A 'Right to Disconnect' Must Be Informed By 'Evidence' Rather Than 'Populism'.

New Measures to Support New Ways of Working

The Irish Government has committed in its Programme for Government to bringing forward proposals on a right to disconnect and will consider a role for the Workplace Relations Commission in drawing up a code in this area. This is part of a range of measures to support new ways of working and to facilitate and support remote working.

The hard-won boundary between work and home life is becoming blurred, putting intense pressure on physical and mental health amid the Covid-19 pandemic. Excessive working hours can of course put a strain on health and productivity and therefore should be discouraged. Over recent months, campaigns are being supported by several trade unions, in Ireland, for a right to disconnect.

The Irish Government has signalled its intention to consider legislating for the issue. This refers to the right of employees to disconnect from their work and to not receive or answer any work-related emails, calls, or messages outside of normal working hours. Proponents argue that technological developments and mobile devices have allowed employees to perform their work anywhere and at any time. While acknowledging the benefits with this flexible approach to work, they point to the risks in eroding the barriers between working and leisure time. They also point to an implicit or explicit expectation to check emails at night, as well as during weekends and holidays.

Creating Boundaries

The right to disconnect would, if established, create boundaries around the use of electronic communication after working hours and provide employees with the right to not engage in any work-related activities at home. The right could also be extended to one of not being penalised for failing to connect, or conversely to be rewarded for staying connected.

The legal right to disconnect emerged **in France** where a law was enacted in 2017 that introduced the right to disconnect as a matter for mandatory negotiation in companies. The detail of what is appropriate is worked out by way of conduct charters at enterprise level. Large employers with more than 50 staff are obliged to negotiate the detail of the charter with workers' representatives, but there is no legal requirement to reach an agreement. Essentially the terms of such rights are left to be agreed at company level.

In Spain, a right to disconnect was included in a Data Protection Act 2018. In Italy, a right to disconnect was contained in a law on "smart working" in 2017. Meanwhile, **in Germany**, a

non-legal approach to the right to disconnect has been encouraged through negotiations between the social partners as a better way to secure disconnection.

'Evidence' not 'Populism' must Inform the Debate

The debate must be better informed by 'evidence' rather than 'populism' as there is a lack of evidence around the implementation of these measures and their impact on work–life balance, and workers' health and well-being. There is a need to assess the impact of a right to disconnect on the work–life balance and health of employees with tele, ICT and mobile working (TICTM) arrangements. This assessment should also consider the fact that existing working time legislation already puts some limits on working time duration.

Worryingly, the debate in Ireland appears to be taking in place in ignorance of the existing obligations under the Organisation of Working Time Act, 1997 which gives significant protection to the limits of working time with a requirement for record keeping by employers to show compliance. However, provisions related to working hours, rest periods and recording working time are more challenging to implement in certain remote working type arrangements. The recording of remote working time, the is regulated in only nine European countries.

A Key Lesson Arising

In light of recent Irish case-law, a key lesson arising is the attention put on the need to keep records of an employees working hours and of the need to take steps to address a pattern of permitting an employee to continue emailing out of hours. This may not sit easily with some employers given the demands of complex business and operating models with the need for employees to communicate regularly with colleagues, including internationally and across time zones.

When putting in place remote working arrangements, employers should consider how they will comply with their existing obligations under the Organisation of Working Time Act, 1997. The legislation provides for a 48-hour working week, rest periods between finishing one shift and starting the next and rest breaks amongst various other rights. Employers need to ensure that employees who are working remotely are still afforded these rights. This can be challenging, particularly if line managers and their reports are rarely in the same physical location at the same time. An employer will need a strategy for supervising the operation of flexible working. As part of this, line managers should be briefed on the role that they can play in monitoring working time given that a failure to do so will result in the employer bearing the burden of proof if an employee brings a complaint that they have been deprived of their rights.

Under the Act, the average 48 hour working week can be calculated over a reference period of either four or prospectively six months in any twelve months (and longer reference periods may be used in defined circumstances). The Act (as an exemption) does allow for the inclusion of a term in an employee's contract of employment whereby the employee decides their own working hours, which may be more typically applicable to senior level staff. In such

circumstances, the employer can state a minimum number of hours of work. However, if an employer is directing its employee to complete such a volume of tasks and as a result it is not possible for the employee to legitimately determine their own hours, the exemption will not apply.

There is a distinction that must be made between employees reading and sending texts and emails outside of normal office hours and the application of the 48-hour maximum working week. Very recently, we have seen that AIB and the FSU have concluded a collective agreement on the relevant Issues for the Bank. However, it is for each employer to establish a clear policy and to decide its own rules. Whilst some international companies have sensibly moved to introduce a curfew on sending emails after hours, the debate and need for confirming a 'right to disconnect' has gathered momentum. France, Germany and Italy have adopted measures to require employers to introduce definite preclusions within set hours.

Balancing Employer Needs and The Health & Safety of Employees

Any further guidance for employers and employees on the issue should be welcomed when balancing employer needs and the health and safety of employees. Remote working can be associated with prolonged working hours (an inability to switch off or disconnect) and encroach on an employee's personal life. This can lead to heightened stress for remote workers who are also more likely to work when they are sick. The employer is still responsible for the protection of the occupational health and safety of employees working from home.

This additional guidance will also need to consider the matter of those individuals who decide to do work outside of an office environment or their contracted hours and to how an employer should 'record' such time in order to comply with the record keeping requirements of the Act. Any debate on a right to disconnect must also consider circumstances where we move from being paid for specific time commitments to getting the work done in a more flexible way (albeit with clarity over expectations and agreed standards) which is likely to be a growing trend in remote working as the focus changes from a time based commitment to getting the work done.

In The Interim

In the interim, the onus remains on the employer to ensure that employees do not work more than the maximum daily and weekly working hours prescribed in law and that they take their statutory rest breaks. When working from home an employee is responsible for assisting the employer in complying with their obligations and the employer may ask an employee to record his/her starting and finishing times and breaks.

More generally, in the context of remote working arrangements, employers engaging with remote working solutions should take care to update contracts, policies and company handbooks to reflect this change. If an employee applies for and is offered remote working options, it is essential that their contract of employment is updated to reflect this new change.

If you would like to talk to us about any of the above issues or about engaging your people through the period ahead, please get in touch with me at brendan.mcginty@stratis.ie or any one of our Partners.

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