

# Urgent Business Needs V. Employee's Right to Disconnect:

## The Remote Work conundrum

1. See Justin McCurry, Japanese Woman 'Dies from Overwork' After Logging 159 Hours of Overtime in a Month, GUARDIAN (Oct. 5, 2017), <https://www.theguardian.com/world/2017/oct/05/japanese-woman-diesoverwork-159-hours-overtime>.
2. White Paper on karoshi (Death from Overwork) Prevention measures 2020, page 28 <https://www.mhlw.go.jp/wp/hakusyo/karoshi/20/dl/20-1.pdf>
3. See Justin McCurry, Japanese Woman 'Dies from Overwork' After Logging 159 Hours of Overtime in a Month, GUARDIAN (Oct. 5, 2017), <https://www.theguardian.com/world/2017/oct/05/japanese-woman-diesoverwork-159-hours-overtime>.

### Introduction

Of all the rights of employees, the right to disconnect is perhaps the least talked about employee rights around the world. This is not unrelated to the realities of modern-day capitalism where companies have to push the limits to ensure that they provide their customers or clients with the best products and services in the market or risk losing them to competitors. Also, technological advancement of work place digital tools have made work more efficient and flexible. It is noteworthy that although these digital tools have helped many businesses remain operational during the pandemic, albeit remotely, they have also created an absence of limits, leading to excessive interference in the private lives of employees thereby shrinking the boundary between work life and home life.

The right to disconnect is a proposed human right regarding the ability of employees to disconnect from work and primarily not engage in work-related electronic communications such as e-mails or messages during non-work hours. This is to prevent overworking as well as afford employees the time to enjoy other pleasures of life.

### The Detrimental Impact of After-Work Electronic Communications on Safety and Health

Although it has been opined that the modern world is gradually becoming obsessed with a culture where overwork seems to be the quintessential modern day ideal as only through hard work is one able to achieve the modern dream of upward social mobility notwithstanding the possible physical and mental health effects of overwork.

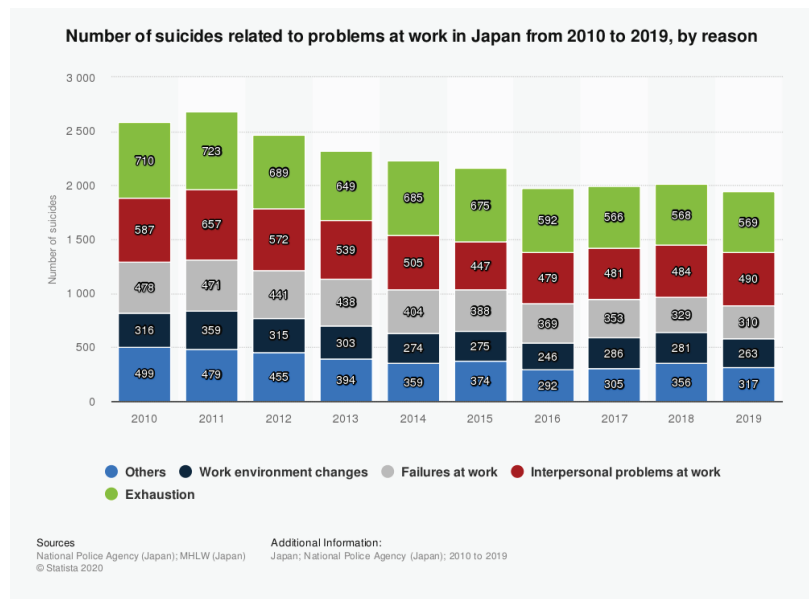
This is especially so as there have been several reported instances of employees being worked to the point of death. The Japanese for example, have a term *karoshi* for people who kill themselves through overwork<sup>1</sup>. A well-known phenomenon in Japanese society, Karoshi has been proven to be caused by heart attacks and strokes caused by physical pressure and mental stress from the workplace.

On the other hand, employees have been reported to commit suicide due to mental health issues arising from occupational stress or overwork, a phenomenon known as *karojisatsu* ("overwork suicide") in Japan. In 2019, over 1,940 people committed suicide due to problems related to their working situation in Japan. The death numbers peaked in 2011 with almost 2,700 suicide victims in total.

In 2019, almost 570 people in Japan committed suicide due to exhaustion, indicating that this was the most common reason for self-inflicted harm related to issues at work. That same year, 310 suicides were attributed to failures at work. The overall number of work-related suicides in Japan reached 1,949 cases in 2019<sup>2</sup>. The story of Miwa Sado, a thirty-one year old Japanese journalist for the country's public broadcaster, NHK, who died of heart failure because of overwork brings to light the sinister effect of overwork<sup>3</sup>. Sado logged 159 hours of overtime and took only two days off in the month leading up to her death from heart failure in July 2013.



4. See William J. Becker, Liuba Y. Belkin & Samantha A. Conroy, Exhausted, but Unable to Disconnect: After-Hours Email, Work-Family Balance and Identification, 2016 ACAD. MGMT. PROC. J.1 (Aug. 2016) (observing how feeling tied to work e-mails constantly can lead to employees experiencing chronic stress and emotional exhaustion); Gilkerson, supra note 8, at 11 (presenting agency professionals account "about the stress and workload issues their younger colleagues faced related to their client social media responsibilities, with accounts of an 'always working' mentality often leading to anxiety, job dissatisfaction, and burnout").
5. See Occupational Health, supra note 1 ("Research findings show that the most stressful type of work is that which values excessive demands and pressures that are not matched to workers' knowledge and abilities, where there is little opportunity to exercise any choice or control, and where there is little support from others.").
6. Code du Travail [C. Trav.] [Labor Code] Art. 55 (Fr.)
7. Ibid
8. Social partners include the Confederation of Germany Employers' Associations, the German Trade Union Confederations and the Federal Ministry of Labor and Social Affairs.
9. Lower Cadre employees include labourers, clerks, etc.
10. Section 13
11. Ibid



Although overwork existed in the traditional workplace long before the advent of smart phones and instant messaging, evidence exists to suggest that the use of smartphones and instant messaging are making it increasingly easier for employees to contact employees on work-related matters outside work hours. Employers constantly reach out to employees through text messages, chats, emails or even phone calls to attend to projects or assignments outside mutually agreed work hours. These after-work requests, even where they do not always come across as commanding, are usually in the language of compulsion. Sometimes, they may casually come off as questioning whether the employee would be available to handle a 'quick' task.

Such workplace dynamics create numerous problems for employees and employers. First, issues of both workplace privacy and autonomy arise. Employee's privacy refers to the right not to be subjected to wrongful employer intrusions. Employee autonomy, on the other hand refers to an employee's protected personal interests outside of the employment relationship. The existence of these two employee rights coupled with the rise in the use of digital technology at the workplace raises the question as to what point employers cease to have the right to intrude upon the private space and time of their employees.

Second, the safety and health of employees who work too many hours is a serious concern. Not only is decline in mental health of such employees an issue, the physical health of such employees is also an issue. The Japanese example of *karoshi* is an eye-catching example. Studies have shown that tired, stressed-out employees get injured, sick, and miss work at alarmingly high rates<sup>4</sup>. Recent studies have also shown that the exposure to constant workplace demands, or even the mere anticipation of such demands, is detrimental to employee health<sup>5</sup>.

Third, employers notice a lack of productivity from overworked employees, as "more" work at some point does not necessarily equal "better" work. Finally, maximum hour laws, overtime, and the acknowledgement of the importance of leisure time have all played such a prominent role in most advanced-industrial societies in the last century. Most employees work not as an end in itself (though some do), but as means to be able to provide other utility-optimizing goods to their families and friends: housing, food, recreation, retirement, vacations, entertainment, and the list goes on. Needless to say, overworked and stressed employees have less time for leisure.

An employee's "right to disconnect" from workplace communication devices has quite recently become an important employment law matter in other countries around the world. France and Germany are two of the most prominent countries that have taken the forefront in passing legislation to address the right of employees to disconnect. In 2017, France enacted the *Droit à la Déconnexion*<sup>6</sup> (Right to Disconnect) which mandates that employers either come to an agreement with their employees or introduce a charter to address the employees' ability to not respond to work related digital communications after work hours. However, there are a few caveats to this pioneering law. First, it only applies to employers with fifty or more employees<sup>7</sup>. Second, and interestingly, the French law has covered employers that adopt "charters of good conduct" that explain for each workplace when employees are not required to respond to after-work electronic communications. On the other hand, employers are also allowed to come to agreement with employees or their unions about these matters. Germany has also taken steps to regulate after-hours work. However, unlike France, Germany has been able to avoid the adoption of legislation. German employers have opted to participate in voluntary self-regulation to adopt policies that fit their individual or industrial needs while partnering with 'social partners'<sup>8</sup> to work together in enacting policies tailored to the needs of different industries as well as the needs of both employees and employers.

In Nigeria, there are no laws directly dealing with whether or not employees have a right to be free from electronic workplace communications once their day ends. The primary legislation that governs employment relationships in Nigeria- the Labour Act (the "Act") applies to lower cadre employees only<sup>9</sup>, leaving the employment relationship of other categories of employees to be regulated by individual contractual agreements and collective bargaining agreements. This creates a divide in the uniformity of standards expected of employers with respect to employees. Although the National Industrial Court has over the years, adopted the attitude of upholding International labour law standards, the right to disconnect has remained an issue almost never discussed within the context of labour and employment law in Nigeria. The Labour Act provides that normal hours of work in any undertaking shall be those fixed- (a) by mutual agreement; or (b) by collective bargaining within the organization or industry concerned; or (c) by an industrial wages board (established by or under an enactment providing for the establishment of such boards) where there is no machinery for collective bargaining<sup>10</sup>.



11. Ibid

Hours which a worker is required to work in excess of the normal hours fixed are considered as overtime. Although the Act recognises the concept of overtime, it does not compel employers to make payments on overtime work done by employees. With respect to other categories of employees whose employment are not governed by the Act, issues like hours of work and overtime are set by contract. Although, in practice, it is not unusual to find clauses that require employees to work outside the agreed hours of work where necessary without additional remuneration. It is understandable that sometimes, urgent business demands require employees to work extra hours where necessary. This may also depend on the industry in question as certain industries require employees to be 'on-call' several hours after official work hours. The need for businesses to meet their bottom-line while respecting employee's right not to be subjected to wrongful employer intrusions as well as an employee's protected personal interests outside of the employment relationship is a question that has to be addressed by employers, employees and other industry stakeholders.

This is necessary especially because it is evident that the definition of safety within the context of work environments have gone beyond conversations around environmental hazards, unsafe working conditions or processes and drug/alcohol abuse. It now includes conversations around employee well-being and mental health as evidence has shown that overwork is a major culprit for both physical and mental health issues<sup>11</sup> which must be properly addressed. In my opinion, a blanket legislation may not be the best solution as it cannot possibly take into consideration, the specific peculiarities of different industries. An interesting option would be to enact a legislation that lowers employee and employer expectations associated with answering after-work electronic communications.

However, it must make provisions for employers to develop policies that fit their individual industries unions. Employers must also be willing to have anti-retaliatory clauses that protect employees who decide to exercise their right to disconnect in line with the policies in place. This is very important because employees, who even with union representation suffer from disparate bargaining power in the workplace are at risk of being 'punished' for exercising this right. However, they might be in a better position to push back against such impositions when they can point to a legislation or policy that supports their unwillingness to be on call during all hours of the day.

## Conclusion

It is important for Nigeria to regulate employer practices concerning employees' right to disconnect from the workplace after work hours to protect employee safety and health. However, the unique landscape of Nigerian employment law calls for an equally unique approach for regulating such action. This article proposes an approach based on international standards on workplace safety and health where employers are encouraged to put policies in place that lowers employee's to protect employees various degrees. Employers, would have some flexibility in meeting these standards based on the particular circumstances and needs of tsheir workplaces and industries. The hope is that the existence of such safety and health rules concerning employees' right to disconnect would also help to protect employee privacy and autonomy, productivity and compensation, and their rest and leisure time.

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