Lawyers say Ontario's right-to-disconnect policy 'impractical,' lacking in detail

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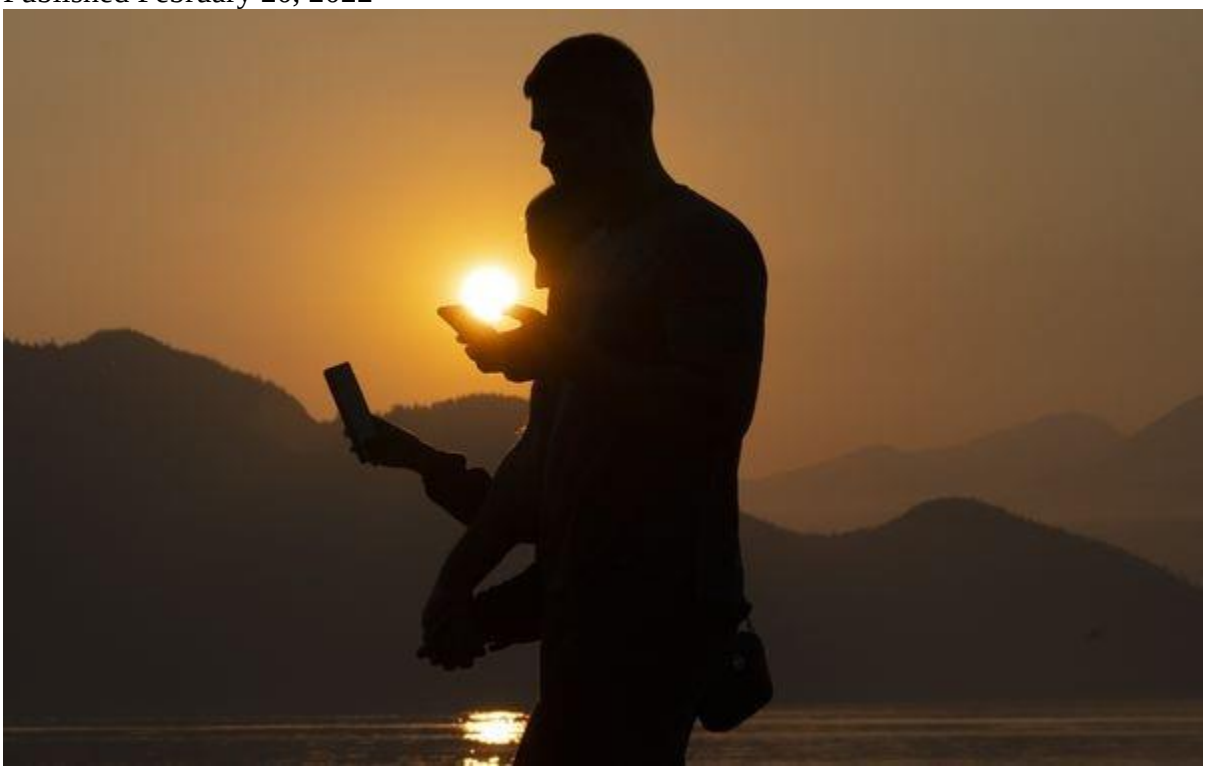
Published February 20, 2022



A right-to-disconnect law introduced by Ontario last year dictates employers with more than 25 staff and regulated by the province must come up with a written policy by June this year outlining how they will ensure employees don't engage in work-related communications outside of work hours.
JONATHAN HAYWARD/The Canadian Press

Lawyers who are aiding Ontario employers in drafting internal "right-to-disconnect" workplace policies say that they are frustrated at how little detail the provincial government has provided about the new piece of legislation, which was passed by Queen's Park in November.

The "right-to-disconnect" law introduced by Ontario last year dictates that employers with more than 25 staff and regulated by the province, have to come up with a written policy by June this year on how they will ensure that employees do not engage in "work-related communications" after work hours.

But the legislation is lacking in detail: It is a couple of paragraphs long and merely serves to define the phrase "disconnecting from work," writing that it means "not engaging in work-related communications, including e-mails, telephone calls, video calls or the sending or reviewing of other messages, so as to be free from the performance of work." There are no other

specifics on how exactly the policy can and should be implemented, and what information should be included in the policy.

“Frankly, I was hoping we’d get some more meat on the bones with this piece of legislation. Employers are looking for specific guidance here, because we are developing this policy from scratch, with no domestic precedent,” said Neena Gupta, a partner in employment law at Gowling WLG.

The right-to-disconnect legislation is part of Ontario’s Working for Workers Act, or Bill 27, which the government has said it enacted to ensure labour laws keep pace with technological advancements in remote work environments. When unveiling the legislation in November, Monte McNaughton, Minister of Labour, Training and Skills Development, said that he did not want Ontario to become a place where “people burn out from endless work, and where family time comes last.”

Ontario introduces legislation to ban non-compete clauses for employees

But the longer the government takes to provide specific guidance to employers, the more difficult it will be for them to implement right-to-disconnect policies on time, says Lisa Bolton, an employment lawyer with Sherrard Kuzz LLP. “Many employers are waiting to see what, if any, guidance the government will provide.”

Ms. Bolton told The Globe and Mail that for businesses, balancing operational needs and ensuring employees are not dealing with work matter past their designated hours was no easy task. This is especially the case for businesses that operate across different time zones, or that have suppliers or customers operating in different time zones.

“In cases like this, when developing the policy, employers could consider adjusting working hours for certain employees, implementing an on-call rotation or specifying exceptions to the right to disconnect if after-hours communications are needed,” she said.

The idea of employees having legal rights to disconnect from communicating with their employers has gained significant traction over the course of the pandemic, as swaths of white-collar workers turned their homes into offices, blurring the divide between work and personal time.

In January, 2021, the European Parliament passed a resolution calling on the European Commission to establish a directive that clarified working conditions, hours and rest periods for employers across the bloc. The legislative proposal drafted by EU members spelled out that workers should have a legal right to disconnect from work because it was vital in protecting their physical and mental health.

Many EU countries, such as France, Italy and Spain, already have versions of the right-to-disconnect legislation either in the works or already implemented. In France, employees are not legally obligated to take calls or e-mails related to work after hours, and employers have no legal right to penalize an employee in any way for only working during work hours.

“We are lucky in some ways because the Europeans are ahead of us on this and they have set a good precedent on how exactly this policy can be implemented,” Ms. Gupta said.

A small tech company in Germany for example, Rheingans Digital Enabler, instituted a five-hour work day in 2019, and encourages employees to only check their e-mail twice a day. Meetings are kept to 15 minutes, and small talk is discouraged in order to keep things efficient. There are also companies, according to Ms. Gupta, that disabled e-mail service for certain employees after hours.

“We’ve also seen certain employers implement the spirit of right-to-disconnect by encouraging employees to use subject lines in their e-mails that indicate an urgency of a response. You could say ‘FYI only’; ‘Not urgent’; or ‘No response required,’” Ms. Gupta said.

Are you protecting your team’s right to disconnect from work?

Part of the reason why the Ontario government has not provided too much detail on the policy, believes Antonio Urdaneta, a labour and employment lawyer, is because the policy is deeply connected to technology and governments do not have the specific know-how on how employers communicate with their employees in different settings.

“There are employers that communicate with employees via text message and WhatsApp. These are practices that perhaps need to be reassessed by companies through a right-to-disconnect policy,” he said.

There is also the question of how the policy will be enforced. Mr. Urdaneta says violations to the Employment Standards Act in Ontario often result in penalties to employers but it will be tricky to determine whether or not the right-to-disconnect law was violated. “If you read an e-mail after work, are you entitled to overtime pay? What about if you read the e-mail at home versus at the office?”

For Ronald Minken, an employment lawyer in Markham, Ont., who runs his own firm – Minken Employment Law – the government’s legislation appears “directionless” and is, to an extent, “impractical.”

“It’s nice to say there’s a right-to-disconnect law and it sounds fluffy, but how much will it actually help your average employee?” he said.

Two years ago, Mr. Minken, like most other white-collar employers, instituted a work-from-home policy for his employees, which he argues gives them a healthy degree of flexibility, something that a right-to-disconnect policy may complicate.

“You could be doing child care in the morning and take those few hours off, and then you might want to put in longer hours. So what happens if you cannot contact staff after 5 p.m. or 6 p.m.?”

But while Ms. Gupta agrees that the Ontario legislation could be more detailed, she also believes that the government never intended for the law to be very prescriptive. “I think it is trying to

achieve a culture change in workplaces, a shift away from workers being on call 24/7, 365 days, and a recognition that people are entitled to a healthy amount of down time," she said.