

Burntout or boredout ? Blame it on the company! A multinational outlook on a global workplace health issue

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Introduction

Over the past decades there has been a growing awareness of the importance of ensuring a healthy work environment for workers. Mental health issues as a result of high stress levels or other workplace related causes have a profoundly negative effect not only on the individual worker but on a company's workforce as a whole. Long term absence from work and the additional cost it entails (hiring temporary workers, reorganizing the work among other workers, ...) may affect a company's productivity. A burntout employee could potentially become a health and safety hazard, if he fails to abide by the safety practices or neglects his work, as a result of his state of fatigue and lack of concentration. From a macroeconomic point of view, the ever growing number of workers on long term sickness leave, *inter alia* because of burnout is putting the continental social welfare system under duress.

The approach the employer should take to these phenomena varies significantly from one national jurisdiction to another (Europe), or from one state to another (USA) or even from one continent to another (Japan). Indeed, in Japan a country that is traditionally known for its very strong work ethic a specific legal framework exists for workers who literally "work themselves to death" ("Karoshi").

This article takes a helicopter view on these global phenomena by giving the outlook from three continents (America, Europe and Asia). Taking the example from the USA, Japan and Europe (France & Belgium), it examines the causes of phenomena like burnout, boreout as well as the specific Japanese phenomenon of "Karoshi" and the various liabilities employers may incur for failing to prevent their occurrence and/or to provide sufficient protection to their workers.

I. Definitions

The World Health Organisation defines burnout, not as a medical condition, but as "an occupational phenomenon"¹: "a syndrome conceptualized as resulting from chronic workplace stress that has not been successfully managed". It is characterized by three dimensions 1) a feeling of energy depletion or exhaustion, 2) increased mental distance from one's job, or feelings of negativism or cynicism related to one's job and ") reduced professional efficacy". While not yet fully documented, burnout can in the long term lead to serious mental health issues, such as depression, eating disorders and/or drug or substance addiction.

There is no official definition for boreout other than it being defined in the urban dictionary as a psychological disorder that causes both mental and physical illness and consists of three elements: boredom, lack of challenge and lack of interest². The term was initially coined by two Swiss organisational advisors P. Rothlin and P. Werder who claim some 15 % of all the workplace show symptoms of boredom³ up to a point where they are affecting their health. Both

¹ International Classification of Diseases (ICE-11).

² https://www.urbandictionary.com/define.php?term=boreout&utm_source=search-action

³ Rothlin P. & Werder P., *Diagnose Boreout – Warum Unterforderung im Job krank macht*, 2007, Redline Verlag.

phenomena overlap in that they are both a negative emotional response to chronic workplace stressors. Whereas burnout is mainly the result of having to cope with excessive workloads for a prolonged period of time, boreout is primarily caused by a lack of job satisfaction and non-challenging work. Another similarity is that these phenomena seem to be more prevalent among the high achieving, perfectionist employees who either push themselves beyond their boundaries (burnout) or who are insufficiently triggered to realise their potential (boreout) and as a result drop out of the workplace. Although the health effects of boreout are said to be equally devastating in that it can also lead to depression (like burnout), epilepsy crises and even suicide.

Various factors are quoted as causes for burnout and boreout: the use of email and the internet, which entails ever faster means of communication but also a decrease of actual human contact; the impact of social media urging people to constantly be online; the difficulty of maintaining a good work/life balance when both partners work and family duties interfere with work obligations; overall higher expectations about attaining job satisfaction and lack of resilience ...

While the concepts of burnout and boreout are as such acknowledged to exist, both in the USA and in Europe⁴, these concepts are absent in the Japanese work place. What liabilities an employer may incur are restricted to the phenomenon of "Karoshi", i.e. death from overwork. If an employee dies due to a heart attack, a stroke or suicide as a result of having worked too hard, his death will be considered as "Karoshi" and give rise to Workers Compensation Insurance (see below).

Finally, reference should be made to the concept of brown-out which can literally be defined as a voltage drop – or the "prelude" to a potential boreout. Here, the employee believes that the tasks he has to fulfil are absurd and make no sense which leads to him/her feeling degraded because of his/her job, feeling useless. The employee does not want to work anymore and no longer believes in the values of the company. A symptom of this phenomenon is the employee not coming to work on a regular basis. Here, there is no strong reaction against the workplace, as there would be in a burnout situation. The employee simply loses interest in his position so, as such, it is less visible. However, it is really present. According to a study published by Corporate Balance Concepts on 1,000 US managers in 2013, 40% of them would suffer from brown-out.

II. An outlook from various jurisdictions

a. The EU: Belgium & France

Impact

Long term absence from work as a result of illness caused by work related factors such as burnout or boreout is considered the most important occupational health issue of the 21st century. Studies show over 53 % of Belgian employees have been absent from the workplace for one month or longer and 30% of these long term absentees are caused by phenomena such as burnout. Over the past ten years there has been an increase of 33 % in numbers of people absent from work⁵. The French Agency for Food, Environmental and Occupational Health & Safety has not published specific statistics on burnout in France yet but stated that

⁴ Although their actual legal implications and employers' liabilities are quite different (see below).

⁵ Survey conducted by pay roll agency SD Worx concerning over 600.000 workers in 19.500 Belgian companies (published 15 February 2018).

between 2001 and 2009, out of the 47,768 diseases that were declared as being occupational, 22% related to mental health issues.

In terms of cost its impact can hardly be underestimated. While unemployment numbers have gone down, there has been a significant increase in the amount of allowances paid by the Belgian National Health Insurance Office to people who are long term absent from work. In France, as soon as an employee does not show up to work, there is an investigation carried out by the Social Security system in order to determine if the absence is linked to the workplace or not. While burnout or boreout have not yet been recognized as occupational diseases by the French legislator, there are Court decisions that have recognized such concept as being linked to work. This means that there are very serious chances that if the employee's doctor states that there is a work-related depression, the disease will be considered as occupational. In that case, the employer will not only see its tax to the Social Security system increase, it will risk having to reimburse the latter of the compensation that it will be granting the employee while the latter is recovering and damages for not providing a safe workplace.

During his absence from work and (quite often time consuming) recovery process the employee will inevitably suffer loss of income: after one month's full pay of salary, the Belgian national health insurance will only pay (capped) allowances.

Employers face the additional cost of having to hire (more expensive) temporary workers to step in, which entails additional costs regarding hiring, training and ensuring the wellbeing of the dropped out worker's colleagues in order to avoid a ripple effect within the team. Moreover, the employer has specific obligations as explained below. Note that in France, the hiring of temporary workers in case of the illness of an employee is only authorized in very strict circumstances and after the employee is absent for a long period of time, which creates a number of organizational concerns.

Employer's obligations

In Belgium burnout and boreout would be considered as "psychosocial risks at work". These are considered occupational health hazards and are defined as follows: *the probability that one or more worker(s) suffer(s) a psychological damage, which can also be accompanied by physical damage, resulting from exposure to some elements of the work organisation, job content, working conditions, living conditions at work and interpersonal relationships at work, on which the employer has an influence and which objectively involve a danger*⁶.

The employer has the primary obligation to prevent these risks from occurring. To that end he must (i) conduct a thorough assessment of the workplace in order to detect and identify potential risks and (ii) he is required to take a proactive approach on ensuring the general wellbeing of its workers. In practice these risk assessments will be conducted by External Occupational Health Service Providers⁷.

During the first month of absence from work, the employer must pay statutory sick pay equivalent to a regular month's wages. After that the National Health Insurance will pay a

⁶ Art. 32/1 Act of 4 August 1996 on Well-being at Work.

⁷ Not-for-profit organizations that offer specialized and multidisciplinary services (medical, psychological, ergonomical, ...) in various matters related to wellbeing at work.

(capped) monthly allowance. After a certain period⁸ of absence from work a return-to-work process may be initiated either by (i) the employer, (ii) the employee (in conjunction with his personal general practitioner) or (iii) the advising doctor of his health service fund⁹. The employer may be required to make (reasonable) adjustments in order to allow for the worker to reintegrate the work process. Whatever measures are required will obviously depend on the cause and seriousness of the worker's condition. Sometimes a solution can be as simple and straightforward as providing a specific tool to an employee (eg. noise cancelling headphones to an employee suffering from stress in an open office workspace) or by adapting his work schedule (eg. allowing him to work from home at least one day a week).

A company that dismisses a sick employee exposes itself to an additional¹⁰ claim on the grounds of discrimination on the basis of the employee's current or future health status. Damages amount either to a lump sum of 6 months' wages or higher, if the employee can prove that he has actually suffered higher damages as well as the amount thereof.

Under Belgian law the employee is also entitled to ask for the reasons for his dismissal¹¹. If the employer is unable to prove this dismissal finds its cause in economic reasons related to the functioning of the company or in reasons related to the employee's conduct or aptitude to perform his functions, he may also be held liable for payment of an additional 3 to 17 weeks of remuneration on the basis of "blatantly unreasonable dismissal".

As regards the boredout employee, a Belgian employer would be well advised to suggest new tasks and challenges to the employee and try to keep him on board. Giving only menial and meaningless tasks to an employee (sometimes with a view to encouraging the employee to quit) could be perceived as a constructive dismissal: indeed, a unilateral change of his function could amount to a demotion, i.e. a unilateral modification of what is considered an essential element of the employment contract, and hence amount to constructive dismissal.

To date, there is no legal obligation for Belgian employers to oblige their workers to disconnect from the company's intranet during the weekend, nor is there a right for employees to go off-line, other than the fact that employees who fall within the scope of the Act on working time are only expected to work within the weekly limits of 38¹² hours and according to the work schedule as set out in the Work Rules and/or their employment contract.

⁸ The length of this period varies, depending on who wishes to initiate the reintegration process: the employer can only do so after four months' absence.

⁹ The so-called "*Mutuelles (French)/mutualiteiten (Dutch)*" – In Belgium all employees will be affiliated to a "health fund" or "public health provider" of their choice. These not-for-profit entities act as an intermediary between the National Health Insurance Office and the insured worker. They reimburse medical services and pay the long term sick leave allowances.

¹⁰ In addition to normal statutory severance pay which is calculated in weeks' and months' wages depending on the seniority accrued by the employee.

¹¹ Collective Bargaining Agreement n° 109 of 12 February 2014 introduces the right for a worker to know the reasons of the dismissal.

¹² In practice and as a general rule: 38 effective hours per week, up to a maximum of 40 hours per week, provided that the 40 h are compensated by 12 days of rest per year. Specific rules apply depending on the nature of the business and hence the applicable Joint Committee.

In France, the concepts of burnout and boreout have not been formally recognized by the legislator and included in the Social Security or Labor Codes. A law in 2015 has however added to occupational diseases, psychological incapacity. In parallel, Labor Courts have considered that they are a form of health-related mental disease, such as stress, that can be compensated and fall under the scope of the safety obligation of the French employer. While, at first, the safety obligation meant that the employer had to do everything it could to ensure the physical and health safety of the employee with only gross misconduct sanctioned, since 2002, French Courts have considered that the safety obligation is an "obligation to achieve a result". This means that as soon as an employee develops a disease, the employer has breached its duty of care. The employer can only defend itself by demonstrating that it was faced with a *force majeure* situation which made it impossible for the employee to stay safe. In other words, employers are always condemned in France on this ground as soon as the employee declares a disease to the Social Security system and that the latter considers that said disease is linked to the workplace.

French Courts now regularly rule that "*the management methods that are implemented by the manager can characterize moral harassment as soon as the methods result in repetitive actions which lead to the degradation of the working conditions that can affect the rights or dignity of the employer, affect his/her physical or mental health and that they compromise his/her career*". The landmark case was a decision by the Versailles Court of Appeal, granting 15,000 Euros of damages on the ground of burnout¹³. Several French Supreme Court decisions followed including some whereby it was ruled that even if there is no harassment, the employee can be subject to burnout and be compensated.

As for boreout, it was first recognized by the Paris Labor Court on March 16, 2018¹⁴. The employer was condemned for unfair dismissal of an employee who had been on a long-term sick leave while such sick leave was linked to boreout and therefore was allegedly due to the employer.

Faced with these new concepts, the employer must, in France; take measures that (i) demonstrate that it is aware that such mental health diseases exist and can occur within its company and (ii) are meant to tackle such diseases. This can prove very difficult as these diseases are linked to subjective feelings but the employer has to identify any trend of employees complaining. This lack of identification of a trend has been ruled as being a serious breach against the main French phone company which, after becoming privately owned (it was before a State company), experienced dozens of suicides from employees who, according to their relatives, could not stand the new management scheme implemented.

Case law on the impact of a change in management should be taken into account anytime a new management (even local) or new values are implemented. Employers should regularly assess work happiness and inclusion. With the rise of brown-out allegations, the employer should also consider assessing employees' belief in the company and in their role. This can be done through 360° surveys and in the course of the annual appraisal. It implies however asking specific questions on mental health status.

¹³ Versailles Court of Appeal, May 22, 2019, docket number 10/05277.

¹⁴ Although the term "boreout" does not feature as such in the Court's decision – the company was convicted for moral harassment ("*harcèlement moral*").

French law explicitly acknowledges the worker's "right to disconnect"¹⁵, although it does not define the exact content of this right, leaving it up to the workers' representative bodies and the employer to negotiate on the terms and conditions that would enable the worker to disconnect from work and to ensure respect for working hours as well as the worker's private and family life¹⁶. A number of companies are signing such charters with their works council and employees' representative bodies, setting out these rules about employees disconnecting. Providing training to workers as well as their managers and raising their awareness on the reasonable use of digital instruments are also part of what should be laid down in these policies. The French Supreme Court has in parallel ruled that any time spent working during holidays and breaks should be compensated either by additional holiday or through a bonus.

b. Asia: Japan

Concept

An expression equivalent to the “burnout syndrome” exists in Japan. However, it has been used in the following ways which are quite different from the WHO definition:

- Mental condition (feeling purposeless and/or despondent) of athletes after big sports events such as Olympic games, World Cups, National Highschool Championships for baseball, soccer and rugby, or National Athletic Festival, and
- Mental condition (feeling purposeless and/or despondent) of students after passing school entrance exams

Work-related mental illness, especially work-related depression, is the most similar to WHO’s definition of “burnout” because it often accompanies the following:

- (i) Feeling of energy depletion or exhaustion,
- (ii) Increased mental distance from one’s job, or feelings of negativism or cynicism related to one’s job, or
- (iii) Reduced professional efficacy as in WHO’s definition.

If the mental illness is considered as work-related, it will be subject to the Workman’s Compensation Insurance¹⁷.

Japan has seen the phenomenon of *Karoshi* or death from overwork. In case an employee dies due to heart attack, stroke or suicide after working too much, such death will be considered as Karoshi and will become subject to Worker’s Compensation Insurance in Japan. The following shows the number of working hours triggering Karoshi:

¹⁵ Literally: "*le droit à la déconnexion*" or "the right to switch off (from work)".

¹⁶ Article L2242-17 of the French Code du travail.

¹⁷ Standards for Application of Worker’s Compensation Insurance for Psychological Disorder Caused by Mental Illness issued by Ministry of Health, Welfare and Labor (December 2011).

- (i) approximately more than 100 hours of overtime work per month before the occurrence of heart attack or stroke¹⁸,
- (ii) approximately more than 80 hours of overtime work per month two to six months before the occurrence of heart attack or stroke¹⁹,
- (iii) approximately more than 160 hours of overtime work per month or approximately more than 120 hours of overtime work per three-week period before the occurrence of mental illness (including depression) which caused the suicide²⁰, or
- (iv) approximately more than 120 hours of overtime work per month for two consecutive months or approximately more than 100 hours of overtime work per month for three consecutive months before the occurrence of mental illness (including depression) which caused the suicide²¹.

Employer's Obligations: Preventive Measures for Mental illness

Under the Industrial Safety and Health Act (effective as of December 1, 2016), employees are required to conduct a stress check on its employees. A stress check is conducted to assess the degree of psychological burden of employees. The following are the processes to be taken by the employer for a stress check²²:

- The employer shall have its employees undergo an examination conducted by a physician, etc. to assess the degree of their psychological burden.
- The physician, etc. shall notify the employee who underwent the examination of the results of the examination. The physician, etc. shall not provide the employer with the results of the examination without obtaining the prior consent of the employee.
- An employee, who is notified by the physicians, etc. that his or her degree of psychological burden is high, may request the employer to have a face-to-face meeting with the physician, etc. to receive guidance. In such case, the employer shall not treat the employee in a disadvantageous manner for making such request.
- The employer shall keep the records of the results of the guidance received by employee during the face-to-face meeting with physician, etc.
- The employer shall obtain the opinion of the physician, etc. on any measures necessary for the employee to maintain his or her health based on the results of the guidance received by such employee during the face-to-face meeting with the physician, etc.
- The employer shall consider the opinions of the physician, etc. on the employee. When it is deemed necessary, the employer shall take measures, including changing the location of such employee's workplace, changing the work content of such employee, shortening the working hours of such employee or reducing the frequency of night work of such employee, as necessary, by taking into consideration (i) the present condition of such employee and (ii) the opinion of physician, etc.

¹⁸ Standards for Application of Worker's Compensation Insurance for Brain and Heart Disease (December 2001)

¹⁹ *Id.*

²⁰ Standards for Application of Worker's Compensation Insurance for Psychological Disorder Caused by Mental Illness issued by Ministry of Health, Welfare and Labor (December 2011)

²¹ *Id.*

²² Article 66-10 of Industrial Safety and Health Act Stress check is required for the employer which has 50 or more employees.

The Japanese government has recently enacted the Life-Style Reform legislations which became effective on April 1, 2019. The law aims to promote a better work-life balance among workers through implementing the following measures:

- Providing restrictions on the upper limit of overtime work to 45 hours per month and 360 hours per year²³,
- Making best efforts Introducing working hour interval system, i.e., an 11-hour interval is required between the work end time and the work starting time of the following day²⁴,
- Requiring employers to have their employees take at least five (5) days of annual paid leave per year²⁵, or
- Increasing the percentage of overtime pay, i.e. if the number of hours of overtime work is more than 60 hours per month, a 50% increase in the hourly base salary is required²⁶.

Consequences of Non-compliance

(a) Penalty under Japanese labor laws

Japanese labor laws provide the following penalties:

- Failed to submit the report to the Labor Standard Inspection Office regarding the implementation of stress check, a fine of JPY500,000 or less²⁷,
- Far exceeding the upper limit of overtime work, imprisonment of six (6) months or less or a fine of JPY300,000 or less (per employee)²⁸, or
- Not allowing employees to receive at least five (5) days of annual paid leave per year, a fine of JPY300,000 or less (per employee)²⁹.

(b) Obligation of due care on employee's safety at workplace

If the employer breaches the obligation to exercise due care on employee's safety at the workplace and did not take appropriate measures to prevent overtime work and/or bullying, such breach will become a cause of action and the employee may seek compensation for damages.

A landmark case on this is the *Dentsu Case* (Supreme Court of Japan, March 24, 2000) which involves excessive overtime work which resulted into depression and eventual suicide of an employee. After the Supreme Court of Japan reversed and remanded the decision of the Tokyo High Court, the parties settled at the Tokyo High Court in the amount of JPY168 million (approximately USD1.6 million).

²³ Article 36 Paragraph 4 of Labor Standards Act

²⁴ Article 2 Paragraph 1 of Act on Special Measures for Improvement of Working Hours, Etc.

²⁵ Article 39 Paragraph 7 of Labor Standards Act

²⁶ Article 36 Paragraph 1 of Labor Standards Act

²⁷ Article 100 and Article 120 Item 5 of Labor Standards Act

²⁸ Article 119 Item 1 of Labor Standards Act (exceeding 100 hour overtime and holiday work per month or exceeding 80 hours overtime and holiday work for two (2) to five (5) consecutive months)

²⁹ Article 120 Item 1 of Labor Standards Act

c. United States

Impact

In the United States, there is currently no legal obligation to address or accommodate employee burnout. However, savvy employers are paying more and more attention to research citing increases in employee burnout for other reasons. Employees who suffer from burnout are typically less motivated, have a higher error and accident rates, have higher rates of absenteeism, are less efficient, and are more likely to mistrust management and the company. Job satisfaction for burned out employees drops dramatically and managers find it harder and harder to drive employees to be innovative and creative. As a result, employers are beginning to take the data on employee burnout seriously and are developing strategies to avoid it, including thinking outside the box when assigning work, addressing the issue in employee engagement surveys, and paying more attention to the types of work that motivates individual employees, instead of sticking too closely to a predetermined job structure.

Addressing burnout can also be a recruiting issue for U.S. employers. More often, prospective employees have put work/life balance at the top of their list for job requirements. Employers are responding to that trend in part by adding such benefits such as mindfulness classes, yoga classes, and even four-day workweeks to attract more talent. Although a four-day workweek has been more of an aspiration than an actual trend so far, it is gaining more traction as employers are becoming more willing to experiment with non-traditional ways to perform work in an attempt to keep employees happy and more productive. The four-day workweek is also starting to make an appearance on the list of demands from labor unions, though it still remains a rarity.

In short, although employee burnout concerns in the U.S. have not reached the level currently seen in other countries, employers are increasingly taking note of the correlation between employee burnout and other considerations.

Employer Obligations

While there are no specific legal obligations for U.S. employers to address employee burnout, it would be a mistake to assume the issue can be ignored. Employee burnout can often lead to or masquerade as other issues that do carry a legal burden. For example, although there is no federal Occupational Safety and Health Administration (OSHA) standard addressing employee burnout, employers have an obligation to protect employees from workplace hazards. There is a growing body of data suggesting employee burnout can lead to a loss of concentration, fatigue, and a higher rate of errors. It does not take a large leap of logic to imagine how employee burnout might cause accident rates to increase, or increase the number of safety violations.

Another way in which employee burnout may trigger employer obligations – albeit indirectly – is through the Americans with Disabilities Act (ADAAA). The ADAAA requires employers, among other things, to accommodate qualified employees with disabilities. Under the ADAAA, a disability is defined as an impairment which

substantially limits one or major life activity. Although employee burnout would not satisfy this definition, chronic depression often does, and there may be a correlation between burnout and depression. Whether the burnout is a factor in depression, or vice versa, is ultimately irrelevant. Once the employee has established that he has a qualifying disability, the employer has an obligation to engage in the interactive process to determine whether a reasonable accommodation is available. In some cases, examples of a reasonable accommodation may be reassignment to a less stressful position, an alteration in the employee's work schedule, or periods of leave.

Therefore, even though U.S. employers are not legally required to directly address employee burnout, its indirect effect certainly raises issues with which they must contend. Increases in employee accidents, legal requirements to accommodate conditions accompanying burnout, and an employee's increased sense of distrust of management mean that employers seeking to prevent legal danger must consider the impact of having employees with burnout.
