Powering Down: Employees and the Legal Right to Disconnect

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Background

In general terms, the right to disconnect protects an employee from reprisal or penalty from their employer when they do not receive or respond to e-mails or other forms of communications during their off hours.

In Europe, several organizations have taken steps to ban after-work e-mails, some going so far as to shut down e-mail servers or to reroute e-mails away from intended recipients until office hours.

On January 1, 2017, France enshrined the concept in law, requiring employers to have clear policies in place regarding when employees engage in workplace communication outside of the office and when on vacation.

Developments Outside Ontario

Since France's law, the right to disconnect has garnered increasing attention on this side of the Atlantic.

A bill was recently introduced in New York City proposing to make it illegal to require employees to respond to work-related electronic communications from home, but with a few exceptions.

In Québec, private member's Bill 1097 (otherwise known as the "*Right-to-Disconnect Act*") was tabled in late March by Québec Solidaire MNA Gabriel Nadeau-Dubois. Should it pass, Québec would become the first Canadian province to enact legislation largely inspired by the French law. The basis of the proposed legislation is to require employers to develop and adopt a disconnection policy for after hours. The bill also includes penalties, such as fines, for employers who fail to comply.

The federal government has also expressed an interest in exploring the issue and has taken steps to determine whether disconnection regulations should be made a priority.

Key Points for Ontario Employers

While no such legislation has yet been tabled in Ontario, the right to be free from work does exist. The *Employment Standards Act, 2000* (the "ESA") does provide for a number of "free from work" periods including eating periods, hours of work per week and consecutive free hours.

While these provisions were drafted prior to the era of e-mails and smartphones, employers should be cautious about their potential impact on after-hours work.

For example, it is altogether possible for employers to be found in violation of the ESA's hours of work limits in cases where employees are spending time receiving and responding to e-mails outside of their regular work hours at the office.

Employers should also be mindful about the link between overwork and stress — an increasingly prevalent challenge in the workplace. This can be costly to employers as stress can lead to performance issues, increased sick time or even disability and workplace health and safety claims. Indeed, the Ontario Workplace Safety and Insurance Board has made access to benefits easier to obtain for chronic mental stress arising out of (and in the course of) employment.

Comments

Despite what may be a legislative trend, many in the legal and human resources communities are not convinced that legislation is appropriate. For some, the issue is sufficiently addressed in existing workplace standards and employment legislation, such as the ESA in Ontario, as discussed above.

Others are of the view that the imposition of disconnection policies or regulations might hinder the modernization of the workplace. For example, employers might be discouraged from offering teleworking arrangements or flexible work hour arrangements.

There is also concern that right to disconnect legislation would be too restrictive given that employment matters are dynamic, ever-changing and highly personal. They also vary depending on the industry. This diversity could create a number of problems for legislation, particularly given the lightning pace at which technology is developed.

By

Odessa O'Dell

Expertise

Labour & Employment

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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