issues

June 05-17th 2017: **ILO** Annual Conference

October 22nd 2017: Federal elections in **Germany**

April 4th 2018: First report under Equality Act 2010 (Gender Pay Gap Information) Regulation 2017 submission by **United Kingdom** employers

May 25th 2018: Final effective date for **EU** General Data Protection Regulations.

Travel Warnings

AUSTRALIA: Severe tropical cyclone Debbie has caused significant damage and flooding to southeast Queensland. A general severe weather warning remains in place and more torrential rain is expected. Visitors should be cautious about flood waters as levels can rise very quickly.

CAMEROON: The US State Department has warned travelers to avoid far North, East and Adamawa Regions of Cameroon because of terrorist threats and the risk of violent crime.

CANADA: All Amtrak train services between Vancouver and Seattle have been shut down until the 31st of March due to a landslide in South Surrey, B.C.

EUROPE: The World Health Organisation has issued a warning stating that Europe is experiencing a severe measles outbreak. The largest outbreaks are in Italy and Romania.

FRENCH GUIANA: Public services and flights are disrupted as general strike is underway across country. Visitors should exercise extra caution because of the potential for the protests to turn violent.

GAMBIA: Parliamentary elections will take place on the 6th of April 2017. Some disruptions may take place around this date due to protests and demonstrations.

INDIA: Dozens of people have been injured after eight coaches of the Mahakoshal Express, traveling from Jabalpur to Delhi, derailed in Kulpahar in Uttar Pradesh's Mahoba district. Long train delays can be expected.

ITALY: Unions representing workers at Alitalia have announced an April 5th strike. This will have knock-on effects on all airlines flying in and out of Italy, particularly Milan and Rome. Travelers should check the status of their flight before departure and expect flight delays and disruptions.

LIBYA: There has been increased fighting in Tripoli, as well as the 'oil crescent' around Ras Lanuf and Sidra and in the eastern city of Benghazi. We advise companies to avoid all business travel to the country. If travel is essential you should exercise great caution as hostilities can escalate quickly into heavy fighting and the situation is likely to remain unpredictable.

MAURITANIA: Travel to the far east of Mauritania is dangerous due to the activities of terrorist groups which are active in the neighboring regions of Mali. These include al-Qaida in the Islamic Maghreb (AQIM), and those which pose a threat in the greater Sub-Saharan region, such as the self-proclaimed Islamic State of Iraq and ash-Sham (ISIS).

MYANMAR (BURMA): By-elections will take place on the 1st of April in parts of Rangoon and Bago, and in Chin, Mon, Rakhine, Sagaing, Shan and Kayah States. Visitors are advised to avoid protests or demonstrations.

RUSSIA: There are several large ongoing and impromptu demonstrations in cities across Russia, including Moscow and St. Petersburg, with arbitrary arrests and clashes between police and anti-government protesters. Onlookers could be equally vulnerable to arrest and fabrication of their involvement. Therefore, visitors should keep well clear of all demonstrations and public gatherings.

SAMOA: A six-month public health emergency has been declared in American Samoa following confirmation by the Hawaii State Laboratory of three dengue fever cases. Visitors should take all necessary steps to avoid being bitten by mosquitoes.

TURKEY: The United States Department of State has issued a travel warning to its citizens concerning Turkey. All travel should be avoided to southeast Turkey due to the persistent threat of terrorism.

WEST AFRICA: Lassa fever outbreaks have been confirmed across five West African countries, including Nigeria, Benin, Sierra Leone, Togo, and Burkina Faso.

USA: High-speed rail work will shut down some trains from Normal to Chicago and to St. Louis on April 3rd during track upgrades.

FedEE News

ON-LINE TRAINING: The second in our series of new employment law programme videos is now available in our members-only area. This covers employment law in Japan. It joins the first in this new series which focuses on China. The third training video covering India will be available early next month. Online certification for the new programme is in preparation and certification for the old programme is now fully functional again after experiencing technical problems.

FEDEE RADIO: We shall be making test transmissions of our on-the-hour news programmes over the next two weeks. It is planned to launch an IOS App when we begin transmissions for the first time next month. This will be a free download in the Apple store.

PUBLIC HOLIDAYS 2018: Dates for public holidays in 60+ countries for 2018 are now available in the FedEE knowledgebase. We shall be updating them in line with governmental announcements during the course of this year.

CODES OF PRACTICE: We have now ended consultation on our code of practice concerning the use of personal data by multinational employers in EEA operations. We have also drawn up a code of good HR policy and practice which will be subject to consultation until the end of May 2017. The latter code will form a useful framework of minimum standards for any company seeking to harmonize its policies on a global basis. Both codes are available in our knowledgebase at <http://www.fedee.com/kb/hr-data-protection-codes-practice/> and those deciding to adopt either code may display an attractive and distinctive kite mark on their literature. The kite marks will be sent to members adopting either code and are available in three sizes. Please send views and comments on our HR code and requests for the kite marks to admin@fedee.com.

FEDEE FLAG: Member companies of the Federation will soon be able to display a full-size FedEE flag on their company flagpoles. This will include our distinctive logo in full colour. They will be available on request from next month and will be free of charge. Those renewing membership will automatically be mailed a flag.

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