



# What could a new right to switch off entail for employers?



In their plan to “Make Work Pay”, the government promised to bring in a “right to switch off” to combat workplace presenteeism. How might this new right work in practice and how can employers plan for it?

## What do we know so far?

**We don’t have full details yet, but in their plan, the government indicates that:**

- The right will be tailored by each employer, through consultation with their workforce; and
- The right shall be included in workplace policies and/or contractual terms.

**Further details have been reported in the UK press including:**

**A planned code of practice:** Reportedly the right will be implemented via a non-statutory code of practice that workers and employers agree to, which will set out minimum standards for the operation of the right.

**Not a “one size fits all” and approach:**

With the government emphasising that it will not adopt a “one size fits all” approach, the onus will be on employers to create and agree “switch off” policies (including defining contact hours) and/or contractual terms with their workers.

**Restrictions on out-of-hours contact:**

Reportedly the right will restrict employers from contacting their workers outside of normal working hours, perhaps only allowing for out-of-hours contact occasionally or in specified circumstances.

**Compensation uplift at tribunal:** Although it seems that a freestanding litigation claim for breach of the right is unlikely to be introduced, repeated out-of-hours contact by employers may be considered as an aggravating factor in other employment rights claims and may entitle workers to substantial compensation uplifts.



# Lessons from Ireland and Belgium

In their plan, the government mentions an intention to follow models already in place in Ireland and Belgium.

Ireland has a non-statutory Code of Practice for its “right to disconnect” which outlines best practice guidance and the respective obligations for employers and employees. The Irish Code is broad and provides employers with substantial flexibility in creating bespoke policies that fit their business. Responsibility is also placed on managers in ensuring the Irish right is adhered to.

Failure to follow the Irish Code, however, is not an offence. There is no freestanding claim or any sort of financial sanction for non-compliance, although the Irish Code may be used in evidence in other employment rights claims.

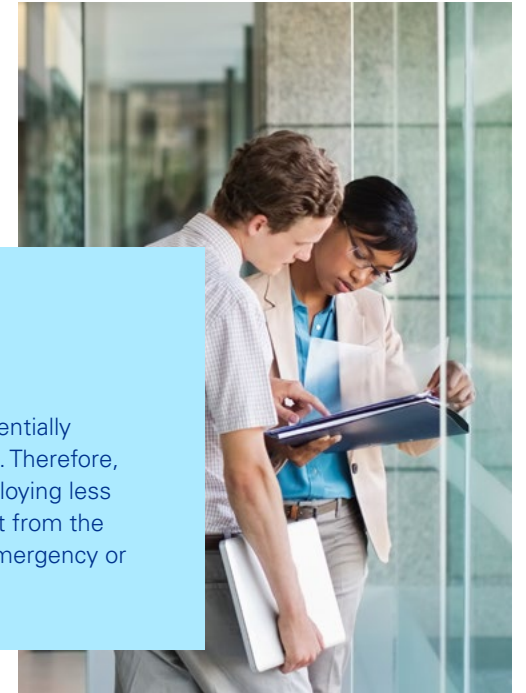
For this reason, Ireland’s model lacks teeth; since being introduced, there has not been a notable change in how and when employers communicate with staff. The most frequent use of the Irish Code in a litigation context is a tag on to other claims, typically in the context of annual leave. Non-compliance with the Irish right has been challenged either because employees have been bothered during their holiday or their refusal to stay in touch with work during leave has impacted them negatively; for example, by missing out on career progression application deadlines.

Belgium, on the other hand, has enacted its “right to disconnect” via legislation. Employers with 20 or more employees are obliged to include this right in a collective bargaining agreement (CBA) or via their work rules. This includes detailing practical arrangements to implement the right.

Like Ireland, there is no specific sanction for breach of the Belgian right, however, any breach may be considered when examining an employer’s compliance with general workplace wellbeing obligations toward their employees, and failure to comply may lead to sanctions for non-compliant employers.

## Who may be exempt from the new Right in the UK?

The government is reportedly aware of a potentially disproportionate impact on small businesses. Therefore, as in Belgium, it may be that employers employing less than a certain number of workers are exempt from the application of the right. It may also be that emergency or critical services receive exemptions.





# What should employers start thinking about?

**At this stage, the government has not articulated what the right may entail nor is its potential impact understood. However, employers should consider:**

- What a “switch off” policy may look like for their business, e.g. what would the contact hours be? Would these differ among different populations?
- Who will be responsible for implementing and enforcing the policy?
- Will there be a specific grievance procedure to deal with breach of the policy?
- How will they consult with staff to agree the policy?

- Does the workplace or team culture promote a culture of presenteeism; if so, what are the drivers for this?
- How will they monitor compliance and ensure that repeated breaches of the right are prevented or disciplined?
- How might they ensure that workers are not penalised or disadvantaged for utilising the right during periods of leave such as annual leave.
- What training should be made available to ensure managers adequately comply and enforce the right?

If you have any questions on the new right to switch off, please get in touch. Our team of employment lawyers will be happy to assist.

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