

Questions & answers from the Right to Disconnect webinar

March 23, 2022

***Note:** This document is not intended as legal advice. For specific advice, please contact your qualified legal counsel before making any decisions or taking any action.

#	Question	Answer
1.	Are short-term, fixed-term, paid interns and part-time employees included in the count to determine whether you have 25 or more employees for the purpose of determining whether a policy is required?	<p>ALL types of employees who physically work in Ontario as defined by the <i>Employment Standards Act, 2000</i> (“ESA”).</p> <p>Anyone who meets the definition of “employee” under the ESA is counted. This includes employees with the following status: part-time, full-time, flex-time, casual, fixed-term (regardless of the length of the term), on leave, on layoff, suspended, probationary, on strike/lockout, some trainees, and students unless they are performing work under a program approved by a college of applied arts and technology or university, a work program that is approved by a private career college registered under the <i>Private Career Colleges Act, 2005</i>, or a work experience program authorized by the school board that operates the school in which the student is enrolled.</p> <p>Independent contractors are not included in the count, but be aware that if they are misclassified, they would be counted as an employee.</p>
2.	What if the organization is family run and the CEO and COO are owners...do they still count here?	<p>These factors are irrelevant. The only factors that are relevant in determining whether a right to disconnect policy is required are:</p> <p>a) Is the business provincially regulated?</p> <p>b) As of January 1st, does the business employ 25 or more employees who work for the business in Ontario?</p> <p>If the answer to the above 2 questions are “yes”, a right to disconnect policy is required.</p> <p>The policy applies to ALL employees whether they are family, founders, the president, the CEO or the receptionist.</p>
3.	If the business has 25 or more employees in Ontario requiring a policy, and also has	<p>Yes. The requirement to have a Right to Disconnect Policy applies only in Ontario.</p>

	employees in other provinces in Canada, can the business limit application of the policy to its Ontario employees only?	
4.	With regards to employee count, what about the situation where there is a parent and a subsidiary that, in practicality work together?	If two or more entities are deemed to be “related” under the ESA, then the number of employees working for both entities in Ontario would be counted in the aggregate. For example if entity A has 10 employees, and entity B has 17 employees, and A and B are deemed to be related, then both A and B would be required to develop a Right to Disconnect Policy because in the aggregate they together employ 27 employees. Whether the parent/subsidiary would be considered to be related under the ESA is a complex legal analysis for which legal advice ought to be sought.
5.	You mentioned that crown employers are exempt. Can you expand upon that?	<p>The requirement for employers to have a written policy on disconnecting from work was added into the ESA on December 2, 2021. Therefore, the requirement applies to those employers covered by the ESA. Section 3 of the ESA lists several groups to whom the ESA does not apply at all, including where the employment relationship is within the federal jurisdiction, employees of an embassy or consulate of a foreign nation and his or her employer.</p> <p>The Ministry of Labour’s guidelines also specify that the requirement does not apply to the Crown, a Crown agency or an authority, board, commission or corporation whose members are all appointed by the Crown and their employees.</p>
6.	How will this interact with industries which are exempt from overtime under the ESA?	Section 21.1.2 of the ESA states that the policy must apply to “all employees” and all employers who are covered by the ESA. None of the traditional overtime/hours of work exemptions presently apply.
7.	Does there need to be a stand-alone disconnecting from work policy?	No. the policy can be incorporated into existing employer policies such as an Hours of Work policy, Overtime Policy. It can also be included in an employee handbook or policies manual.

8.	<p>Can you 'post' the policy on a website - and direct employees to the link, or do you need to give them a hard copy?</p>	<p>There is no requirement to give an employee a hard copy, as long as the employee has the reasonable opportunity to access the document and a printer.</p> <p>The employer may provide the policy to employees as a:</p> <ul style="list-style-type: none"> - printed copy, - an attachment to an email (if the employee can print a copy), - a link to the document online if the employee has a reasonable opportunity to access the document and a printer
9.	<p>What if your company has offices outside of Canada or works within different time zones, do you have to be mindful of the time difference when sending emails to Canadian employees.</p> <p>How will time zones be impacted? If you have a customer/ supplier in Asia and need a response during their business hours which is our night, what happens then?</p> <p>If we work in a global work place and there are e-mails coming at all hours of the day, as the long the employee is not required to respond are we ok?</p>	<p>The legislation does not specify that it is a right of employees to disconnect from work or be free from the obligation to engage in work-related communications completely after a certain time. Therefore, an employee receiving messages outside of their regular work hours is not a violation of the new requirement.</p> <p>The legislative requirement is simply that an employer who meets the 25-employee threshold must have a written policy on “disconnecting from work”. An organization’s policy can contemplate that its employees have to coordinate with different time zones and should address this within the policy. If it is necessary for an employee to respond to certain types of communications, such as that from customers or suppliers, outside of their regular working hours, this can also be addressed in the policy.</p> <p>This is why it is beneficial to consult managers, supervisors, team leaders, etc. to understand how their teams/divisions operate in developing a policy that is suitable to your workplace. For example, are there certain types of communications that employees must review/respond to, but not others?</p>
10.	Does this include afterhours staff	<p>Time spent by an employee in training that is required by the employer or by law is counted as compensable work time. Training that is taken at the option of the employee, i.e., training that is not required by the employer as a condition of employment or continued employment or that is not otherwise</p>

	meetings, training and development?	<p>necessary for the performance of the employee's job would not be considered working time.</p> <p>Employee rights under the ESA to not perform work are established through other ESA rules and employers should, consider overtime etc. when having after hours meetings.</p>
11.	What are the expectations around monitoring of policy and demonstrating due diligence?	<p>The amendments to the ESA are silent with respect to how an employer enforces or monitors the policy. It should, however, be anticipated that proof of monitoring/enforcement will be expected should an employee make a complaint or an issue arise that it brought to the attention of the Ministry of Labour, including random audits. If an employer policy gives an employee a greater right or benefit than the ESA, then an employee may also be able to legally challenge the employer for non-compliance.</p>
12.	How does this effect the 3 hour rule that if employees respond to communication they are compensated for it?	<p>Whether the 3 hour rule applies is an analysis that needs to be undertaken based on the unique facts of the particular situation; it is not a one-size-fits all analysis/answer.</p>
13.	<p>How should employers cover the issue of employees being on-call due to the nature of the business?</p> <p>How is it suggested we handle such a policy, when long hours of overtime are expected/the norm in this industry?</p>	<p>The ESA does not specify that the policy provide a right for the employee to disconnect from work and be free from the obligation to engage in work-related communications.</p> <p>If it is unreasonable to have everyone completely disconnect, make this clear in the policy. Clarify things like response-time expectations, including expectations depending on different situations (e.g., the time of day of a communication, the subject matter of the communication or who is contacting the employee).</p> <p>Having a disconnecting from work policy also does not mean that employees no longer have to meet their deadlines. However, employers should consider whether more staff are required if there is very little ability to disconnect at any time.</p> <p>These are the types of issues that you need to review with your business teams and your legal counsel to assist in the development of the policy; they are not mandated by the new legislation.</p>

14.	<p>What are some ways an employer can monitor hours of work for remote and hybrid workers?</p>	<p>There are a variety of methods an employer can monitor hours of work, including requiring employees to keep time sheets, punch-in tools, automated time-and-attendance solutions, computer or mobile applications, etc.</p> <p>However, please keep in mind that there may be additional legal considerations when introducing such technology. For example, Bill 88, if passed, introduces a requirement for employers who meet certain conditions to develop a policy on electronic monitoring. There are also privacy implications to consider.</p> <p>This is an issue that should be analyzed by your business in consultation with your legal counsel; this is not mandated by the new legislation.</p>
15.	<p>What if you have less than 25 employees? Can you email, text, etc after regular work hours?</p>	<p>If you have less than 25 employees in Ontario, you are not required to have a disconnecting from work policy.</p> <p>The requirement to have a “disconnecting from work policy” does not mean that you cannot email/text/communicate with employees after regular working hours.</p>
16.	<p>Could you address a customer contacting their account rep after hours? How do we deal with customer expectations with this policy?</p>	<p>If an employer is required to have a disconnecting from work policy, then the policy must cover ALL of its employees. However, the policy can have different requirements/expectations for different types of roles/demands/expectations. For example, an employer may have specific policy terms dealing with customer-facing positions that are different from administrative positions.</p>
17.	<p>Many tech companies promote flexible work hours - employee chooses when to work as long as their tasks completed. Does this legislation eliminate this "perk"?</p> <p>What do you do if staff work staggered hours, especially with compressed or flexible work arrangements?</p>	<p>The amendments to the ESA do not eliminate the ability for employers to maintain flexible work arrangements. There are multiple ways to be legally compliant with the new requirement to have a disconnecting from work policy while maintaining remote work, flexible work arrangements and with work being done across multiple time zones.</p> <p>Terms can be added into your policy to manage conflicting work schedules between employees/managers who still need to communicate in order to get the job done.</p> <p>For example, you can create tiers for the types of communications that require a responses those that do not based on a particular job’s requirements. Communications dealing with the following subject matters need not be addressed by an employee during a blackout period:</p>

		Administrative matters include anything relating to: expense reimbursement, billing, pay, scheduling time off, etc.
18.	Does this policy give employees the right to decline a company cell phone?	<p>The legislative changes do not create any new rights for employees. If an employee is required to have a company cell phone, then they cannot reject it based on the disconnecting from work requirement.</p> <p>Please note that any term that is included in an employer's policy, if it is a greater right or benefit than minimum ESA entitlements, will likely be interpreted by the Labour Board as a statutory right, and enforceable as a statutory right. (s.5(2) of the ESA).</p>
19.	Is Ontario the only province that this has been implemented?	Yes, Ontario is the first province in Canada to introduce a requirement related to disconnecting from work.
20.	How might this apply to employees who travel for work? (i.e. flights to/from destination that may be outside working hours)	<p>The requirement to have a disconnecting from work policy does not have a direct impact on employees who travel for work. There are pre-existing rules and factors that apply when assessing when work is deemed to be performed by an employee. There are also pre-existing rules that assess when travel time is considered work time.</p> <p>If an employee regularly travels for work, it is prudent to outline expectations regarding disconnecting from work during this time. An employee is not required to stop all work outside of working hours as a result of the changes to the ESA. They can choose to continue to work if they choose to do so</p> <p>Employers must also keep in mind other Ontario employment laws such as those related to overtime where an employee is working during travel.</p>