Legal Update Article

Will Construction Employees Enjoy the 'Right to Disconnect'?

By Charles T. Jeremiah & Nathaniel J. Higgins

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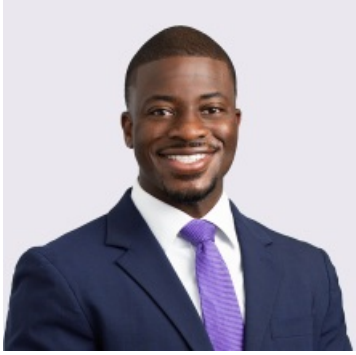
Meet the Authors

Charles T. Jeremiah

(Chuck)
Principal
Charles.Jeremiah@jacksonlewis.com



Nathaniel J. Higgins

Associate
832-900-5525
Nathaniel.Higgins@jacksonlewis.com

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Cell phone communications, emails, and texts have been around for decades. According to JB Knowledge's 2020 Construction Technology Report, 93 percent of construction industry workers use smartphones for work purposes. Notwithstanding the incredible benefits of immediate contact and transfer of information to personal and business communication, these capabilities inevitably affect many construction workers personally in how well they can separate work life from personal life and, thus, their overall quality of life.

The specific effect depends on many factors, including the nature of the construction work, the nature and frequency of the communications, the degree of interruption in their personal life, and the consequences, actual or perceived, in avoiding contact during off-work hours. Additionally, there are some occupations, such as construction supervisors, forepersons, and safety managers, where such after-hour work might be expected, and desired, by both employer and employee. To be sure, unforeseen project-related events requiring the attention of skilled personnel in real time are an escapable part of the construction industry. On average, construction professionals are typically putting in more than 10 hours a day, with harsh weather conditions and high-pressure deadlines. Accordingly, communication often at off-schedule hours is critical to the industry yet threatens to overstress a workforce already spread thin.

Expressed concerns over workers led to discussion that, in some parts of the world, has led to consensus. For example, in France, the sentiment became codified as law. Others were not quick to follow, at least to the same degree. In certain other European countries, Canada, and Mexico, similar protections have gotten traction in more recent years.

California is the first U.S. state to see a bill proposed. California Assembly Bill 2751 was proposed this past legislative session and much debated. The bill was met with significant opposition, including arguments that the one-size-fits-all approach made the bill overly broad and limited employers' autonomy to establish effective workplace cultures. For now, the bill has been shelved.

Whether a law is necessary to address concerns is questionable. Many states would hesitate to dictate how and when an employer can communicate with its employees. One can imagine scenarios where a need for employee-employer communication is crucial. For example, an unexpected safety or operational issue in the workplace requiring attention at, or avoidance of, that location.

Employees without contractual obligations (at-will) simply have the right to leave. If an employer imposes oppressive obligations inconsistent with expectations, then the free market of labor should correct. Moreover, employers must comply with their obligations to pay compensable time, so time contacting and communicating with employees

during off-work hours could be on-the-clock and require payment of wages or overtime. The necessity of off-schedule contact with construction employees regarding unpredictable project developments render this a concern for employment law compliance in the industry.

Crafting laws to account for all concerns is and will remain challenging and difficult, at best. Here are some examples:

- In 2017, the French government adopted a labor law that included the right to disconnect. Employees do not have to take calls or read work-related emails during their time off. While officially adopted in 2017, the right to disconnect in France dates to 2004, when a court found an employee's failure to answer his work phone outside of his regular hours of employment was not a valid reason to fire him. In light of the rise in telework, France's Labor Code requires telework arrangements to specify when an employer can expect to be able to reach an employee. Other European countries, including Italy and Belgium, have enacted similar, but less stringent, measures.

- In 2022, the Canadian Province of Ontario began requiring provincially regulated employers with at least 25 employees to have a written policy on employees disconnecting from work. Ontario's Employment Standards Act (ESA) defined "disconnecting from work" as not engaging in work-related communications, including emails, telephone calls, video calls, or sending or reviewing other messages, to be free from the performance of work. However, the ESA does not require employers to create a specific new right for employees to disconnect from work and be free from their obligations to engage in work-related communications in the employer's policies. The Canadian government has considered a similar measure for federally regulated employees in its 2024 budget, which would affect 500,000 workers across various industries.

- On Jan. 12, 2021, the right to disconnect became an employment right in Mexico for telework employees. Mexico's right to disconnect includes disconnecting from digital devices and communications during off-hours, agreed-upon working hours, or leaves of absences (e.g., maternity and illness), and other applicable situations. Like France's, Mexico's right to disconnect permits teleworking employees to not be contacted, and these employees have no obligation to be available during off hours. Despite these regulatory obligations, Mexico's provisions do not provide clear parameters or direction to employers on implementing these obligations. Thus, employers have discretion in implementing measures to achieve the right to disconnect.

- As proposed, California Assembly Bill 2751 would require employers to establish policies providing employees the right to ignore communications outside of work hours, except for in an emergency or scheduling. Backers of the bill argued that it would help maintain boundaries between work and personal life, which some have found to be increasingly blurred with the rise of smartphones and telework. Opponents to the bill assert that it would be a step back in flexibility, impose a rigid work schedule, and run counter to the work culture of Silicon Valley.

Fashioning a right to disconnect as law inherently requires flexibility and the

incorporation of exceptions and nuances, at least in certain sectors. That is where the debate is centered. Balancing employers' need for communication and workers' wellbeing will be particularly challenging in the construction context.

Although there is no law yet giving a right to disconnect on the books, U.S. construction employers should ensure their policies on device use, particularly in remote work arrangements, are clear, up to date, and fully compliant with Fair Labor Standards Act and state wage requirements. Jackson Lewis attorneys will continue to monitor these developing laws and can provide assistance on any related inquiries.