Insight

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Sorting out the Truth About the Right to Disconnect in France

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Introduced on August 8, 2016 and effective since January 1, 2017, the "El Khomri law" (named after the French Labor Minister) or "loi travail" granted employees in France the "right to disconnect" from digital devices. Although media reports made it seem as if this were yet another onerous rule for employers to comply with in France, these reports may have oversimplified the law.

Contrary to popular belief in the United States, the right to disconnect does not prohibit employees from receiving, reading, and writing e-mails, or from answering phone calls over the weekend and after 6:00 p.m. during the workweek. Rather, the right to disconnect is a component of flexible and telework arrangements under which employees freely determine their schedule. This right grants employees some breathing room where the boundary between work and one's personal life can be blurred. While some might initially consider the right to disconnect to create another constraint for companies, the goal of separating work from personal time appears universal, likely transcending hierarchical levels and cultural differences.

The right to disconnect also places on the employee a duty to disconnect, or, at least, a responsibility to use digital tools reasonably. Consistent with the French tendency to create new concepts, the right to disconnect is but another expression or confirmation of employees' rights to a minimum period of rest at night, over the weekend, and during holidays.

While much has been said about the right to disconnect, this article seeks to separate fact from fiction regarding this topic.

Legal and Practical Underpinnings of the Right to Disconnect: The Search for Balance

The right to disconnect developed from the ongoing search for balance between flexible work arrangements and the reasonable use of digital

devices. Before the law's enactment, the right to disconnect had already emerged. Indeed, the right grew from the increased reinforcement of rules governing the yearly working-time schedules for executive employees and those who freely determine their own work schedules (known as "*forfait jours*").

Not all French employees work 35 hours a week. Many employees, particularly executives, work under terms of employment that do not count work time in hours per week, but in days over the course of the year (*e.g.*, 218 days): the "forfait jours." As with salaried employees in the United States, actual hours worked are not calculated. In addition, like exempt employees in the United States, these employees are not subject to overtime, a significant advantage for employers. Nevertheless, French law does impose some wage and hour safeguards for these employees. For example, such employees are entitled to compulsory daily and weekly rests, employer tracking of employee workload, minimum levels of compensation, and a balance between professional activity and personal and family life.

Since 2011, the French Supreme Court has closely monitored the annualized working time scheme. In light of that scrutiny, the Syntec branch (that is, information technology companies) became the pioneer of the right to disconnect. In April 2014, the industry-wide collective bargaining agreement covering this branch included this right in its new rules relating to the yearly working-time schedule (the "*forfait jours*") and actually referred to the "duty to disconnect" from remote communication tools.

French law also recognizes a contractual right to disconnect for employees working from home (teleworkers). Individual agreements formalizing telework arrangements specify working time periods during which the employee can be contacted by the employer.

With the new law, however, the right to disconnect has been expanded to all employees who use digital and telecommunication tools in their professional activity. The law—found at Article L.2242-8 of the French Labor Code—does not define the right to disconnect. Instead, it requires employers to implement "procedures for the full exercise by the employee of his/her right to disconnect" and to "establish[] . . . control mechanisms in order to regulate the use of digital tools, with the aim of ensuring compliance with rest periods and leave as well as personal and family life." In a nutshell, the guiding principle of the right to disconnect is the protection of the employee's health and the observance of rest and leave periods.

Of course, the right to disconnect cannot apply the same way in every situation. Quite the opposite: undifferentiated application could actually spawn new risks to employees and employers. Arrangements for compliance should consider the specific needs of the organization and the personal needs of the worker. For instance, it would be meaningless and counterproductive to systematically prevent an employee from connecting after 7:00 p.m. when he or she is part of an international team and needs to communicate with people in different time zones. Similarly, later evening access would be useful for an employee who wishes to stop working between 4:00 p.m. and 7:00 p.m. to take care of children and then reconnect in the evening.

The right to disconnect is both a constraint and an opportunity for the employer to minimize unreasonable practices and habits and actually reduce health and working-time-related risks. After-hours e-mails provide the classic example. Who does not know an employee who routinely sends e-mails in the evenings and over the weekends and yet seems to expect an immediate response? Employers might wish to curb such conduct while also permitting other employees to send e-mails during the evening or the weekend who find this beneficial. Employers could, for example, remind all employees that these after-hours e-mails should not be interpreted by their recipients as calling for immediate action. There are several ways for employers to achieve this goal, including pop-up notifications and/or a delayed sending function.

In the end, the right to disconnect relies on common sense and good judgment to prevent unreasonable behavior and to reduce the related risks for companies, such as overtime, excessive workload, and moral harassment claims, which cover bullying and other kinds of behaviors that threaten the dignity of individuals at work. The challenge, however, lies in differentiating between the misuse or abuse of digital tools and the

legitimate working arrangements that permit connections outside standard working hours, sometimes for the employee's convenience.

Legal Framework: A Duty to Negotiate, With Employer Discretion to Determine the Means

The right-to-disconnect law, which took effect January 1, 2017, generally applies to companies with at least 50 employees. While there is no penalty for non-compliance, the law obligates covered employers to negotiate with employees about the right to disconnect. The law gives priority to collective bargaining with staff representatives and trade unions in order to set the applicable rules relating to the right to disconnect. This topic falls within the scope of the compulsory annual negotiation on gender equality in the workplace and the quality of life at work.

While there is no obligation to reach a collective bargaining agreement, the law provides that in the absence of such an agreement, the employer must draw up a code of conduct or policies setting forth the terms and conditions under which employees can exercise their right to disconnect. Employer policies must also include plans to educate employees and raise awareness regarding the reasonable use of digital tools.

Even if not covered by the new law, smaller employers also should be concerned with the right to disconnect. Indeed, pursuant to new Article L.3121-64 of the French Labor Code, from the law of August 8, 2016, all employers—no matter the size of the company—must address the right to disconnect for employees subject to the annualized working days system. In other words, even if the company has less than 50 employees, a particular employee may be entitled to the right to disconnect.

The combination of these provisions suggests that the right to disconnect may flow to all employees and all companies (regardless of their size). Furthermore, it is likely that case law will extend the application of this health-related right to all employees.

Aside from legal pronouncements, industry-wide agreements may also address and affect the right to disconnect. For instance, the Syntec collective bargaining agreement applicable to IT companies requires the employer to include rules relating to the right to disconnect and rest periods into company employment policies ("*Réglement intérieur*"). Inclusion in company policies involves both the prior consultation of the staff representatives and approval from the Labor Inspectorate.

Interestingly, integration of the right to disconnect into the employer's policies o means that employees who violate any obligations contained therein may be subject to discipline. Thus, employees who fail to comply with rules governing the right to disconnect could receive a warning on this basis.

Challenges and Risks Posed by the Right to Disconnect

Given the lack of penalties for non-compliance, employers may be tempted to ignore the right to disconnect. However, there are many reasons why companies should consider implementing an internal policy relating to the right to disconnect.

Indeed, the right to disconnect is not only an obligation towards employees working under the annualized working days system, but should also be considered as part of the employer's duty to provide workers with adequate rest periods. This interpretation applies equally to teleworkers, whose working time is harder to monitor and requires more sophisticated solutions to manage.

In this context, the right to disconnect falls within the scope of an employer's general legal obligations, particularly the duty "to take the necessary measures to ensure the security and protect the physical and mental health of employees." This obligation includes the prevention of psycho-social risks.

In other words, if an employer does not comply with the specific provisions relating to the right to disconnect, it might be held liable for claims of burn-out, moral harassment, etc. For instance, if an employee

is forced to send numerous e-mails during the night by his or her manager, the employer might be held responsible. Additionally, it is likely that employees will use the new legal ground of the right to disconnect to strengthen overtime claims and seek separate damages on this basis. An employer also might face a claim for constructive dismissal by an employee for violation of his or her right to disconnect.

In the end, controlling unreasonable practices in the use of digital tools by employees allows the employer to manage the related risks and secure its defense in case of disputes over workload, overtime, or related psycho-social risks. For example, the claim of an employee challenging his or her annualized working time scheme based on an allegation of non-compliance with time-off periods presumably would be weakened if, for example, the employer has proof that this employee received numerous notifications for (intentionally) sending too many e-mails out of the standard working hours.

Various Approaches for Implementation of the Right to Disconnect

Of course, there is no one single approach for implementing the right to disconnect. Implementation must be personalized and adapted to each company's activity, culture, age structure, and mode of communication. Furthermore, the application of the right to disconnect may not be the same for all business units of the same company. Distinctions among groups may be necessary, especially for companies with international teams that need to communicate in different time zones. In sum, before undertaking negotiations or establishing any policies, employers must analyze their needs and workforce, both to identify risk behaviors and bad habits and to assess possible solutions.

While the law gives employers discretion, it provides no guidance on what control measures might be appropriate to regulate the use of digital tools by employees. It is widely acknowledged that the solution is not to cut off access systematically to the IT servers between 8:00 p.m. and 7.30 a.m. and on weekends. There are, however, a variety of more realistic approaches.

Based on our review of practices adopted by companies that have already defined the scope and application of the right to disconnect, here are some interesting options:

- **Awareness-Promotion and Training Activities.** Employers should consider developing awareness and training programs on the right to disconnect. Specific training courses should be designed for top management, who must set a good example and foster an environment where employees do not feel that they have to respond immediately to e-mails when they exercise their right to disconnect.
- **Involvement of the Health and Safety Committee.** Employers can involve the Health and Safety Committee and health specialists to raise awareness and help educate employees on the proper use of the digital tools.
- **Warning System.** Employers can implement an IT system, which will warn managers and the Human Resources department of non-compliance. For example, if the daily rest period has not been observed by an employee several times during the month, the manager could schedule a one-on-one meeting with the employee to address and resolve the situation.
- **Definition of a Disconnection Period.** Employers can expressly define a "disconnection period" during which no e-mails should be sent and/or emails may not require a response. These limitations would depend on the organization of the company. But, for example, a disconnection period might restrict e-mail use on full Sundays and on workdays, from 8:00 p.m. until 7:30 a.m., perhaps with exceptions for specific units.
- **Providing Exceptions.** Employers should acknowledge that exceptional circumstances occur and should ease the general restrictions for such emergencies. Thus, for example, an employer's policies

might include exceptions to the established restrictions in the event of a serious accident, media crisis, other extraordinary business need, or pubic emergency.

- **Tracking of E-mails.** Employers can also take advantage of technology to determine what business units or individuals are likely to infringe upon the right to disconnect. The IT department, for example, could track e-mails sent and received out of the standard working hours to identify the business units at risk.
- **Automatic Notifications.** The e-mail system itself can be designed to encourage respect for the right to disconnect. Employers can install a delayed e-mail-sending function, which would hold an e-mail until a particular time if no emergency exists. Another feature would require confirmation from the sender that he really wants to send the message during the disconnection period while reminding him or her obligation to disconnect.

Recommendations for Employers

Now that the right to disconnect has become law across France, employers should be taking steps to ensure compliance. At the outset, employers should identify whether any applicable industry-wide collective bargaining agreement includes specific provisions relating to the right to disconnect and whether those provisions need to be updated. In any case, employers should assess whether they are obligated to initiate negotiations with trade unions and/or staff representatives on the right to disconnect.

Employers with less than 50 employees should evaluate whether they have workers subject to the annualized working days (forfait jours) system, as they are also entitled to disconnect. All employers should review the terms of any agreements with teleworking employees as well.

Where the right to disconnect applies, employers should immediately launch an investigation, with the help of the IT team, to identify risk behaviors as well as business units that may be prone to non-compliance. Employers should consider appointing a specific management team dedicated to the right to disconnect, which can focus on the development of training and awareness campaigns. As mentioned earlier, employers should consider and select control measures appropriate for their organizations and permit exceptions in cases of emergency or where otherwise justified.

In conclusion, the right to disconnect should not be caricatured and demonized as a French oddity but rather seen as a control and prevention tool. Employers that take the new law seriously and implement proper control measures will be able to better manage risks and will hopefully reap the benefits associated with healthier employees.

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