Federal Post

The Right to Disconnect and More: Final *Federal Post* of 2018

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In this smartphone and email-intensive world, should there be a “right to disconnect”?

In our final *Federal Post* of 2018, George Vuicic looks at this question, which was discussed in the federal government’s recent report on modernizing federal labour standards.

Find out what’s happening on the legislative front. Kim Pepper reviews new legislation requiring the development of a federal framework for post-traumatic stress disorder experienced by first responders. Also discussed is the progress of Bill C-86 which, if passed, will result in significant federal workplace reforms.

Finally, we look at a recent decision of the Occupational Health and Safety Tribunal Canada which delves into the question of who is a “competent person” for the purposes of conducting a workplace violence investigation.

We wish you all a happy holiday season.

Jodi Gallagher Healy, Editor

The Challenges of Employees’ Right to Disconnect

The notion of an employee “right to disconnect” came to the forefront in 2017, when France passed what is known as the El Khomri Law, in the wake of a 2004 French Supreme Court decision that ruled that “the fact that [the employee] was not reachable on his cell phone outside working hours cannot be considered as misconduct.”

Now the idea is making headlines in Canada, as the federal government discussed the right to disconnect in its report, “What We Heard: Modernizing Federal Labour Standards” regarding its proposed overhaul of the *Canada Labour Code* (Code). The government indicated that the issue of the right to disconnect warrants further study. Note that other proposals in the report have recently been tabled as part of Bill C-86, the *Budget Implementation Act, 2018, No. 2*.

(a) Right to Disconnect Legislation Elsewhere

In France, companies with more than 50 employees are already required to conduct a Mandatory

Annual Negotiation with employees to discuss gender equality and quality of life at work. The El Khomri Law adds a requirement that employers negotiate when employees can disconnect from digital tools. Companies can choose the most practical way to implement the law in their workplaces, given variations such as working with clients in different time zones, and night or shift work.

Italy and the Philippines enshrined the concept into law in 2017 and 2018. Employees now have the right to disregard after-hours work communications without facing discipline.

New York State is considering legislation making it illegal to contact off-duty workers.

In March 2018, a private member's bill was introduced in Quebec that would require employers to adopt an after-hours disconnection policy, although the Bill died when the legislature adjourned for the recent provincial election.

While Germany entrenched the right to disconnect into law, many German companies (including Volkswagen, Allianz, Telekom, Bayer and Henkel) have policies limiting employees' digital connection after work hours, sometimes stopping email servers between specific hours.

(b) Is Legislation Necessary?

While the Code only applies to federal employees – a small portion of the Canadian workforce – the key question raised by the proposed amendments is whether including the right to disconnect in legislation is desirable or even necessary.

Ninety-three per cent of those who responded during the consultation process stated that employees should have the right to refuse to respond to work-related communications received outside of working hours, and 79 per cent called for company policies addressing this issue.

Respondents also noted, however, that the workplace must adapt to the interconnectedness in the current economy. They also noted that work has evolved away from the traditional "9 to 5" model, since operational needs do not necessarily stop at the end of regular working hours, and that employees who respond to communications outside of working hours are generally managers who are paid accordingly.

Others have argued that legislation already governs the main elements relating to employees' ability to disconnect from work, such as hours of work, overtime, rest periods between work shifts, vacation time and leaves of absence.

Critics of France's law argue it is difficult to enforce, since it does not contain any penalties.

An outright ban on responding to emails during specific time periods could undermine flexible work

arrangements, and could even discourage employers from negotiating these arrangements with employees at all. Employees themselves might break such a law while catching up on email after returning from a vacation, or putting in more hours during a particularly busy day.

Any attempt to legislate a right to disconnect in Canada would undoubtedly face similar challenges. Addressing the issue via company policies may be more realistic and practical. An after-hours policy could clarify employers' expectations but still let employees choose when, and from where, to complete their work. This would encourage a work environment where employees do not feel expected to respond outside of work hours, but still have the flexibility to do so if they so choose.

As noted above, we will monitor for any new legislation tabled and will provide updates as they become available.

Legislative Update

1.

Federal Legislation Pertaining to PTSD Now In Force

On June 21, 2018, Bill C-211, the *Federal Framework on Post-Traumatic Stress Disorder Act* (Act) a Private Member's bill, received Royal Assent and is now in force.

The preamble to the Act expressly recognizes that there is a need for both provincially and federally regulated first responders such as "firefighters, military personnel, corrections officers and members of the RCMP" to receive timely access to resources in order to address post-traumatic stress disorder. The preamble also recognizes that although there are both government and not-for-profit resources available to address mental health issues, there is currently no consolidated national strategy in place which would, among other things, ensure "long term solutions."

The Act requires the Federal Minister of Health to "convene a conference" with certain other Federal Ministers, representatives of provincial and territorial governments, and stakeholders such as representatives of the medical community and patients' groups. The Minister is required to convene this conference on or before June 20, 2019.

The purpose of the conference is to develop a national framework which would address:

a. improved tracking of the incidence rate and associated economic and social costs of PTSD;
b. the establishment of guidelines for the diagnosis and treatment of PTSD and the sharing of best practices relating to the diagnosis and treatment of PTSD;
c. the creation and distribution of "standardized" educational materials related to PTSD for distribution by Canadian public health care providers.

On or before December 20, 2019 the Minister is required to submit a report setting out the federal framework to each House of Parliament and publish a copy of the report on the Public Health Agency of Canada's website.

The Public Health Agency is then required to conduct a review of the effectiveness of the federal framework within five years after the day on which the report is published.

This legislation is part of a continuing trend at both the federal and provincial levels, of governments paying close attention to issues of acute mental stress in the workplace. Whether a federal framework will, in fact, result from this legislation and the contents of any such framework remains to be seen.

2.

Progress of Bill C-86, *Budget Implementation Act, 2018, No. 2*

In our *Federal Post* of November 2, 2018, Federal Government Proposes Significant Workplace Law Reforms, we provided a detailed summary of the proposed changes to the *Canada Labour Code* and the introduction of a federal pay equity scheme.

As of December 5, 2018, Bill C-86 had received Second Reading in the Senate and was referred to the Standing Senate Committee on National Finance. We will continue to monitor the progress of the Bill through the legislative process and provide updates as the become available.

Appointing a "Competent Person" to Conduct Workplace Violence Investigations

An Appeals Officer of the Occupational Health and Safety Tribunal Canada recently upheld the direction of a Ministerial delegate that a federal government employer must retain an external investigator to conduct a workplace violence investigation, rather than using a federal government employee trained in doing investigations.

In *Employment and Social Development Canada v. Canada Employment and Immigration Union*, the Appeals Officer considered Part XX, Violence Prevention in the Workplace of the *Canadian Occupational Health and Safety Regulations* made under the *Canada Labour Code* and the requirement that an employer appoint a "competent person" to investigate the allegation of workplace violence where a matter is unresolved. "Competent person" is defined as a person who: (a) is impartial and is seen by the parties to be impartial; (b) has knowledge, training and experience in issues relating to work place violence; and (c) has knowledge of relevant legislation (section 20.9(1) of the *Regulations*).

The Appeals Officer found the complainant had genuine concerns regarding the impartiality of an investigator who was a government employee, as had been proposed by the employer. She stated that “there must be agreement among the parties involved on the impartiality of the person selected for the investigation, so that this person can serve as a competent person in the meaning of the *Regulations*. […] [I]t is sufficient for one of the parties involved to not consider the person proposed to conduct the investigation to be impartial for that person to not be able to serve under the terms of subsection 20.9(3).”

By failing to obtain the agreement of the parties, the employer breached paragraph 20.9(1)(a) of the *Regulations* “as the obligation to appoint a person considered by all parties to be sufficiently impartial to investigate was not fulfilled.” The direction of the Ministerial delegate that an external investigator be appointed was upheld.

Given this decision, employers should review and take seriously concerns raised by either a complainant or a respondent to an investigation regarding the impartiality of a proposed investigator.
