

As widely publicised, the minister for employment and workplace relations, Tony Burke, has done a deal with the cross benchers to introduce a new “employee right to disconnect” via the *Fair Work Legislation Amendment (Closing Loopholes No 2) Bill 2003* (Bill).

The Bill was passed by Parliament on Monday 12 February 2024 and amends the *Fair Work Act 2009* (Cth) (*FW Act*) by inserting a new Division 6, Part 2-9 – Right to Disconnect. The *FW Act* will provide workers with a legislative right to refuse to respond to contact from their employer outside of work hours – unless the refusal is unreasonable.

“In Australia, you’re meant to be paid when you’re working”, Mr. Burke stated. Employees now have the right to “not monitor, read or respond” to contact from their employer (or work-related contact from third parties), such as emails and phone calls, outside of their paid working hours, without fear of disciplinary action or punishment at work.

When considering whether a refusal is reasonable, it will be necessary to consider:

- The reason for the contact or attempted contact
- How the contact is made and the level of disruption it causes
- The extent to which the employee is compensated to remain available (such as an on-call allowance) or to work reasonable additional hours outside their ordinary hours of work
- The nature of the employee’s role and level of responsibility
- The employee’s personal circumstances
- If the contact or attempted contact is required under law

If the unpaid outside-of-hours contact remains ongoing, or results in a dispute between the employee and employer, then the employee can seek the intervention of the Fair Work Commission (FWC) and ask for a “stop order”. If the employer does not comply with the stop order, the FWC will be empowered to make any order it considers appropriate (other than issuing a fine).

If an employer contravenes an order of the FWC, then the employer can be subject to a civil remedy penalty (it has been confirmed that such breaches will not attract criminal penalties). The right to disconnect changes will commence six months after royal assent.

The right to disconnect will become a workplace right for the purposes of the general protections provisions contained in Part 3-1 of the *FW Act*, meaning that employees will be protected from adverse action being taken against them because they exercised their right to disconnect.

Changes to Modern Awards

The Bill also requires that modern awards must include a term that provides for the exercise of an employee’s right to disconnect. While not legislative, the FWC is also required to make written guidelines in relation to the operation of the new right to disconnect provisions.

In addition, but separately to the changes to the *FW Act*, the FWC has commenced a targeted review of modern awards.

The FWC’s *Discussion Paper – Work and Care, Modern Awards Review 2023-24*, released on 29 January 2024, is designed to promote a discussion on balancing work and care in the context of workplace relations settings in modern awards. A key priority of the review is to consider the relationship between work and caring responsibilities. Included in the scope of the review are working from home provisions and the right for employees to disconnect.

Clearly, the newly legislated changes to the *FW Act* have somewhat superseded the FWC’s discussion paper. Nevertheless, the FWC will pursue the changes as part of their 2023-24 Modern Award Review process. Employers can make submissions on the discussion paper and the soon to be released literary research report, both of which will inform amendments to the modern awards.

Employers interested in making a written submission or wishing to engage in the consultation process can contact awards@fwc.gov.au

Commission timeline:

- 29 January 2024 Discussion paper published
- 8 March 2024 Literary research report published
- 12 March 2024 Submissions in response due
- March to April 2024 Consultations with interested parties

We expect any amendments to modern awards are likely to coincide with the commencement of the right to disconnect changes in the *FW Act* around the middle of 2024 (six months after royal assent).

Takeaways

Actions that employers can consider and start to take before the commencement of the right to disconnect provisions include:

- Reviewing employment contracts to check if hours of work and remuneration clauses are adequate to protect the employer with respect to this development
- Reviewing remuneration packages and bonuses to ensure that employees who are required to remain available after working hours are adequately compensated
- Job mapping and ensuring position descriptions are updated and drafted to adequately reflect the requirements of the position
- Consider the operational impacts of the changes, particularly in relation to employees under flexible working arrangements, employees who work across different time zones, and award-covered employees
- Update policies and procedures to reflect the changes, and ensure managers undergo proper training and are made aware of their obligations
- Prepare for employee general protections claims alleging that adverse action was taken against them because they asserted their right to disconnect

Our Labour & Employment team can assist and advise on queries regarding workplace flexibility and the right to disconnect.

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