



The Right to Disconnect

From 26 August 2024, changes are now in effect that will have a bearing on how you communicate with team members after hours.



With the culture of constant connectivity and the expectation of workers to always be available, the line between work and personal life has been becoming increasingly blurred.

This 'always on' mentality has led to "availability creep," that is, the notion that employees have to be available to do work or respond to work questions and requests outside their usual working hours.

The pressure of always having to be available for work, and suffering negative consequences for not being able to do so, can result in negative consequences for employees. These include adverse effects to mental health and burnout, that can then impact their work and the business as a whole.

The right to disconnect was introduced to address these issues. For businesses with 15 employees and more, this applies from 26 August 2024, while businesses with less than 15 employees will see this change come into effect on 26 August 2025.

What does the Right to Disconnect really say?

There have been plenty of misconceptions around what the Right to Disconnect is, and what the obligations of employers and employees are.

This is what the Fair Work Act 2009 says:

333M Employee right to disconnect

- An employee may refuse to monitor, read, or respond to contact, or attempted contact, from an employer outside of the employee's working hours unless the refusal is unreasonable.
- An employee may refuse to monitor, read, or respond to contact, or attempted contact, from a third party if the contact or attempted contact relates to their work and is outside of the employee's working hours unless the refusal is unreasonable.

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Frequently Asked Questions

Who can employees refuse contact from?

Employees are given the right to refuse contact from or respond to their employer (this includes managers and colleagues). They can also refuse contact from third parties like clients, customers, and the like.

However, this is not an absolute right. Employees have the right to refuse to respond to contact where that refusal may be reasonable.



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What does refusing contact mean?

This means refusing to answer calls, texts, emails, messages via platforms like MS Teams, Slack.

Employees also have the right to refuse to monitor for contact. For example, they can say that they will be turning their phone or computer off once their working hours have ended.

What are “working hours”?

The Right to Disconnect legislation gives employees the right to refuse contact when it is done “outside of the employee’s working hours.”

“Working hours” isn’t defined by the legislation. However, it’s reasonably clear that this covers an employee’s working shift, giving workers protection from being contacted once this shift ends, whatever time this might be at.



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Will I break the law if I contact an employee outside of working hours?

No. The legislation gives employees the right to refuse to respond to contact outside of their working hours. However, the legislation does not penalise employers for communicating with employees outside working hours. Employees are just given the right to not respond to these communications.

Employers will be breaking the law, however, if they require employees to respond to being contacted outside their working hours, or subject employees to negative consequences for not responding, and the requirement to respond was unreasonable.

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What is reasonable vs unreasonable refusal to respond to contact?

The Right to Disconnect sets out a non-exhaustive list of five matters that must be taken into consideration when considering whether a request is reasonable:

1

The reason for the contact or attempted contact

The more urgent or business-critical the need for the contact, the more likely it will be to be unreasonable to refuse contact.

2

How contact was made and the level of disruption it caused the employee

A phone call or email in the middle of the night is a less reasonable contact as opposed to an email sent a few minutes after their shift has ended.

3

The extent to which the employee is compensated

- to remain available to perform work during the period in which the contact or attempted contact is made; or
- for working additional hours outside of the ordinary hours of work

If the business has an allocated extra payment for employees being contacted outside of working hours, or for being "on call," then it will be more reasonable to require employees to be contactable.

In the same vein, if an employee's pay includes consideration of an amount of out of hours contact, this also supports the reasonableness of this kind of contact.

Note: Some modern awards already include requirements for employers to pay "on call" allowances for work performed outside of working hours.

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The nature of the employee's role and their level of responsibility

Some roles will have a degree of out of hours contact necessary to be able to perform the role. For example, a manager who is in charge of rostering and has to make decisions based on employee availability or emergency situations will need to have a degree of out of hours contact.

Generally speaking, the more senior an employee is, the easier it becomes to justify occasional out-of-hours contact, particularly for handling emergencies and unforeseen events in the business.

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The employee's personal circumstances, including family or caring responsibilities

The appropriateness of any out-of-hours contact will be influenced by the employee's personal circumstances. A clear example of this is when such contact interferes with their caregiving duties.

For instance, it is less reasonable to expect an employee to be available during times when the employer knows they are responsible for looking after their children, compared to periods when they are not.

Dealing with disputes

The legislation has a specific process for dealing with disputes about the right to disconnect and whether the refusal for contact is reasonable or unreasonable.

- **The Workplace level.** Employers and employees are required to first "attempt to resolve the dispute at the workplace level by discussions between the parties."
- **The Fair Work level.** If the above isn't successful, either party may now apply to the Fair Work Commission. The Commission can:
 - make orders to prevent an employee from being unreasonably obligated to monitor for or respond to contact
 - prevent an employer from continuing to require an employee to monitor for or respond to contact
 - order an employer to refrain from enacting disciplinary action against an employee for refusing contact.

*Note: The Commission can make different types of orders. However, the legislation specifically prevents the Commission from issuing a financial penalty. An employer or employee can still be subject to a financial penalty for breaching any order the Commission makes.

Need guidance on implementing the Right to Disconnect in your particular industry? Or perhaps you need to review your documentation to ensure compliance with this legislation? Our team can help.

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