RIGHT TO DISCONNECT: A NEEDED SOLUTION OR A POTENTIAL DISRUPTION TO BUSINESSES AND EMPLOYEES? AUSTRALIA MAY PROVIDE SOME GUIDANCE

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THE PROPOSED LAW

On 15 February 2024, Assemblymember Matt Haney introduced Assembly Bill (AB) 2751—Employer Communications During Nonworking Hours. AB 2751 would cement an employee's right to ignore communications from their employer during their nonworking hours unless the communication relates to an emergency or scheduling. AB 2751 defines emergency to include unforeseen situations that (1) threaten employees, customers, or the public; (2) disrupt or shut down operations; or (3) cause physical or environmental damage. Scheduling is defined as changes to a schedule within 24 hours. The proposed law would also require employers to establish a workplace policy providing employees the right to disconnect in addition to a written agreement that defines the employee's nonworking hours. Three or more documented violations of the right to disconnect would be considered a “pattern of violation,” which carries a minimum fine of US$100. AB 2751 would not apply to employees covered by a collective bargaining agreement.

CLARIFICATION STILL NEEDED

AB 2751 seeks to set clear boundaries for nonworking hours that have been blurred with the proliferation of the smart phone and the changes to patterns of work caused by the COVID-19 pandemic, and to protect employees from being penalized for not being available at all hours of the day. Questions remain regarding the applicability and scope of the proposed law. For example, in its present iteration, AB 2751 seemingly applies to both exempt and nonexempt employees. Generally, exempt employees are not bound by a work schedule, are not required to clock in or out, and generally enjoy autonomy and flexibility to perform their work. That would change under AB 2751, which makes no exception for exempt employees.

AB 2751 also does not delineate who would be barred from contacting employees, as “employer” is not expressly limited to management. It is not clear, for example, whether a coworker but not a supervisor may contact the employee during their nonworking hours. Further, AB 2751 also does not appear to consider employers whose workers collaborate across different time zones and whether those employers would need to limit their contact with their employees in order to comply with AB 2751.

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As companies grapple with whether they will require employees to return to the office, would AB 2751 expedite that requirement as employers seek to avoid liability for inadvertent after-hours communication? It is too early to tell.

On 17 April, AB 2751 was heard in the California State Assembly Committee on Labor and Employment. Assemblymember Haney told committee members that while AB 2751 would require employers to have a written policy establishing the right of employees to disconnect during nonworking hours, the policy can be flexible and consider the nature of the job. Although not expressly stated in the text of AB 2751, Assemblymember Haney said that AB 2751 would not prevent an employer from sending an email or work-related communication after hours, but rather that it protects employees from retaliation if they choose not to engage in work during nonworking hours. Similarly, AB 2751 would not prevent an employee from engaging in work after work hours if they choose to do so. A homecare worker and the California Employment Lawyers Association testified in support of the bill. California State Council of the Society for Human Resource Management and the California Chamber of Commerce testified in opposition to the bill, stating in part that the one size fits all approach will have negative consequences for businesses and employees alike. They argued that AB 2751 lacks clear definition, is an administrative burden, and will create issues with enforceability. The opposition stressed that this bill makes no distinction between exempt and nonexempt employees, who are already covered by stringent employment laws.

Prior to the hearing, the Assembly Committee on Labor and Employment produced an analysis of the bill and recommended that Assemblymember Haney consider excluding exempt workers and that he narrow the proposed exclusion of workers subject to collective bargaining agreements to only those subject to collective bargaining agreements that provide a similar right to disconnect. The analysis also suggested that the bill clarify the definitions of “employer,” “contact,” and “emergency.”

THE RIGHT TO DISCONNECT IN AUSTRALIA

Assemblymember Haney has openly credited Australia's Right to Disconnect as the inspiration for AB 2751. On 26 February 2024, the Australian Federal Parliament passed legislation creating a new statutory right to disconnect from work for all employees covered by the national employment system.

The new provisions are effective on 26 August 2024 (and on 26 August 2025 for employees of small business employers).

THE SCOPE OF AUSTRALIA'S NEW RIGHT

The new provisions do not prevent employers from attempting to make contact with their employees outside of normal working hours. Rather, they give employees the right to refuse to monitor, read, or respond to contact, or attempted contact, from an employer or from a third party (such as a client or supplier) relating to their work, outside of their working hours unless their refusal is unreasonable.

An employee's 'right to disconnect' is a workplace right for the purposes of the Fair Work Act 2009, meaning that an employer is prohibited from taking adverse action against an employee (such as a demotion or dismissal) because they exercise or propose to exercise this right.

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WHEN WILL AN EMPLOYEE'S REFUSAL BE UNREASONABLE?

Whether an employee's refusal to respond to contact is unreasonable will depend on the circumstances and will be considered with reference to the following factors identified in the legislation:

- The reason for the contact or attempted contact;
- How the contact or attempted contact is made and the level of disruption it causes the employee;
- The extent that the employee is compensated (by financial or nonfinancial means) for:
  - Remaining available to perform work during the period that contact is made or attempted; or
  - Working additional hours outside of the employee's ordinary working hours;
- The nature of the employee's role and their level of responsibility; and
- The employee's personal circumstances (including family or caring responsibilities).

It is anticipated that, in many instances, determining whether an employee's refusal is unreasonable will hinge on the extent that the employee is remunerated for working the additional time (either because they have access to payments for being on-call or working overtime or because their annual salary is set at a level that is intended to compensate the employee for working additional hours), and the nature of the employee's role and level of responsibility.

BOTTOM LINE

Unlike Australia's right to disconnect regime, which does not seek to penalize employers, but rather to protect employees against unreasonable disruption outside of their working hours, AB 2751 currently reads as an onerous administrative lift for employers given the various protections employees enjoy in the Golden State.

As AB 2751 makes its way through the legislative process, California employers should continue to pay employees for all hours worked, including on-call pay, reporting time pay, and for nonexempt employees those instances when they contact employees outside of their normal working hours. Likewise, companies with California employees should assess their potential costs and other implications (e.g., scheduling, additional staffing) if AB 2751 were to pass.

In addition, any employer with a workforce in Australia will need to prepare for the commencement of the Right to Disconnect provisions, including by proactively seeking to identify any existing work patterns or requirements that could provide an employee justification for refusing to monitor, read, or respond to contact, or attempted contact, from an employer outside of working hours.

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