

## PROTECTING MENTAL HEALTH IN THE DIGITAL WORKSPACE: THE RIGHT TO DISCONNECT

As newspaper headlines highlight that '*Working from home fuels cyberbullying*' in its latest resolution on protecting mental health in the digital workspace the European Parliament has once again called for a Directive on the Right to Disconnect.

The Pandemic has led to a significant shift to remote working arrangements, and this has provided more flexibility and autonomy and, in some cases, a better work-life balance and indeed greater access to work opportunities. However, the Parliament recognises that teleworking also has negative consequences for workers; being overly connected, a blurring of the lines between work and private life and a greater intensity of work and technology-related stress to name but a few consequences. Accordingly, it is calling for the [EU Mental Health Strategy](#) to address the mental health issues that have arisen as a result of the shift to teleworking including a directive on minimum standards and conditions to ensure all workers the effective right to disconnect, and to regulate the use of existing and new digital tools for work purposes.

### A NEW FORM OF HEALTH AND SAFETY IN THE WORKPLACE?

The European Parliament considers that teleworking gives rise to modern health and safety risks in the workplace that are not adequately addressed by the current health and safety legislative regime. In its opinion remote working gives rise to psychosocial risks arising from work-related anxiety, burnout, depression, excessive workload, conflicting demands, a lack of clarity about roles and a lack of support from management.

Mental health issues can also arise from the greater use of digital tools such as apps, software, and artificial intelligence to manage workers which has arisen hand in hand with the new teleworking arrangements.

#### Key issues

- The European Parliament believes that mental health in the digital workplace requires additional protection.
- MEPs have called for a directive on the 'Right to Disconnect' as part of a revised EU health and safety regime.
- Public and private sector employees would have a 'right to disconnect' outside working time.
- Employers would have to put in place arrangements to switch off digital tools for work purposes, including any work-related monitoring tools.
- Employees would be protected from dismissal and detrimental treatment for asserting their right to disconnect.
- A reverse burden of proof would apply in cases brought by workers.

The European Parliament's proposal for a Directive on the Right to Disconnect is one of several changes to the working environment it is calling for to tackle hazards to such psychosocial well-being arising from the digital world of work.

Other measures that MEPs envisage are requiring employers to provide clear information to their workers on mental health in the workplace, providing training for management on mental health issues and expressly addressing the digital world of work in their anti-bullying and harassment policies.

## **WHAT IS MEANT BY THE RIGHT TO DISCONNECT?**

The 'right to disconnect' refers to the right not to engage in work-related activities or communications outside working time, by means of digital tools, such as phone calls, emails, or other messages.

It is proposed that the right to disconnect would entitle workers in the public and private sector to switch off work-related tools and not to respond to employers' requests outside working time, with no risk of adverse consequences, such as dismissal or other retaliatory measures.

## **WHAT MEASURES WILL FIRMS HAVE TO TAKE TO IMPLEMENT THE RIGHT TO DISCONNECT?**

Employers will be required to:

- Put in place practical arrangements that facilitate digital tools being switched off for work purposes, including any work-related monitoring tools.
- Have a system that enables them to measure working time and to make available to any individual a record of their working time.
- Carry out health and safety assessments that include psychosocial risk assessments, with regard to the right to disconnect.
- Implement awareness-raising measures about the health and safety issues that arise in relation to teleworking, including in-work training.

It is envisaged that Member States will be able to legislate for exemptions from the right to disconnect; however, where an employer benefits from such an exemption the worker will have to be compensated for any work performed outside working time.

## **WHAT WILL EMPLOYERS' INFORMATION OBLIGATIONS LOOK LIKE?**

Employers will be required to provide written information to their workers on their right to disconnect. As a bare minimum such information will have to include:

- the practical arrangements for switching off digital tools for work purposes, including any work-related monitoring tools.
- the system for measuring working time.
- the employer's safety assessments with regard to the right to disconnect, including psychosocial risk assessments.
- the criteria for any derogation from the employers' requirement to implement the right to disconnect and any criteria for determining compensation for work performed outside working time.

- the employer's awareness-raising measures, including in-work training.
- the fact that the workers must not be subjected to discrimination, less favourable treatment, dismissal, or other adverse measures for exercising the right to disconnect.
- what the right of redress is if they are subject to adverse treatment.

## **WILL THERE BE ANY PENALTIES FOR NON-COMPLIANCE?**

Member States will be required to prohibit discrimination, less favourable treatment, dismissal and other adverse measures by employers on the ground that workers have exercised or have sought to exercise their right to disconnect and to ensure that a swift, effective, and impartial dispute resolution mechanism is provided to workers whose rights have been infringed.

A reverse burden of proof will apply in such cases so that employers will have the burden of proving that the dismissal or other adverse treatment was based on other grounds.

The current text of the draft Directive does not however prescribe what penalties should be put in place to ensure compliance other than that they should be effective, proportionate and dissuasive.

## **HOW WILL THE NEW DIRECTIVE REQUIREMENTS INTERACT WITH EXISTING LOCAL GUIDELINES/RULES?**

Some Member States are ahead of the curve and have already developed various approaches to the issue of work life balance, mental health, and the right to disconnect.

Luxembourg has tabled a bill on the respect of the right to disconnect in relation to all employees using digital tools for professional purposes. The right to disconnect indirectly derives from the Labour Code's provisions on the duration of work and from the employer's health and security obligations to its employees. However, under the proposed bill companies will be responsible for deciding (at the sector or company level and with the involvement of the staff representatives if any) what measures to introduce. Hence, the bill is minimally restrictive (particularly in companies without staff delegation) and may simply operate as a reminder of the importance of permitting workers to disconnect, rather than acting as an effective legislative restriction on employers. The proposed Directive's requirements would be much more restrictive to employers than current and proposed local requirements. For the moment, it is impossible to predict when the bill will pass into law; however, the current state of the bill suggest that it is unlikely to come into force this year.

In Italy, Article 19 of Law No. 81/2017 and the multi-sector national collective agreement dated 7 December 2021 regulate "agile work" (i.e., hybrid remote work), and require that the agile work agreement in place with the agile worker must provide for the worker's right to disconnect. For example, the agreement must identify rest times and technical measures to ensure that workers are disconnected from the technological instruments of work. Similar to the current Luxembourg regime, these local regulations are less restrictive than the proposed Directive and the legislative restrictions only apply to agile working

arrangements and not workers more generally (albeit that they are entitled to minimum rest time: in principle, a daily rest of 11 hours and a weekly rest of 24 hours, with some exceptions).

To date Italian employers are yet to face specified sanctions for breaching the right to disconnect in cases that do not constitute an infringement of minimum rest time, maximum working hours where applicable, health and safety regulations, or a breach of the right to privacy.

Germany currently has no explicit right to disconnect, despite calls from the trade unions for such a right to be implemented. However, employees are only obliged to be available outside working hours if their legally binding contract so provides.

Spanish statute does not define the right to disconnect, although measures are in place to ensure that employees can disconnect from work. For example, regulation on remote working in Spain limits the use of technological devices during rest periods and ensures that employers guarantee digital disconnection. To date Spanish employers are yet to face specified sanctions for breaking the right to disconnect in cases that do not constitute an infringement of health and safety regulations or a breach of the right to privacy. As such the proposed Directive appears to be more restrictive than current domestic provisions on the right to disconnect.

In France, the Labour Code has provided for the right to disconnect since the law of 8 August 2016, which encouraged companies to negotiate with unions arrangements in relation to employees 'disconnecting' or to implement them unilaterally. Since then, the right to disconnect has become a topic for mandatory annual negotiations in companies with more than 50 employees and must be implemented unilaterally by employers in the absence of collective agreement. Although employers can be sanctioned for some breaches of the rest period and provisions on the right to disconnect are mandatory for the validity of some working time arrangements, there are no direct sanctions for failing to adhere to the right to disconnect. This would change under the proposed Directive's provisions that Member States implement effective penalties for non-compliance.

Dutch law does not currently provide for the right for employees to disconnect. However, a bill was submitted in 2020 stipulating that a mandatory conversation must take place between the employer and its employees on their availability outside of working hours. If the conversation demonstrates that an employee's availability outside of working hours is burdensome and/or adding to the employee's stress levels, this should be classified as a 'risk' that needs to be addressed as part of the employer's working conditions policy. The bill provided that the Dutch Labour Inspectorate will monitor relevant conversations taking place. The bill is expected to be debated by the Dutch Parliament in the first week of November 2022.

In Belgium, employees' right to disconnect is indirectly derived from the employment legislation on working time and on the employer's health and security obligations to its employees. Belgium also has provisions obliging employers in scope of the law on collective bargaining agreements of 5 December 1968 to consult with its health and safety committee or, failing that, with their employees at regular intervals and whenever the health and safety committee (or the employees) so request. This consultation addresses the disconnecting from work (i.e., not being reachable outside of normal working

hours) and the use of digital means of communication. Agreements which may result from the consultation may be incorporated into the work rules or implemented by a collective bargaining agreement. There are however no sanctions provided for in this context. However, in the event of infringement of the general principles provided for by employment legislation on working time duration, criminal and/or administrative sanctions apply. Moreover, a draft bill reforming the labour market has been tabled. Although the text of the draft is not yet available, it is understood that it includes provisions on the right to disconnect.

Slovak law explicitly provides for the right to disconnect so that employees are not obliged to use work equipment (i.e., computer, telephone) outside their standard working hours provided they are not engaged in overtime or emergency work. This means that every employee has the right to refuse to perform the work and the employer is prohibited from treating any such refusal as a breach of work discipline.

If the Directive progresses it remains to be seen whether the final text will provide for an exemption for Member States whose current legislation is of adequate equivalence.

## **TIMEFRAME: WHEN WILL THE RULES WILL COME INTO EFFECT?**

The proposed Directive must now proceed through the EU's ordinary legislative procedure. The next step is for the proposed Directive to be considered by the European Commission. There is no indicative timeframe of when the Commission will respond. Given that the initial Parliamentary resolution was passed in January 2021 and followed by this more recent call for the Directive it appears not to be progressing rapidly. When an agreed text is finally adopted and published in the EU's Official Journal Member States will need to implement it domestically within two years.

## **HOW DO THESE RULES COMPARE WITH THOSE OF OTHER JURISDICTIONS?**

In the United Kingdom there is no specific legislation addressing the right to disconnect/disengage from work and work-related communications, such as emails, during non-work hours. Any right to disconnect is indirectly derived from the duties and hours of work set out in the contract of employment and the rules on working time set out in the Working Time Regulations 1998.

In an April 2021 report called 'Beyond Digital: Planning for a Hybrid World', a House of Lords Select Committee on Covid-19 called on the Government to consider a 'right to disconnect'. The Government has not expressly indicated any intention to take this recommendation forward.

Across the pond in the United States there have been no efforts at the federal level to introduce any similar type measures (apart from specific measures to ensure payment for after hours work). Some state efforts (New York and California) have been discussed but have not led to regulations. Instead, companies have, largely in connection with "work life balance" or "employee health" initiatives opted measures within their organization.

The vast majority of the countries in APAC do not have right to disconnect legislation, with some criticising the right to disconnect legislation as incompatible with employees working flexible schedules and impractical for those needing to work across different time zones. In those APAC countries

where workaholic culture is present, the road to any such legislation will likely be a long and perhaps thorny one.

## **PREPARATORY STEPS: WHAT SHOULD EMPLOYERS BE DOING TO PREPARE?**

Regardless of the proximity (or more likely otherwise) of a European Directive mandating the right to disconnect employers would be well advised to consider the physical, mental health and other issues around equality of treatment, harassment and bullying that arise in relation to tele working and hybrid working arrangements as they continue to bed in post pandemic as part of their general health and safety obligations and duty of care to their workforce.

By way of initial preparatory steps employers may wish to consider:

- Auditing disciplinary, grievance and health and safety policies and procedures to assess if they are fit for purpose in this digital hybrid world as appropriate.
- What use they make of digital tools.
- How such tools can be used to monitor an individual's working time.
- Whether effective records of working time are currently maintained that capture any extra curricular work undertaken.
- Whether digital tools can be de-activated outside working hours.
- What areas of work cannot function effectively if employees can enforce a rigid right to disconnect outside working hours?

[European Parliament Press Release](#)

[European Parliament resolution on mental health in the digital world of work](#)

[Link to European Parliament proposed Directive text](#)

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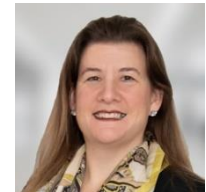


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