

How employers can set boundaries for remote workers

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While many South Africans have taken to remote working with enthusiasm, the question of when to switch off from work is looming large as the next big workplace challenge.



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South African law has not yet developed to the extent of that in some other countries, for example, France. The French Labour Code includes a mandatory obligation for employers with 50 or more employees to negotiate terms that regulate an employee's 'right to disconnect'. It also regulates the use of digital tools, with a view to ensuring respect for rest periods and leave, as well as personal and family life.

In South Africa, employees earning below the threshold set in the Basic Conditions of Employment Act (BCEA) have some protection from the 'always on' culture through limits on maximum working hours and overtime. However, more senior employees and employees earning above the earnings threshold do not.

The gap in legal protections for the two different groups of employees is considerable.

Below the earnings threshold

The current earnings threshold in the BCEA is R211,596.30 a year.

Subject to limited exceptions, the position of employees who earn less than this or are not in senior positions is relatively straightforward.

Employees who work five days a week, for example, may not be permitted to work more than nine hours in a day or more than 45 hours in a week. Accordingly, time worked in excess of this amounts to overtime, which can only be required by agreement and is statutorily limited to 10 additional hours in a week per employee. Ordinarily, employment policies also require employees to obtain pre-authorisation from their employers before working overtime.

Moreover, counting ordinary hours and overtime, such employees cannot be required to work more than 12 hours in a day. These employees, again subject to limited exceptions, are also entitled to a daily rest period of 12 hours from the end of work on one day to the start of work on the next, as well as a weekly rest period of 36 hours, which must include a Sunday, unless otherwise agreed. This means that any Sunday work must be by agreement.

For employees who are entitled to overtime in terms of the BCEA, overtime rates are prescribed at 1.5 times the normal wage for time worked in excess of their ordinary hours or for time worked on Sundays (if employees ordinarily work on a Sunday) and double time on Sundays and public holidays (if employees do not ordinarily work on these days). However, any work on a public holiday must also be regulated by agreement.

Above the earnings threshold and senior managerial employees

More senior employees and those earning above the earnings threshold are in an altogether different position as they are excluded from the BCEA provisions regulating maximum working hours and overtime.

These categories of employees may be required to be available after hours, on weekends and on public holidays, without any expectation of additional remuneration. This is often incorporated into their employment contracts, adding a further contractual obligation to be available beyond ordinary working hours if the operations of the business require it. Failure to comply with an instruction to work after hours may be a breach of the employment contract and could potentially result in disciplinary consequences for the employee.

This is not to say the working hours of these categories of employees may be open-ended. The BCEA (which cannot be contracted out of) requires employers to regulate the working time of all employees, including senior employees and those earning above the earnings threshold, from the perspective of health and safety, and the family responsibilities of employees.

Taking into account the potential adverse physical and mental health consequences that may arise from an always-on-culture, reasonable boundaries may be required when it comes to working hours of more senior employees or those earning above the earnings threshold.

The law does not provide guidance as to what boundaries might be reasonable for the working time of employees in these categories, which largely leaves it to employers to self-regulate, depending on their environments and requirements.

Here are a few suggestions for employers to consider in setting working hour boundaries:

Set the tone from the top: Leaders can demonstrate their own commitment to maximising productivity during 'ordinary working hours' by limiting communication with team members to these hours (except when the work is genuinely urgent).

Be clear about expectations: Employers should clearly and frequently communicate the company's stance as a productive organisation where work done during ordinary or core hours is the norm. Employers should encourage high productivity and responsiveness during these hours and make it clear that employees should switch off thereafter, unless it is absolutely necessary to do otherwise.

Put processes in place to cater for urgent work and emergencies: Each business unit or department should specify how it will deal with urgent after-hours work requests, including who should be contacted and how and what work can be considered urgent work. What is urgent may depend on the nature of the job and the level of seniority of the employee. For example, employees may reasonably, in certain instances, be expected to be contacted telephonically in genuinely urgent cases after hours.

Make time management a priority: If certain employees are habitually working overtime or after hours and on weekends, employers should interrogate the underlying reasons. It may be that employees are working beyond core hours because they are not able to effectively manage their time. Alternatively, additional resources, such as another employee, may be required to handle the workload or there may be capacity issues.

Employers could also explore ways to disable 'push-notifications' for emails after hours and on weekends and while on annual leave, allowing employees to switch off for a period and in this way minimising the 'always on' culture, which can be detrimental to their mental well-being and have an indirect, detrimental impact on the business of the employer in the long term.

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