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New Code of Practice on the Right to Disconnect

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On the 1st April 2021, the Tánaiste, Leo Varadkar, brought into effect the Workplace Relations Commission ("WRC") Code of Practice for Employers and Employees on the Right to Disconnect ('the Code').

The Tánaiste said:

"The Code of Practice comes into effect immediately and applies to all types of employment, whether you are working remotely or not. It will help employees, no matter what their job is, to strike a better work-life balance and switch off from work outside of their normal working hours."

The Code was developed by the Workplace Relations Commission, following a request by the Tánaiste in November 2020, underpinning the commitment made in the Programme for Government to facilitate and support remote working.

As outlined in the press release accompanying the Code, employers and employees are required to work together to determine the appropriate working arrangements and policies. Because the Code is flexible, employees will have more options to work outside of traditional hours, which many people have availed of during the pandemic. And it reflects the fact that many Irish employees are part of a global network, requiring contact with colleagues around the world.

While placing the onus of management of working time on the employer, individual responsibility on the part of employees is also highlighted in the Code (for example: being mindful of other colleagues' right to disconnect or cooperating with any employer mechanism to keep a record of hours worked).

The Director General of the WRC, Liam Kelly, commented:

"Disconnecting from work and work-related devices necessitates a joint approach by employers and employees. While placing the onus of management of working time on the employer is appropriate, individual responsibility on the part of employees is also required."

In this Insight, we will examine the Code and outline the practical steps that employers must now take to ensure compliance with the Code.

What Does the Code Oblige Employers to Do?

In a nutshell, the Code places an obligation on employers to do the following:

1. Engage proactively with employees and/or their trade union or other employee representatives to develop a Right to Disconnect Policy that takes account of the particular needs of the business and its workforce.
2. Equality proof the Policy to avoid unintended negative consequences for any employees. For example, the Code refers to employees with caring

responsibilities and some employees with a disability who may not be able to stay connected outside of the working day or may need more flexibility to reconnect.

3. Reference the Right to Disconnect Policy in an employee's terms and conditions of employment or employment contract and cross-reference the organization's Dignity at Work, E-Communications, Data Protection and Confidentiality policies. The company's formal grievance procedure should be utilised for any concerns that employees have that their right to disconnect is not being respected or that their workload is such that they are not able to disconnect at the end of their normal working day.
4. Emphasise the Right to Disconnect Policy during an induction process.
5. Review the effectiveness of the Right to Disconnect Policy annually in accordance with company practice and, where appropriate, in consultation with trade union or other employee representatives as appropriate.
6. Provide training and support for managers on the policies and procedures and the right to disconnect so that the managers can demonstrate clear commitment to the policy through leadership and be active role models.
7. Provide training to staff to reinforce the appropriate behaviours around disconnecting from work outside normal working hours.
8. Where not already in place, introduce a time management system to record working time and attendance.
9. Consider the use of measures such as email footers and pop-up messages to remind employees, and customers, that there is no requirement to reply to emails out of hours and an answer should not be expected. Also, the use of delay send options should be utilised where appropriate.

The main thrust of the Code is the creation of a workplace culture in which employees feel they can disconnect from work and work-related devices. The Code recognises that this necessitates a joint approach by both employers and employees. So, the onus is not solely on employers - employees do not escape obligations under the Code as outlined further below.

Background to the Code

In August 2019, the then Minister for Business, Heather Humphreys, stated that her Department intended to explore the introduction of legislation conferring a right to "disconnect" for employees. The French government introduced such legislation in 2017, mandating companies with more than 50 employees to develop a charter defining employees' right to switch off and setting out the hours when staff are not supposed to send or answer emails. Ms. Humphreys stated that she intended to examine the French system to determine how a similar approach could be introduced in Ireland.

An Interdepartmental Steering Group was formed by the Minister to investigate flexible practices in the Irish workforce, such as remote working and the attitudes towards such arrangements.

"As part of their work programme, I will ask the Interdepartmental Steering Group to examine the French approach referenced by the deputy. Given the increasing digitalisation of the workforce, I believe it is important from a work-life balance perspective that there are clearly defined guidelines regarding workers' rights to switch off after office hours".

The Minister confirmed that a report on issues around flexible working, including the impact on the welfare of employees caused by excessive after-hours emails and calls, would be finalised in the final quarter of 2019, and published shortly thereafter. She said this report would consider the possibility of introducing a so-called right to disconnect for workers. The Financial Services Union (FSU), among others, had been calling for such a right to be introduced to prevent what they say is increasingly routine after hours work contact, often via company smartphones. The FSU had said that such contact was creating "*techno stress*" for workers and causing a crisis in mental health.

The Department of Business, Enterprise and Innovation published its report, "*Remote Work in Ireland – Future Jobs 2019*" ("the Report") in December 2019. The Report showed 46.7% of respondents noted that switching off was the biggest challenge of working remotely. The Report also noted that it is a primary challenge of the new world of remote working that ordinary working hours are maintained. While the remote working arrangement can provide some welcome flexibility, for example for parents of young children to manage childcare and school runs, the flip side of this coin is that working hours can potentially continue indefinitely throughout the day and night. It can be difficult to disconnect from work systems and have genuine, unbroken downtime. It is, of course, an employer's duty to ensure employees do take their breaks and do maintain proper working hours throughout the remote working week, under both the OWSA, and the Safety Health and Welfare at Work Act 2005 and other

statutory health and safety provisions. As such, employers must have sufficient systems in place to ensure accurate record keeping in respect of working time.

Then, of course, in March 2020, Covid-19 arrived on our shores and remote working and the right to disconnect were suddenly thrown into very sharp focus. In January 2021, Leo Varadkar published the National Remote Work Strategy, and, in that document, he committed to developing a Code of Practice for the right to disconnect.

"The Government is aware of the need to find the right balance. Whilst the right to disconnect does not just relate to remote work, it is clear that over the course of the COVID-19 restrictions that employees have faced difficulties in switching off from work. In order to ensure that employees are protected from overwork, the Government has asked the WRC to draw up a code of practice in this area for approval by the Minister. It will be possible to refer to the code of practice in disputes and adjudications."

The Code

The Code sets out guidance and best practice for employers and employees with respect to compliance with employment legislation and the right to disconnect. While failure to follow the Code is not an offence in itself, the Workplace Relations Act, 2015 provides that, in any proceedings before a court, the Labour Court or the WRC, a Code of Practice shall be admissible in evidence and any provision of the Code which appears to the court, body or officer concerned, to be relevant to any question arising in the proceedings, shall be taken into account in determining that question.

In other words, employers cannot afford to ignore the Code. Failure to follow the Code and implement the measures outlined in the Code, outlined above, may have legal repercussions for employers in any proceedings brought against that employer.

The Code is designed to do the following:

1. Complement and support employers and employees' rights and obligations under various pieces of **employment legislation**.
2. Assist employers and employees navigating an increasingly digital and changed working landscape, which often involves **remote and flexible working**.
3. Aid those employees who feel **obligated to routinely work longer hours** than those agreed in the terms and conditions of employment.
4. Assist employers in **developing and implementing procedures and policies** to facilitate the right to disconnect.
5. Provide guidance for the **resolution of workplace issues** arising from the right to disconnect both informally and formally, as appropriate

What is the Right to Disconnect?

The Code confirms that the right to disconnect has three main elements:

1. The right of an employee to not routinely perform work outside normal working hours.
2. The right to not be penalised for refusing to attend to work matters outside of normal working hours.
3. The duty to respect another person's right to disconnect (e.g. by not routinely emailing or calling outside normal working hours).

The Code is not overly prescriptive and recognises that each business and its workforce will have its own particular needs. The Code sets out that employers should engage proactively with employees and/or their trade union or other employee representatives as appropriate to develop a Right to Disconnect Policy and sets out that the policy should clearly state that it is about supporting the employee's right to disconnect, not about restrictions and blockages to communication models while recognising that occasionally legitimate reasons arise when it is necessary to contact staff outside of normal working hours. The Code also recognises that policies will need to address the issue of working across global time zones, where relevant to the business, and recognise that working across different time zones and international travel may result in colleagues connecting at different times outside of normal working hours to complete their objectives. The Code states that this does not mean that the recipient needs to respond in the same time period and that clear guidance around disconnecting and expectations for responding to digital communications globally should be provided to all employees.

Obligations of both Employers and Employees under the Code

The Code summarises the existing statutory obligations on employers relevant to the right to disconnect as follows:

- › Providing detailed information to employees on their working time (under the **Terms of Employment Information Act, 1994-2004**).
- › Ensuring that employees are informed of what their normal working hours are reasonably expected to be (under the **Employment (Miscellaneous Provisions) Act, 2018**).
- › Ensuring that employees take rest periods (under the **Organisation of Working Time Act, 1997**).
- › Ensuring a safe workplace, including reviewing risk assessments and safety statements (under the **Safety, Health and Welfare at Work Act, 2005**).
- › Not penalising an employee for acting in compliance with any relevant provision or performing any duty or exercising any right (under the **Safety, Health and Welfare at Work Act, 2005**).

Though created largely for the benefit and protection of employees, the Code sets out obligations that employees are expected to observe in order to allow for the effective operation of the right to disconnect. An emphasis on the personal responsibility of employees is notable.

Employees are thus expected to do as follows:

- › manage their own working time and to fully cooperate with any mechanism used by their employer to record their working times, whether they are working on-premises or remotely;
- › take reasonable care to protect their safety, health, and welfare and that of their co-workers while at work;
- › take responsibility for being mindful of their own work-related wellbeing and this encompasses employees ensuring that they take their statutory rest periods. Should an employee be unable to take such rest period, they should inform their employer in writing of their entitlement to take that rest period and their reason for not having been able to avail of it; and
- › respect the rights of their colleagues, customers/clients, and all other people to disconnect by not routinely making work-related contact with those people whether by email or phone call outside of normal working hours.

Is any out of hours permitted under the Code?

The short answer is, yes. The Code recognises that there will be occasional legitimate situations when it is necessary to contact staff outside of normal working hours, including but in no way limited to ascertaining availability for rosters, to fill in at short notice for a sick colleague, for when unforeseeable circumstances may arise, where an emergency may arise, and/or for business and operational reasons that require contact out of normal working hours. This can be reflected in the employer's Right to Disconnect Policy.

The Code also sets out that the Policy should recognise that business and operational needs may dictate that there will be situations which clearly require some out of hours working by some employees depending on the service being provided, the employee's role, the needs of customers/clients and the unique requirements of critical services and as agreed in an employee's terms of employment.

The Code also acknowledges that policies should recognise that many employees choose and may request to work in a more flexible manner, given their work life balance needs, which results in employees proactively requesting to work outside normal working hours. However, the Code cautions that, even in circumstances where an employee is working flexibly, the right to be able to maintain clear boundaries between work and leisure should not be compromised. The Code goes on to set out that, where remote or flexible working is in place, employers should consider if their usual method of monitoring specified working hours is suitable for remote and flexible working. This has certainly become an issue for most employers during the last 12 months, with a large proportion of the workforce working remotely.

Do employees have any recourse if the right to disconnect has not been respected?

Yes, an essential aspect of the functioning of the right to disconnect is that employees make it known to their employer if they feel that their right to disconnect has not been observed in line with the Code.

Under the Code, the first port of call for an employee who feels that their right to disconnect has not been observed or they are unable to disconnect due to their excessive workload is to discuss their concerns informally with their employer. Alternatively, it is suggested that the employee seek support from a colleague, member of the Human Resources department or a representative of their trade union.

In the case of an informal approach not being successful in resolving the employee's concern, recourse can be had to a company grievance procedure.

Next Steps for Employers

An adaptable sample Policy on the Right to Disconnect is provided within the Code that can

be used by employers as a guide when drafting their own policies. The Code goes so far as to provide template clauses for inclusion in a Right to Disconnect Policy.

But a Policy in and of itself is clearly not enough. This Code seeks to address workplace cultures around communication and respecting the rights of employees to switch off from work outside of normal working hours and during annual leave. Any culture change must happen from the top down so organisational leadership teams will have to buy in to the right to disconnect and examine whether their organisation is truly committed to that concept.

The Code talks about communication reaching all levels of the company, from the most junior staff members to senior managers whose support of the policy must be articulated clearly.

Training of managers is going to be key to ensure compliance with the Code. The Code places an obligation on managers to act when an employee's inability or reluctance to disconnect appears to be linked to excessive workload, performance issues, or whether organisational culture is a contributing factor. In such circumstances, the Code sets out that managers must ensure that employees have clear goals and deliverables that, other than in exceptional circumstances, stand to be delivered during normal working hours. This will involve employers ensuring that managers are suitably resourced to get work done and are trained to recognise and address issues of employees working excessive hours.

Conclusion

The Code is only the first piece of the jigsaw - in Q3 2021, Leo Varadkar has committed to introducing legislation giving employees the right to request remote working. So more to come but for now, employers need to study the Code and think about their Right to Disconnect Policy and tackling organisational culture and training on this issue.

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