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A "Right" to Disconnect from Work? Not so fast!

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It may be trite to say, but the pandemic changed everything. The need to work from home left many workers struggling to balance their employer's urgent work demands and their own personal time. Employers were in a panic to keep their businesses afloat to be able to continue to pay their employees. Many workers were willing to sacrifice their personal time to assist their employers in an emergency. Due to the lockdown, some had little else to do. Some worried that pushing back would cost them their jobs.

But here we are, more than two years later, and the blur between personal and work time continues. In response, the Ontario Government amended the *Employment Standards Act* in November 2021 to enact what has widely been referred to as "*a right to disconnect from work.*" Employers were required to create and implement a policy for all employees. We eagerly waited for the regulations, which we understood were to provide the particulars of what was to be included in this mandated policy. However, no such regulations have been introduced to date. As a result, employers are left with a very bald requirement to implement a policy clarifying what, if anything, is expected from employees after their regular working hours.

The *Employment Standards Act* of Ontario ("ESA") already has various protections for employees regarding time off work. There are requirements* that an employee not work more than eight hours a day (unless they have agreed to different daily hours in writing) or 48 hours in a week. There are general requirements to provide 11 consecutive hours free from work each day and eight hours free from work between shifts. Employers are required to provide 24 consecutive hours off every work week or 48 consecutive hours off every two consecutive work weeks. There are requirements for a meal break after five consecutive hours of work and mandatory vacation and public holidays each year.

The important point for employers and employees to realize is that the November 2021 amendment to the ESA did **NOT** create an actual right to disconnect from work. In fact, there is no requirement for employers to do more than to abide by the existing obligations of the ESA, like the ones summarized above. The new amendments simply require an employer to prepare and implement a policy that covers if, how, and when their employees can disconnect in any workplace that has 25 or more employees (as of January each year) and to provide its employees with a written or electronic copy of the policy within 30 days of implementation or amendment.

Certain types of employees are exempt from these requirements.

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As a result, employers should be very careful when preparing this policy. An employer could in fact mistakenly create and implement a policy that inadvertently provides employees with greater rights than the ESA requires and which the employer did not intend.

As some type of policy is required to be implemented by June 2, 2022, employers have a decision to make. There are at least two possible approaches as this deadline looms:

1. Implement a Basic Policy Model.

Employers can meet the statutory obligation by implementing a very minimalistic policy. All that is required to meet this obligation is to ensure that the policy has the following:

- A provision that states who the policy applies to. There has to be a policy for all employees in Ontario - although an employer could have different policies for different types of employees (e.g. management vs non-management);
- The date implemented or amended;
- A statement of what disconnecting from work means e.g. the ESA provides: *"not engaging in work-related communications such as, but not limited to, e-mails, telephone calls, video calls, or the sending and reviewing of messages so as to be free from the performance of work"*;
- A statement that eligible employees have the right to hours free from work as required by the ESA; and
- Reference to how the employees will receive copies of the policy and any amendments.

2. Build an Enhanced Policy that describes how and when employees have a Right to Disconnect.

An employer could recognize the importance and long-term benefit of disconnecting from work and design a policy that suits its workplace needs. The policy could address the culture of the workplace and set guidelines for the organization. For instance, this policy could consider:

- Setting universal protocols for what the employer considers urgent and non-urgent work;
- Clarifying how an email or other message is marked dictates the timing of a response – e.g. messages marked "*urgent"* require a response even after hours and all other messages should be responded to within the regular work day.
- Requiring that communications from certain individuals need an immediate response (e.g. fire alarm company) whereas communications from others could be responded to during the normal work day.
- Implementing out-of-office message protocols noting the employee's working hours and providing alternate contacts in their absence.

- Designing formal email/messaging delivery options that for instance, delay sending or receiving messages until the employer's core business hours or employee's work hours. Managers could be instructed to be mindful of when they communicate to their teams after hours and to pay attention to employees who regularly reply to or send work-related communications during off-work hours.

In today's competitive market for talent, these types of commitments to transparency about work obligations may allow your organization to stand above others.

Employers must be thoughtful about this new requirement. While it is tempting to simply slap together a policy to meet a statutory requirement, as mentioned above, there could be longer-term consequences to taking such a hasty step. Currently, employees do not have the right to disconnect from work as long as the ESA, any relevant employment contract, or collective agreement are followed. This means, for instance, an employer could require an employee to respond to e-mails outside of work hours, and in exchange, an employer may be required to pay, such as a call-in fee, overtime pay, and/or provide alternative time off to meet the existing "*free from the performance of work requirements."* A badly drafted policy could grant an employee the right to ignore those email requests and potentially be protected from any reprisal, such as disciplinary action, for failing to respond to an urgent message.

So, please ensure that you take the time now to consider your business and its needs and do not get caught with unintended consequences.

Unlike some other policies that have been mandated by statute, this policy requires an employer to assess and understand its workplace, how work is done, how employees/clients/suppliers, etc. communicate, its classification of employees, how employees are paid, and most importantly how and when the owners or managers expect work to be done. As a result, we are unable to attach a one size fits all sample policy to this email. It may be that many employers implement a Basic Policy for this deadline and then spend some time later in the year developing a detailed policy for their workplace to be amended and implemented, for instance, effective January 1, 2023.

If you would like some direction about drafting and implementing this policy, please feel free to reach out to any of us, Tracy Kay at (416) 369-4330 or tkay@mindengross.com, Andrew Zinman at (416) 369-4106 or azinman@mindengross.com, or Reshma Kishnani at (416) 369-4331 or rkishnani@mindengross.com.

I am delighted to welcome Reshma to our group and know that you will enjoy working with her! Reshma has experience advising employers on all of their workplace needs and is looking forward to working with all of you.

This article is intended to provide general information only and not legal advice. This information should not be acted upon without prior consultation with legal advisors.