

Alert

Employment, Workplace Relations & Safety

Do Not Disturb: What Employers Need to Know About the Fair Work 'Right to Disconnect'

By Ben Duggan & Nicholas De Pasquale

A deal to give employees the right to disconnect has been struck with the Greens to ensure the Federal Government has support for their second tranche of Closing Loopholes reforms.

The Fair Work right to disconnect will commence on 26 August 2024 for all employees except those employed in a small business (less than 15 employees).

Modern Awards will also require a right to disconnect term, which is expected to be similar to the Fair Work workplace right, and will be inserted into Awards in the coming months.

What is the Fair Work 'right to disconnect'?

The Fair Work right to disconnect will allow employees to refuse to read or respond to contact from their employer or a third party about work matters outside of their normal working hours.

All forms of communication, including emails, calls, texts and any other work-related communication platform such as Slack, Microsoft Teams or Zoom, are covered by the right to disconnect.

The amendment makes it explicit that the right to disconnect is a workplace right and that the general protections provisions prohibit employers from taking adverse action because of a workplace right. However, an employee does not have an unfettered ability to choose

whether to connect in response to contact from their employer or a third party, as the right to disconnect is not activated if the refusal to connect is unreasonable.

Comment

Importantly, the Fair Work right to disconnect does not prohibit an employer (or another party, e.g. a customer) from contacting an employee after hours about a work matter.

Rather, the right to disconnect gives the employee a choice, subject to the 'unreasonable' test, to decide whether they connect with their employer or customer after they are contacted after hours.

The Fair Work 'employee choice' model for the right to disconnect follows the same model for casual conversion chosen for other amendments brought about under the second Closing Loopholes reforms.

When may a refusal be deemed unreasonable?

If an employee's refusal to connect is unreasonable, the right to disconnect is not activated.

A refusal is deemed unreasonable when an employee chooses not to connect in response to contact or attempted contact about work related to an obligation/responsibility under Federal, State or Territory law.



In other situations, the amendment identifies a list of 5 matters that must be taken into account in the determination of whether an employee's refusal to connect is 'unreasonable', as follows:

- the reason for the contact or attempted contact;
- the manner in which the contact is made;
- the level of disruption caused to the employee;
- the extent to which an employee is compensated:
 - to remain available to work during the period when contact or attempted contact is made; or
 - for working additional hours outside the employee's ordinary hours of employment;
- the nature of the employee's role and their level of responsibility; and
- any relevant personal circumstances, including family or caring responsibilities.

Comment

It is reasonable for an employer (or client) to contact an employee when workplace issues arise, such as seeking coverage for another employee who has an unexpected illness after hours in the future.

The employee contacted would, by reference to the 5 listed matters, need to consider whether their refusal to connect is 'unreasonable' before they choose not to connect, which seems overly complex. Many employees may choose to connect because of this complexity and to avoid conflict with their employer.

What powers will the Fair Work Commission have?

A dispute may arise in relation to the practical application of the Fair Work right to disconnect, and the intention is for these disputes to be discussed at the workplace in the first instance.

If an employee and employer can't resolve the dispute at the workplace, either party can make an application to

the Fair Work Commission asking them to deal with the dispute.

The Fair Work Commission would be expected to seek to conciliate the dispute in the first instance in a manner that is consistent with its normal practice.

A hearing would take place in the absence of a conciliated outcome, after which the Fair Work Commission has the ability to make orders to prevent:

- an employee from unreasonably refusing contact with their employer;
- an employer from contacting an employee outside of work hours; or
- an employer from taking disciplinary action against an employee as a result of the employee refusing contact outside of their normal working hours.

Comment

The Greens have suggested that the new right to disconnect will not lead to a large number of disputes before the Fair Work Commission. Due to a restriction of the Fair Work Commission's powers to the making of 'preventative' orders, it may mean that, like anti-bullying (where there are only 'preventative' orders), there will not be a rush of disputes. However, employers will, of course, be more concerned about creating a new workplace right to disconnect because if it is not managed properly, it could result in legal action based upon allegations of contraventions of the general protection provisions of the Fair Work laws.

How to prepare for the Fair Work right to disconnect

The upcoming commencement of the Fair Work right to disconnect has resulted in many employers seeking guidance on how to respond to this change.

In preparation for the commencement of the right to disconnect, all employers may wish to consider:

- a review of employment contracts and position descriptions, specifically clauses pertaining

to salary, remuneration and duties, in order to ascertain if employees are remunerated with an expectation to be contactable outside of normal working hours;

- a review of current policies and procedures regarding employees being contactable outside normal working hours;
- the provision of training to managers to ensure they are aware of the introduction of the right to disconnect and the management of after-hours contact in the future; and
- the preparation of workplace policies on working outside an employee's agreed upon working hours.

If you have any questions in relation to the right to disconnect or any of the other recently announced Closing Loopholes workplace reforms, please get in contact with one of our employment law experts.



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