

Opinion

Beware of performative policymaking

EMPLOYMENT

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If anything can be said to be trendy in the world of employment law, it is probably the “right to disconnect”.

France, Belgium, Spain, Portugal, Italy, Luxembourg, Colombia, Peru, Argentina, Costa Rica and Thailand have all brought in new rules over the past six years which, broadly speaking, give employees the right to disconnect from work technology out of hours. If it wins the next election, the UK’s Labour party has said it will introduce a right to disconnect too, “learning from countries where it has been introduced successfully”.

It’s easy to see why the idea appeals to politicians. It makes them seem forward-thinking – that they are on top of the changing world of work and have

something to say about it. It also speaks to a real unease that many people feel about the dissolving boundaries between work and life.

The idea tends to poll pretty well, too. An Ipsos poll in the UK last year found 60 per cent of adults in favour of “a law giving employees the right to ignore work-related communication outside of their official working or on-call hours” and only 11 per cent against. That poll also suggested the problem of not being able to switch off is not confined to highly paid professionals, though it is felt most acutely by them. Just over 80 per cent of people paid over £55,000 a year said they check and reply to work messages outside their usual hours, as did 65 per cent of people paid less than £55,000 a year.

It’s equally easy to see why critics have predicted the laws will be a disaster, particularly the more draconian ones such as Portugal’s, which bans employers from contacting employees out of hours.

These policies pay no regard to the reality of how modern companies work, they say. Employees in different time-

zones have different working hours – are they no longer allowed to communicate? What about people who want to choose their own hours on the fly, taking time off to pick up their kids, or going for a run in the daylight, then catching up later in the evening? Are we really going to tie companies and workers up in expensive red tape rather than just let them figure it out for themselves?

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But for all the debate whenever one of these new rights is announced, something has always bothered me: why do we never hear how they’re actually going?

The answer, from what I can tell, is that they have had less impact than proponents hoped or critics feared. In Ireland, Síobhra Rush, an employment partner at Lewis Silkin in Dublin, says

the country’s “code of practice” on the right to disconnect caused “a big furore” when it began in 2021. But she hasn’t actually seen it feature in any employment cases.

The biggest change in working culture she has seen is new disclaimers at the bottom of people’s emails which say something like “I’m sending this in my working hours, but unless it’s flagged as urgent, I don’t expect a response outside of yours.”

Perhaps that’s to be expected in Ireland, which took a softly-softly approach, but the story seems to be similar in Portugal, which was at the other end of the spectrum. Inês Reis, the head of labour and employment at Portuguese law firm pbb, tells me “nothing has really changed” as a result of the law. She doesn’t know of any complaints so far, though she says that – as in Ireland – employees are adding disclaimers to their emails explaining they don’t expect an urgent response.

Nadia D’Agostino, a principal associate at Eversheds Sutherland, agrees the law in Portugal “has not created a big cultural shift”. She says there isn’t much

impetus for employers to comply, because the fines are relatively low, nor is there much incentive for employees to report them.

“It’s a difficult claim to bring,” D’Agostino says. “There are no automatic financial rewards you would get; you’d have to bring a damages claim [so] it’s easier for the employees to do the work and bring overtime claims.”

Was it a waste of time, then? I wouldn’t go that far. The new rights and codes do seem to have prompted employers and employees to be more thoughtful about when to communicate outside core working hours. Many of the European laws require companies and workers to agree on a policy that works for them, which seems reasonable enough given the complexities of different organisations.

But there is a lesson for voters: don’t fall for performative policymaking. Whether the proposed law sounds good, it’s worth asking first how it will be enforced.

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