

THE **SABPP**™

# FACT SHEET

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## A RIGHT TO DISCONNECT





# Introduction

In this Fact Sheet we will explore a right to disconnect or disengage from work after hours. We first will consider global examples of legislating and realising this right. We will contextualise these examples and consider some of the relevant global policy and legislative trends. Thereafter, the Fact Sheet explores what it means for the South African context where there is no explicit defined right as such. Here, the Fact Sheet will focus on expectations and the interpretation of flexibility and control. This is the interpretation of flexibility and control in relation to legislation and employer and management discretion and their exercise of control.

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INTRODUCTION

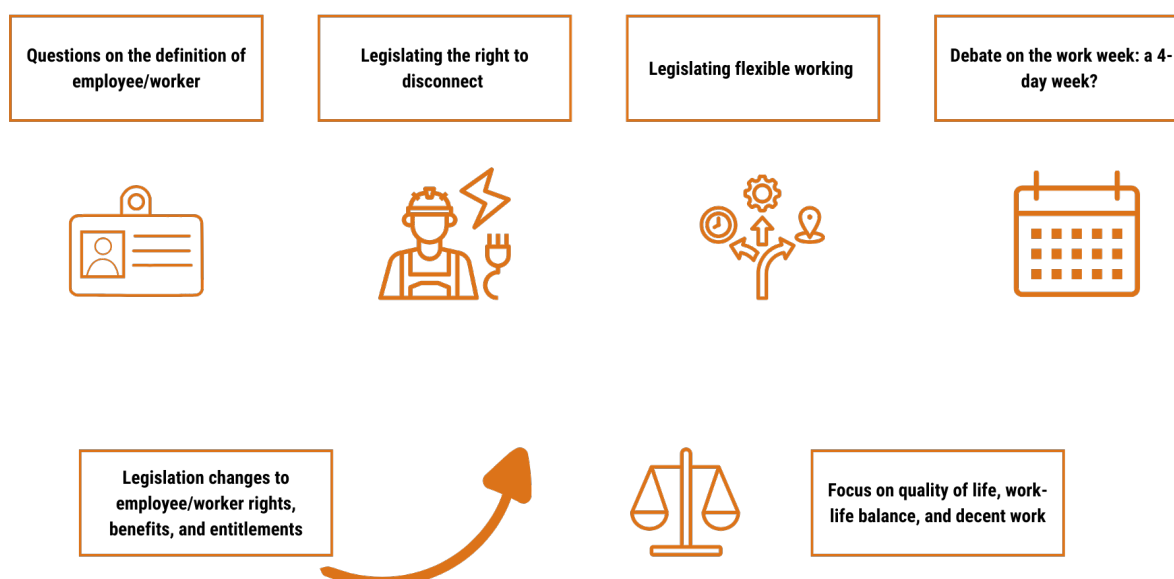
GLOBAL POLICY AND LEGISLATION TRENDS

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CONCLUSION



# Global policy and legislation trends



Source: Author

In the **February 2021 Fact Sheet** we explored the debates on the definitions of employees, workers, and independent contractors as well as the status of platform or gig workers. The debates on these definitions within legislation and organisations are continuing and remain contested. The International Labour Organisation (ILO) provides countries non-binding guidance on defining an employee. For example, it provides indicators of an employment relationship as listed in the footnote below<sup>2</sup>. In South Africa, the instance of these indicators can be seen in the Labour Relations Act which provides various tests for determining who can be defined as an employee. These include the control test, organisation or integration test, economic reality test and dominant impression test. However, these tests do not always provide clear-cut answers. This is especially the case with the changing world of work, which challenges the boundaries and legal tests of the nature of the employment relationship. For example, the place of work and hours of work may not always help to determine the nature of the employment relationship given the possibility of remote work and flexible work arrangements and hours. Flexible working arrangements, hours and conditions means the employment relationship and the nature and exercise of control is negotiated. In the case of platform workers, such as ride-hailing platforms (for example, Uber), there are contestations regarding the control and integration tests as discussed in the February 2021 Fact Sheet.

As the debates on the definition of employees and workers continues so does the debates on the set of employee and worker rights and entitlements. In the UK we see the recent review of their employment rights bill undertaken by the respective government. The reviewed bill sets out changes to worker's rights and entitlements regarding unfair dismissal, parental rights, zero-hour contracts, prevention of harassment, equality at work, and flexible working<sup>3</sup>. On flexible working, the CIPD's PM Editorial notes that the reviewed bill "aims to make flexible working the "default" for all employees from day one, meaning employers can only refuse an employee the right to work flexibly if they can prove it is unreasonable."<sup>4</sup> "The valid reasons that employers could cite include "the burden of additional costs, a detrimental effect on ability to meet customer demand, an inability to re-organise work among existing staff or recruit additional staff, and a detrimental effect on quality or performance." The burden to provide valid reasons is on the employer and employer representatives, which also means that flexible working cannot be arbitrary, last-minute, or subject to the whims of the employer or employer representatives. It needs to be negotiated in a considered, open and rational manner, and it needs to be fair, transparent and reasonable for all parties.

2. "[a] the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;

(b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker" (ILO, 2015)

<https://www.ilo.org/resource/42-who-employee>

3. See the CIPD article on these: **11 things HR needs to know about the employment rights bill**

4. **11 things HR needs to know about the employment rights bill**

European countries – such as France, Belgium, Portugal, Spain, Ireland, Italy – and other countries such as Philippines, Kenya and Australia have legislated the employees' right to disconnect from work outside of working hours with certain qualifiers <sup>5</sup>. This is to address working conditions, excessive expectations regarding employee availability by employers and employees, and work-life balance in the contemporary workplace. Concerns have been raised regarding the unofficial increase in working hours and the negative impacts of technology, such as the blurring of lines or boundaries between work and personal spaces and lives. Thus, we see growing concern regarding employee rights and their assertion thereof, their wellbeing and their quality-of-life. There are reports of increasing burnout and mental disorders such as depression and anxiety disorders as well as physical impacts such as disrupted or poor sleep, repetitive strain injuries and other muscular and postural issues. There are also reports of increased risk of strokes and heart disease. <sup>6</sup>

One of the key questions raised is the actual enactment and enforcement of the legislated right. This may not be clear. There are many questions such as the following: Where is the burden placed for the enactment of the right? Is it the employer, employee or both? How do they enact the right? What are the organisational policies, systems, and procedures required to enact the right? How does the organisation navigate flexible working arrangements and the right to disconnect? If the burden is placed on the employee, then are they empowered and have the autonomy to realise the right? Would they experience negative consequences in their relationship with their manager, their performance evaluation, or their career development and trajectory when taking up their right? Would they feel pressured not to exercise their right? What sanctions should organisations face for negating this right? How should organisations enable or facilitate the realisation of the right? These many questions again point to the need for negotiations between the employer, managers and employees. As noted previously, these negotiations need to be done in a considered, open and rational manner, and it needs to be fair, transparent and reasonable for all parties. In these negotiations the stakeholders need to clarify what flexibility, autonomy, operational requirements, and availability mean.

We can note that disconnecting or disengaging from digital devices, particularly emails and messaging platforms, is not new. For example, corporates, such as Volkswagen in 2011, undertook the limitations of emails after hours for certain segments of workers <sup>7</sup>. Also, we should not view the right to disconnect or disengage from a narrow lens. Taking a broader outlook, we can consider the ILO's continued focus on decent work and a human-centred agenda for the future of decent work. See the [May 2020 Fact Sheet](#) for more information on the ILO's policy work on decent work wherein South African stakeholders participated. Thus, we should consider the right to disconnect or disengage within the broader debate on decent work and quality of life.

Along with these global policy and legislation trends, we note the experimentation with the 4-day work week globally and in South Africa. Although at first it appears to mean a shorter 4-day work week from Monday to Thursday, the 4-day work week is actually a reference to flexible working hours. This flexibility is structured in alignment with the organisation's context, strategy, operating model and operational requirements. Pilot studies has been conducted across various countries by the organisation advocating the flexible model, namely, 4 Day Week Global. The results of the first South African pilot study can be found here: <https://4dayweek.co.za/2024/09/30/download-our-south-africa-pilot-results-report/>

As we consider these policy and legislative shifts, we need to also pay attention to the political parties, governments, and the leadership of multilateral institutions leading these. This is in the context of the recent elections abroad and the concerns raised regarding rising nationalist, conservative, and right-leaning governments. This we will explore in the next Fact Sheet on the shifting landscape of 2025. This shifting landscape may see increasing contestations regarding critical social, economic, and political issues. This includes the green transition in energy and industries as well as the just transition programmes. See the [May 2020 Fact Sheet](#) on the just transition.

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5. <https://www.cnbc.com/2024/08/27/these-countries-grant-workers-the-right-to-ignore-bosses-after-work.html>;  
<https://www.cliffedekkerhofmeyr.com/news/publications/2024/Practice/Employment/employment-law-alert-25-March-the-right-to-disconnect-from-work-related-communications-outside-of-working-hours->

6. <https://www.who.int/news/item/17-05-2021-long-working-hours-increasing-deaths-from-heart-disease-and-stroke-who-ilo>

7. <https://www.theguardian.com/money/2021/jun/29/it-just-doesnt-stop-do-we-need-a-new-law-to-ban-out-of-hours-emails>

## South African context

In the South Africa we have a set of legislation that speaks to working conditions, conditions of employment, worker and employer rights, and economic and employment equity as well as security in terms of job and unemployment security. This includes the following:

- Labour Relations Act
- Basic Conditions of Employment Act
- Skills Development Act
- Occupational Health and Safety Act
- Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA)
- Mine Health and Safety Act
- Unemployment Insurance Act
- Employment Equity Act

The further development or elaboration of these – including through policy, regulations, and good practice guidelines – will be influenced by the above global trends. As noted in an article:



“While South Africa’s Basic Conditions of Employment Act 75 of 1997 (BCEA) and Labour Relations Act 66 of 1995 do not provide for the right to disconnect, it is evident that international trends and developments may soon necessitate its integration into South Africa’s legal framework.

In anticipation of this shift, South African employers can take proactive steps [to] implement policies that delineate expectations regarding communication outside of working hours, including contact by third parties such as customers” (CDH, 2024).<sup>8</sup>

As Vlok (CWM, 2024) notes, “there is no specific law in South Africa granting employees the “right to disconnect” outside of normal working hours”<sup>9</sup>. These hours are regulated by the Basic Conditions of Employment Act 75 of 1997 (BCEA). Vlok adds:



“Whilst employees earning below the threshold (R 254,371.67 annually at present) may only be required to work a limited number of hours per week and are entitled to overtime in terms of the BCEA, this does not apply to employees earning above the threshold”.

“Some jobs inherently require availability after hours, but that is most certainly not the case with all jobs. Employers should be reasonable and encourage work-life balance to prevent poor staff retention, burnout, grievances, and reduced productivity. International trends may lead to the introduction of “a right to disconnect” in South Africa in the future and employers should be mindful of that when determining workplace demands.”

Another article notes that for employees earning above the earning threshold, “flexibility regarding work hours often depends on the nature of the job and employers’ operational requirements” (*italics added*, CDH, 2024).<sup>10</sup>

We need to interrogate what this flexibility regarding working hours means. This includes the unofficial or unspoken assumptions and expectations of employers and employees regarding working hours, availability thereafter and the nature of availability. Here, we need to also consider discussions regarding the unofficial increase in, and intensity of, working hours during and post the COVID pandemic. That is, the quantitative and qualitative changes in working time and the experience thereof. See the **March 2022 Fact Sheet** for further information on this.

8. <https://www.cliffedekkerhofmeyr.com/news/publications/2024/Practice/Employment/employment-law-alert-25-March-the-right-to-disconnect-from-work-related-communications-outside-of-working-hours->

9. Jeanette Vlok, Cowan-Harper-Madikizela, 2024, personal communication.

10. <https://www.cliffedekkerhofmeyr.com/news/media/2024/Employment/the-right-to-disconnect-from-work-related-communications>

This examination of what flexibility entails needs to be done by the stakeholders themselves. Employers, employees, and their representatives need to explicitly negotiate, agree, and stipulate what the flexibility entails. This is not suggesting a rigid formulation, but rather proactive steps to ensure transparency, fairness, reasonableness, and equity when defining operational requirements, employment contracts and the exercise of control. And to ensure the interests and sustainability of employees and organisations are both served. It provides guiderails against employers and employer representatives' arbitrariness, unreasonableness, and whimsy as well as that from the side of the employee in terms of their reasonable availability and flexibility. It needs to ensure that issues with management capabilities and competence are not veiled by the recourse to operational requirements, and that 'emergencies', 'urgencies', or 'crises' are not the result of poor management. At the same time, there needs to be guidelines and structure to ensure that flexibility is not subject to the whim of individual employees and that they function at their compensated level and in accordance with the contracted key performance areas and indicators. These key performance areas and indicators need to be negotiated between managers and employees, and these need to be reasonable, realistic and achievable.

The proactive steps regarding flexibility require the examination of the organisation's culture as well as the leadership and management capabilities along with what is rewarded and recognised in the organisation. This requires that organisations have a clear people philosophy, strategy and agenda; a clear employment value proposition; a clear sense of the organisational culture required; and a coherent people management architecture and platforms to deliver and monitor and evaluate the value proposition <sup>11</sup>. This includes a coherent set of organisational design and development interventions as well as change management, and the capabilities to deliver on these. As well as change management, and the capabilities to deliver on these. Refer to the People Practices and Governance Standard and System Model, which will be available to SABPP members as a complimentary member value.

As organisations negotiate their people philosophy, strategy and agenda, they need to consider the shifts in the evolving world of work. The table below provides some examples.

Traditional world of work	Evolving or new world of work
Control of employees and their work and services	An employment value proposition that includes flexible work arrangements, conditions, and hours; focus on empowering employees and giving them voice and agency; providing flexibility to address and foster diversity and inclusion; developments in distributed work and teams; and the evolution of internal talent marketplaces.
Singular career directed by the organisation	Skilling for current and future roles; focus on portfolio careers rather than singular careers with changes in jobs and skills; evolution of internal talent marketplaces; and the allowance of side hustles and gig work along with (and subsidising) primary employment.
Control of tools, use thereof, and hours of use by organisations	Negotiation of flexible working arrangements and hours; addressing the "always on" culture; providing discretion to define flexible core or focus hours; demarcating downtime including dedicated time allocated to wellbeing; the limitations on communications after hours; and weekends free of formal communication (such as emails).

Further web resources



- Why remote employees should have the right to disconnect after working hours
- 0\_bltr april - what the right to disconnect means in sa.pdf
- Unplugged: Should South African Employees Have the Right to Disconnect After Hours? - LabourNet

11. See the People Practices and Governance System Model: <https://www.sabpp.co.za/product-solutions/index>



## Conclusion

The right to disconnect or disengage needs to be contextualised within the broader policy, legislative, and world of work trends. It speaks to how we think about, negotiate, and articulate the rights of employees and employers as well as how the nature of work and the way work is done is being revised. We need to consider the shifting landscape of 2025 where we may see increasing contestations regarding critical social, economic, and political issues, including these specific rights and the nature of work.



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