

Disconnecting...

Navigating the right to disconnect as an Employer in 2025

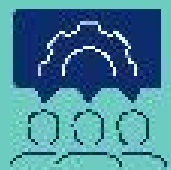
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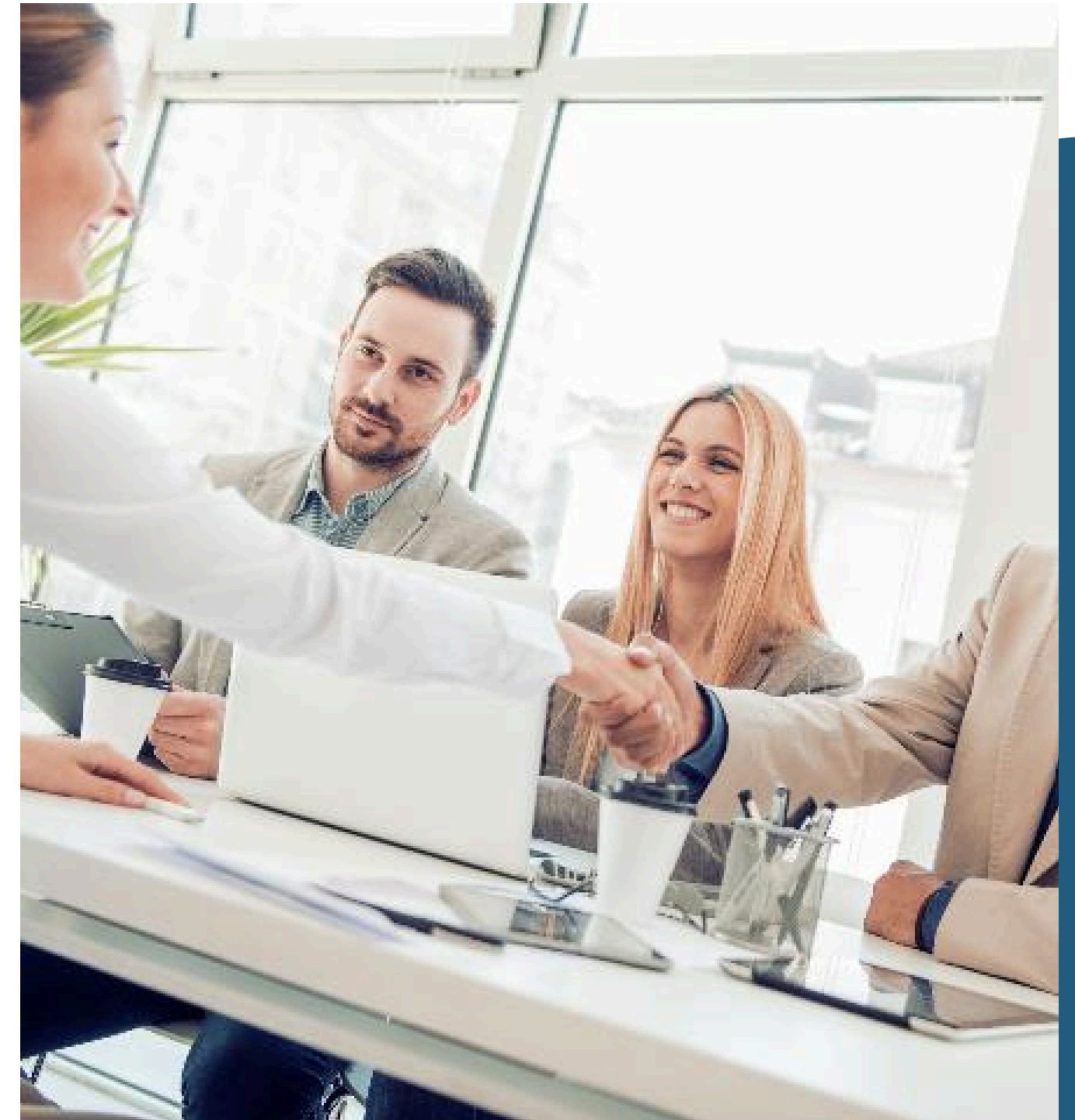
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Today's agenda



Overview of the Right to Disconnect



A closer look at the Right to Disconnect



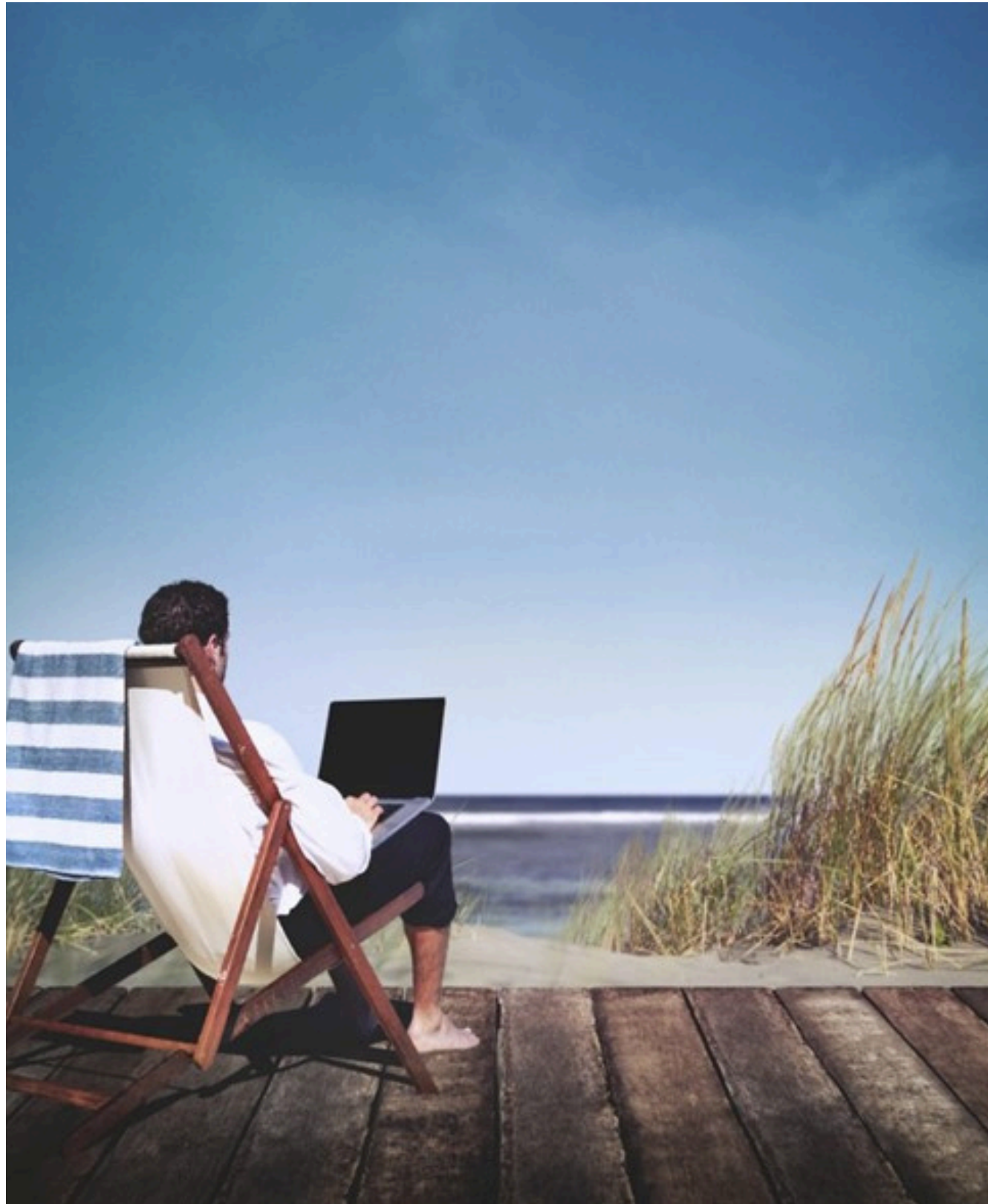
The Right to Disconnect in Modern Awards



Practical examples and tips



Q&A

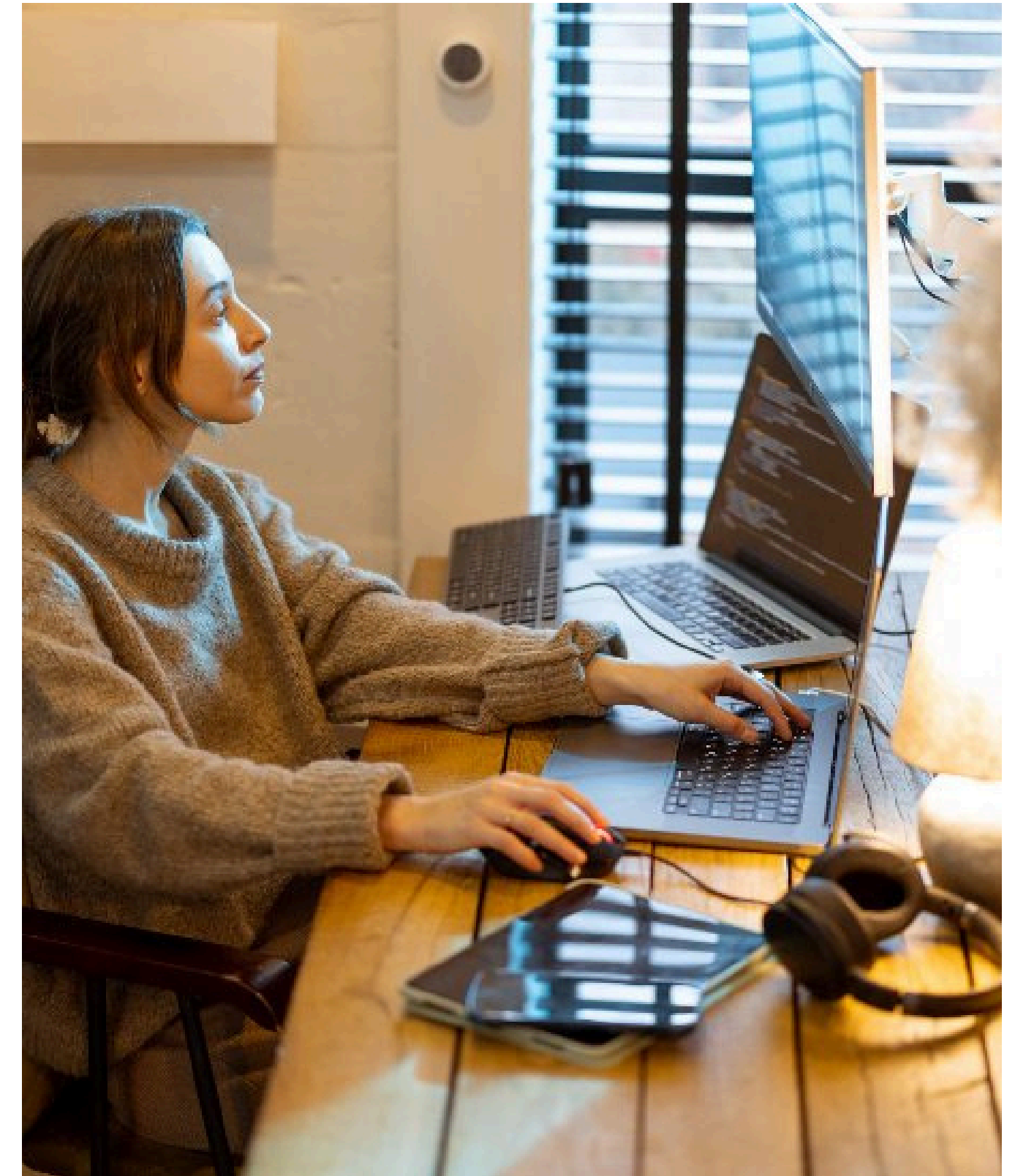


The Right to Disconnect: An Overview

What were the changes?

The changes include:

- providing employees with a right to disconnect.
- detailing how disputes are to be resolved.
- conferring new powers on the FWC to deal with disputes and make RTD orders.
- new penalties for breaching an RTD order.
- amendments to modern awards to deal with RTD and introduction of RTD guidelines.
- a review of the award RTD terms in 12 months.



Commencement of the Right to Disconnect

When does it commence for your business?

As of **26 August 2024** the Right to Disconnect is operational

Small businesses
(14 or less employees)

- You have until the earlier of:
- **26 August 2025** or
 - the date you are **no longer a small business employer** and are classes as non-small business.

The Right to Disconnect

What is the “Right to Disconnect”?

An employee now has the right to refuse to monitor, read or respond to contact, or attempted contact from:

- their employer, outside of the employee’s working hours ***unless*** the refusal is unreasonable; or
- a third party, if it is work related and outside of the employee’s working hours ***unless*** the refusal is unreasonable.

“**Monitor, read or respond**” will have a broad application and will likely capture all forms of communication.

The Right to Disconnect

What the “Right to Disconnect” is not?

The right to disconnect:

- **does not** prohibit employers from emailing or texting their employees;
- **does not** prohibit employers from calling their employees; and
- **does not** make it a criminal offence to contact their employees.

It is simply a right that an employee has to “ignore” communications from their employer or third parties (e.g. clients) outside of their working hours, provided that doing so is reasonable.



A Closer Look at RTD

Hours of work

What are the employee's "working hours"?

- Employees can only "ignore" contact or attempted contact if it is: *"outside of the employee's working hours"*
- The provision applies to **that** employee's working hours. It is employee specific.
- Comparing similar terms such as "ordinary hours of work", this arguably means that "working hours" is intended to capture hours beyond their "ordinary hours of work" (i.e. reasonable additional hours).
- Employers will likely need to have regard to their employees' contracts of employment and applicable modern award or enterprise agreement provisions.

Unreasonableness

What is “Unreasonable”?

- Unreasonableness will be different in each scenario and will be dependent on the facts of each circumstance.
- Factors that may be taken into account in determining if a refusal is unreasonable include:
 - the reason for the contact or attempted contact;
 - how the contact or attempted contact is made and the level of disruption the contact or attempted contact causes the employee;
 - 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 employee’s ordinary hours of work;
 - the nature of the employee’s role and the employee’s level of responsibility;
 - the employee’s personal circumstances (including family or caring responsibilities).

Disputes about the Right to Disconnect

What happens if there is a dispute between the parties?

- The dispute provisions will become operational when:
 - an employee has exercised the right to disconnect; and
 - the employer believes the refusal is unreasonable; or
 - the employer has asserted the refusal is unreasonable and the employee believes the refusal is not unreasonable.
 - there is any other dispute about the operation of the right to disconnect provisions.
- Employers and employees must first attempt to resolve the dispute between themselves in the first instance.
- If they cannot, a party can apply to the FWC to deal with the dispute.

Disputes about the Right to Disconnect

What can the FWC do with the dispute?

When the FWC receive a dispute, they have the power to:

- make an order preventing an employee from unreasonably refusing to monitor, read or respond to contact or attempted contact;
- make an order preventing an employer from continuing to require an employee to monitor, read or respond to contact or attempted contact;
- make an order preventing an employer from taking disciplinary action against the employee for refusing to monitor, read or respond to contact or attempted contact; and/or
- otherwise deal with the dispute (eg conciliation).

Potential Legal Risk

What are the legal risks of getting it wrong?



Employers should be taking steps to educate relevant management staff on these provisions to ensure these

1

- Penalties can be imposed where an RTD Order from the FWC is not complied with.
- Orders may be broad or specific to the circumstances depending on the matter.

2

- The right to disconnect is a workplace right within the meaning of the general protection provisions of the *Fair Work Act 2009* (Cth).
- For example, if an employee exercises the right to disconnect, and the employer disciplines the employee because the employee exercised that



RTD in Modern Awards

Modern Award Terms

The Right to Disconnect in Modern Awards

- Modern awards have now been varied to include right to disconnect provisions that supplement the provisions in the *Fair Work Act 2009* (Cth).
- Determinations for these variations were issued on 23 August 2024 with the FWC currently taking a “minimalist” approach.
- It is expected these provisions will be developed over time to suit the individual needs of the relevant industries of each award (and occupations for occupational awards).
- The awards provide that an employer must not directly or indirectly prevent an employee exercising their RTD.
- Some awards provide circumstances where conduct of an employer will not be considered to be preventing an employee exercising their RTD.

Modern Award Terms – Examples – Manufacturing Award

- Clause 17A.1 incorporates section 333M of the FW Act.
- Clause 17A.2 identifies when the section commences for small and non-small business employers

17A.3 An employer must not directly or indirectly prevent an employee from exercising their right to disconnect under the [Act](#).

17A.4 Clause 17A.3 does not prevent an employer from requiring an employee to monitor, read or respond to contact, or attempted contact, from the employer outside of the employee's working hours where:

- (a) the employee is being paid standing by time under clause 32.14; and
- (b) the employer's contact is to notify the employee that they are required to attend or perform work or give other notice about the stand by.

17A.5 Clause 17A.3 does not prevent an employer from contacting, or attempting to contact, an employee outside of the employee's working hours in circumstances including to notify them of a recall to work under clause 32.13 or 57.6.

Modern Award Terms – Examples – Clerks Award

- Clause 13A.1 incorporates section 333M of the FW Act.
- Clause 13A.2 identifies when the section commences for small and non-small business employers

13A.3 An employer must not directly or indirectly prevent an employee from exercising their right to disconnect under the [Act](#).

13A.4 Clause 13A.3 does not prevent an employer from contacting, or attempting to contact, an employee outside of working hours in circumstances including to notify them of a recall to work under clause 21.5.

Modern Award Terms – Examples – Health Professionals Award

- Clause 13A.1 incorporates section 333M of the FW Act.
- Clause 13A.2 identifies when the section commences for small and non-small business employers

13A.3 An employer must not directly or indirectly prevent an employee from exercising their right to disconnect under the [Act](#).

13A.4 Clause 13A.3 does not prevent an employer from requiring an employee to monitor, read or respond to contact, or attempted contact, from the employer outside of the employee's working hours where:

- (a) the employee is being paid the on-call allowance under clause 23.2(d); and
- (b) the employer's contact is to notify the employee that they are required to attend or perform work or give other notice about the on-call.

13A.5 Clause 13A.3 does not prevent an employer from contacting, or attempting to contact, an employee outside of the employee's working hours in circumstances including to notify them of:

- (a) an emergency roster change under clause 14.1(b); or
- (b) a recall to work under clause 25.6.



Practical Examples

Example – Manufacturing Award

Harry the Boilermaker

- Harry is a boilermaker for Materials R' Us Pty Ltd, a manufacturing business.
- Harry is a C10 employed on a full-time basis working 38 hours per week.
- Harry works four x eight-hour shifts (6am to 2:30pm with a break) Monday to Thursday and one x six-hour shift (6am to 12:30pm with a break) on Friday.
- Harry is paid at the C10 rate and receives overtime and penalty rates when payable.
- Harry has no parental responsibilities and lives approximately 10 minutes from work.
- His contract of employment states that he may be recalled to work and that reasonable additional hours are expected of him.

Example – Manufacturing Award

Harry the Boilermaker

- On Tuesday, Harry finishes his shift and goes home. He is later texted by his supervisor asking him to return to work to perform overtime.
- Harry refuses to respond to the text. His supervisor calls him up requiring him to come into work. Harry refuses to answer the call.
- The next day when Harry goes to work, his supervisor speaks with him and asks him to respond outside of hours and not to do that again.



Is Harry's refusal reasonable?

Factors for Consideration

What factors are relevant?

- Factors for determining what is reasonable includes:
 - the reason for the contact or attempted contact;
 - how the contact or attempted contact is made and the level of disruption the contact or attempted contact causes the employee;
 - 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 employee's ordinary hours of work;
 - the nature of the employee's role and the employee's level of responsibility;
 - the employee's personal circumstances (including family or caring responsibilities).



Practical Steps

Practical Steps - Communication

What can you do to mitigate risks?

- Forms of communication
 - Is the form of communication disruptive?
 - Are the current forms of contact reasonable?
 - Can they be challenged by employees?
- Reasons for communication
 - Is the reason for communication disruptive?
 - Is the reason for communication urgent? or can it wait?
 - How much of the employee's time will the contact take to read, monitor or respond?

Practical Steps - Education

What can you do to mitigate risks?

- Educate managers, team leaders or supervisors.
 - What are the new laws?
 - How do they operate?
 - When do they operate?
 - What does this mean for my direct reports?
 - What does it mean for me?
- Educate employees and set parameters.
 - What are the new laws?
 - When can I exercise my RTD?
 - When does the business expect me to respond?
- Provide practical guidance and examples that are applicable to the workplace

Practical Steps – Policies and Procedures

What can you do to mitigate risks?

- Draft a policy or policy position.
 - It should consider both managerial interests and employee interests.
 - Outline that employees are not required to respond to out of hours contact unless it is unreasonable to refuse.
 - Describe when refusal may be unreasonable. RTD doesn't mean this outright ability to refuse contact.
 - Detail why it is important to respond in specific employer related scenarios which may be prevalent to the business.
 - Create an avenue for employees to raise concerns internally so they don't feel that the first option for a resolution is the FWC.
- Provide training on the policy and ensure all parties understand its effect.

Practical Steps – Contracts of Employment

What can you do to mitigate risks?

- Review employment contracts to ensure they are compliant with applicable awards and meet your expectations on contact.
- Does the contract indicate out of hours work may be required?
- Does the contract provide for overtime, loadings, penalties etc. for additional work?
- Does the contract explicitly call out a span of hours?
- Is there an applicable industrial instrument which prescribes these items? If so, is the contract inconsistent with those respective provisions?
- Does the contract (and/or position description) require updating to reflect the employer's intentions?

Practical Steps – Third Parties and the Workforce

What can you do to mitigate risks?

- Assess how contact with third parties is made with employees.
- Identify if it is out of hours and if so, why?
- Is it only applicable to specific employees or is it organisation wide?
- Determine how you will set parameters for third parties.
- This will likely be the most employer specific step given engagement with third parties varies so much.
- Identify if the workforce is spread across multiple or continuous roster patterns.
- Does the workforce work in differing time zones?

Practical Steps – Technology

What can you do to mitigate risks?

- How can you use technology for the better?
- Can you implement the use of delayed messages?
- Can messages be sent when an employee commences work?
- Can you identify an employee's working hours in their signature?
- Can you make it clear when sending correspondence that a response is not immediately required?
- Are there “apps” that will provide relevant information while limiting disruption?



QUESTIONS

Questions

Questions from Registration

- Do small businesses or NFPs /charities have different obligations?
- How does this legislation cover staff with employment contracts for Mon to Friday day shift roles stating that wage is "inclusive of any additional hours, out of hours, weekends nights, public holidays" etc ?
- Does the right to disconnect apply in reverse - does the employer also have the right to opt not to answer calls from employees out of hours?
- Does size of the company or service of the company matter?

Questions

Questions from Registration

- 24/7 Security business where works are requested - how do you define the right to disconnect? As a Company we are mindful of contacting our staff for works, however, when an emergency is upon us, we are required to contact a staff member. Where does this leave us moving forward?
- How does "right to disconnect" impact on employment contracts of "salaried" employees?
- As a small business the law comes into effect for us in August this year. What policies/procedures do we need in place (any alterations to current employee/subcontractor agreements?) before then?
- Is it acceptable to send a request via email or leave a message before/after standard business hours which the employee can answer or action when they are working next, ie the expectations is not for them to action immediately, it is just that I happen to be working through my tasks outside business hours?

Questions

Questions from Registration




- How can this apply and be monitored for real estate industry which works 7 days per week and can be before/after hours calls - both for sales and property management?
- How to break the habits of a culture where it is okay to contact employees on their non contracted work day?
- How proactive do we need to be about this, if there aren't any issues at the moment (managers rarely contact employees after hours) do we need to do anything?
- What would be some examples of 'reasonable' out-of-hours contact and managing this right well?

Questions

Questions from Registration

- How do the new regulations affect technicians who are on-call via a on-call roster?
- Our staff are employed under the Fitness Industry Award and are all casual. They are currently on call for extra shifts, how does this now affect that arrangement?
- Right to disconnect: how does that compare to a role that's critical to the organisation for customer satisfaction.
- Is there any chance this legislation will be repealed or modified if there is a change of government?

How we can help

-  Preparation of policies, contracts and associated toolkits
-  Drafting and reviewing correspondence & responses
-  Representation at Fair Work Commission proceedings
-  Training your staff, management training
-  Subscribe to ABLA updates at ablawyers.com.au/subscribe
-  For legal assistance email info@ablawyers.com.au or call **1300 565 846**



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