

Key takeaways on the WRC's 'Right to Disconnect' Code of Practice

Earlier this month, the WRC introduced its Code of Practice on the Right to Disconnect. Terence McCrann and Declan O'Rourke of McCann FitzGerald consider below some of the key questions for employers following the publication of the Code.

The Workplace Relations Commission (WRC) published its Code of Practice on the Right to Disconnect (the "Code") at the beginning of April, defining for the first time in an Irish context the Right to Disconnect.

While failure by an employer to follow the Code is not an offence in itself, the Code is now admissible in evidence in proceedings before a Court, the Labour Court or the WRC.

The Code emphasises the creation of a culture that allows workers 'disconnect'

The Code states that the Right to Disconnect refers to an employee's right to be able to disengage from work and refrain from engaging in work-related electronic communications, such as emails, telephone calls or other messages, outside normal working hours.

The Code states that the Right to Disconnect has three main elements:

- i) the right of an employee to not routinely perform work outside normal working hours;
- ii) the right to not be penalised for refusing to attend to work matters outside of normal working hours; and
- iii) the duty to respect another person's right to disconnect (e.g., by not routinely emailing or calling outside normal working hours).

EMPLOYERS' DUTY

As noted above, failure by an employer to follow the Code is not in itself an offence. However, the Code provides practical guidance for employers and employees to assist in meeting their obligations under existing legislation, the purpose of which legislation is, among other things, to protect employees from working excessive hours.

Therefore, if an employee makes a complaint to the WRC relating to their working hours under the Organisation of Working Time Act 1997, the Safety Health and Welfare at Work Act 2005, the Employment (Miscellaneous Provisions) Act 2018, or the Terms of Employment (Information) Acts 1994 - 2014, the employer's compliance or otherwise with the Code will be taken into account in the adjudication of that complaint.

This is particularly relevant given that the Code recommends that if informal attempts to resolve employee complaints around the Right to Disconnect are unsuccessful, a company's formal grievance procedure may then be utilised.

If the formal grievance procedure is unsuccessful in resolving a complaint around the Right to Disconnect, an employer may ultimately end up defending a claim in the WRC, either under the legislation listed above or indeed under any other employment legislation, for example under the Unfair Dismissals Acts 1977 – 2015 if an employee were to claim that the employer's refusal to respect the Right to Disconnect has resulted in a constructive dismissal situation, or under the Payment of Wages Act 1991 should an employee claim that he or she was required to work outside of normal hours and should be paid accordingly.

EMPHASIS ON CULTURE

The Code sets out a number of steps that the WRC will expect employers to take in order to meet their obligations under the legislation referred to above:

- Providing detailed information to employees on their working time, in accordance with the Terms of Employment Information Act, 1994 - 2014.
- 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, in accordance with the Organisation of Working Time Act 1997.
- Ensuring a safe workplace, including reviewing their risk assessment and, where necessary, their safety statement, in line with the Safety, Health and Welfare at Work Act 2005 and taking account of their obligations under section 8(2)(b) of that Act which extends to 'managing and conducting work activities in such a way as to prevent, so far as is reasonably practicable, any improper conduct or behaviour likely to put the safety, health and welfare at work of his or her employees at risk'.
- 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.

The Code envisages the "creation of a culture in which employees feel they can disconnect from work and work-related devices", and the implementation of a Right to Disconnect Policy will be a key part of the creation of this culture.

It appears to be a clear expectation of the WRC that employers will implement a Right to Disconnect Policy, with the Code stating that employers "should engage proactively with employees and/or their trade union or other employees' representatives as appropriate to develop a Right to Disconnect Policy that takes account of the particular needs of the business and its workforce."

The Code states that the Right to Disconnect Policy should be referenced in an employee's employment contract in the same way as any other company policy would be, and that it should be emphasised during any induction process.

OCCASIONAL LEGITIMATE SITUATIONS

The Code states that, where appropriate, a company's Policy should recognise that certain businesses and roles do not always operate on a standard hours basis but in a manner responsive to customer needs, where flexibility is required to meet the needs of the business, and as agreed in the employee's terms of employment.

Regarding the topical issue of emails being sent and received out of hours, the Code states that while the Policy should emphasise that there is an expectation that staff will disconnect from work emails, messages, etc., outside of their normal working hours and during annual leave, it should also allow for 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, where unforeseeable circumstances may arise, where an emergency may arise, and/or where business and operational reasons require contact out of normal working hours.

Employers will be glad to see the Code stating 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 requirement of critical services and as agreed in an employee's terms of employment.

The Code also acknowledges that where relevant to the business, the Policy should address the issue of working across global time zones, recognising 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 Policy 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 also states 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.

It will be important for employers to ensure that the Policy is 'equality proofed' in order to avoid unintended negative consequences and to ensure that it does not result in any employees being directly or indirectly discriminated against on any of the protected grounds under the Employment Equality Acts 1998 - 2015.

EMPLOYEE OBLIGATIONS

The Code acknowledges that the creation of a culture in which employees feel they can disconnect from work and work-related devices necessitates a joint approach by both employers and employees, and it lists a number of obligations on employees in this regard:

- Ensuring to manage one's own working time, recognising that section 13(1)(a) of the Safety Health and Welfare at Work Act 2005 places an obligation on an employee, while at work, to take reasonable care to protect their safety, health and welfare and the health and safety of co-workers.
- Cooperating fully with any appropriate mechanism utilised by an employer to record working time, including when working remotely.
- Being mindful of colleagues', customers'/clients' and all other people's right to disconnect (e.g. by not routinely emailing or calling outside normal working hours).
- Notifying the employer in writing of any statutory rest period or break which the employee is entitled to, but was not able to avail of on a particular occasion, and the reason for not availing of such rest period or break.

- Being conscious of one's work pattern and aware of one's work-related wellbeing and taking remedial action if necessary.

FINAL TAKEAWAY FOR EMPLOYERS

While many employers and employees are likely still digesting the provisions of the Code and considering its long-term implications, it is clear at this stage that a central aspect of compliance with the Code will be the concept of an employee's 'normal working hours'.

To understand the hours that are 'off limits' for the purposes of complying with the Code and respecting the Right to Disconnect, employers and employees need to be clear around what an employee's normal working hours are.

Both parties' expectations around those normal working hours must therefore be clearly documented, the normal working hours must not exceed maximum weekly limits on working hours and must be structured in such a way that statutory rest periods are observed, and the hours actually worked must be recorded, so that an employer will be in a position to show that employees have not been routinely required to perform work outside of their agreed normal working hours.

In a world of increased remote and agile working, more employers are likely to invest in time-recording software, not only for the purpose of meeting their existing record-keeping obligations under the Organisation of Working Time regime, but also now so that they can demonstrate that their employees have been able to exercise their Right to Disconnect.