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Labour & Employment

The problem with a 'right to disconnect' law

Company after-hours policy may be a more realistic alternative

By **Donalee Moulton**

(April 11, 2017, 8:20 AM EDT) -- France greeted 2017 by ushering in a law that could see workplace e-mails banned after the office shuts down for the day. Under the requirements of what is commonly called the right to disconnect, companies with more than 50 employees must create a charter of good conduct that spells out when staff should and should not respond to e-mails.

The intent of France's law is to bring more life back to the work/life balance in a digital age. It may be a legislative approach that catches on. At the very least, it may send organizations scrambling to review their employment practices.



Katherine Poirier

"Although 2017 marks the 10th anniversary of the use of smartphones in the workplace, it is fairly recent that the business community has started to identify that 'answering an e-mail or two' outside business hours can be considered as work and compensable as such, as if someone was having work phone conversations outside of normal business hours or reviewing files," said Katherine Poirier, a partner in Borden Ladner Gervais LLP's labour and employment group in Montreal.

Whether legislation is needed to address this issue, she added, is a question dividing the legal community. "Some find that overtime and hours of work are already governed by provincial legislation, as well as time off and leaves of absence ... The right to disconnect, however, is an element that has not yet been addressed specifically in Canada."

Current employment standards legislation across Canada provides for some resting periods that must be respected by the employer between work shifts. Many experts contend existing laws do not go far enough, however, and the right to disconnect should be enshrined in statute.

"Some union and employee representatives [maintain] that it should be added to lower the expectations associated with connectivity," noted Poirier. "This situation is mainly problematic with managerial personnel and homeworkers, for whom the frontiers between the professional and the personal life appear to be more blurry."



Claire Milton

On the plus side, right to disconnect legislation would create awareness on both the part of employers and employees. "The advantages of a regulatory approach may be a resulting heightening of 'consciousness' around the problem many employees deal with when they believe they cannot ignore after-hours communications — the stress and interruptions to family or personal time," said Claire Milton, an associate with BoyneClarke LLP in Dartmouth, N.S.

"It would also potentially alleviate the employee's risk of raising the issue with an employer. It is easier to say 'Hey, leave me alone' when the employer is subject to a legal duty." Emulating France could be legislatively difficult.

At the very least, said Molly Reynolds, a senior associate with Torys LLP in Toronto, "It would be an unwieldy piece of legislation that would be difficult to enforce. "By the time the law was in place," she added, "the technology would have changed."

Since every industry has its own standards on responsiveness outside office hours, it could be difficult to set specific rules across a province on the right to disconnect. For example, should or could the law spell out the exact number of hours employees must be completely silent? Are emergencies an exception and, if so, what constitutes an emergency? Could employees consent, despite the statutory right to disconnect, to receive and respond to e-mail communications after hours? "It would be difficult to insert specific metrics with regards to the right to disconnect. Therefore, adopting a legislation across the board may not be tailored and specific enough and may end up being inoperable," said Poirier.

Enforcement is a significant issue. The French law contains no penalties for violators, and it is unclear how such a law could practically be enforced or what would be an acceptable

penalty. Also, violators could be an employer or an employee. "Even with a law, many people will still feel the pressure to meet employer expectations and will simply ignore the law," noted Milton.

Reynolds pointed out that legislating the right to disconnect could have unintended and unfortunate consequences. "The law could actually be a disincentive for some companies to offer a flexible work arrangement."

Policies may offer an effective alternative. "Employers can develop policies that clarify expectations and affirm the rights of employees to turn off after hours," noted Milton. "It's a two-way street, however. Employees who are feeling the effects of too much after-hours intrusion need to raise the issue with employers."



Molly Reynolds

It is important to understand why France enacted such a controversial and seemingly unenforceable law and why it has generated an international response. "There is an underlying concern that workers, especially vulnerable workers, are being taken advantage of," explained Reynolds. In Canada, that concern is often being translated into litigation. "We have seen grievances regarding employer's requirements that an employee use its own tools to work remotely."

"This has been held to be an invasion of privacy, unless duly negotiated in advance," said Poirier. "However, we have seen no case law assessing the legality of such requirement when the tools, such as the smartphone or the computer, are provided by the employer."

The law would likely turn on overtime statutes in place across the country. The basic legislative tenet is that employees are entitled to be paid for time worked, and the location of the work or the tools used to perform the work are largely irrelevant. "If an employer expects too much of an employee, who then experiences burnout or mental illness, the employer might be liable under occupational health and safety concepts," said Milton.

Ultimately, she noted, "employers need to be aware of the increasing level of stress in workplaces that are generally seeking to do more with less."

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