Employment Newsletter Autumn 2018

Battling burnout: why employers must switch off the "always on" workplace

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This Autumn we focus on the issue of overworking and the problems it poses for employers. Overworking is an overlooked problem that often contributes to a range of workplace issues, from low productivity and high staff turnover, to sickness absences and legal claims.

In a recent interview with The New York Times, business magnate Elon Musk described his 47th birthday. The normally upbeat entrepreneur said he spent the full 24 hours of his birthday at work pulling an "all-nighter". He admitted to regularly working 120 hours a week and noted that this has come at the expense of seeing his children and friends. While this might seem an extreme example, Musk's warped work ethic speaks to the "always on" work culture of the 21st Century, where technology and work seep into every aspect of our lives.

Admittedly, not all of us are attempting to colonise Mars, as Musk is, but we are working for longer than ever before. Many of you reading this article will be all too familiar with the late-night business calls and the incessant tide of work emails. In fact, at 42.3 hours per week (according to the World Economic

Forum), the UK has the longest average full-time working week of any European country. At the same time, the Office for National Statistics reports that we took an average of just 4.1 sick days in 2017, the lowest number since records began. Despite this, in terms of productivity, a measurement of the output of each UK worker, the UK has been lagging behind the Eurozone and most of the G7 countries for years. We are not working harder, we are simply working longer.

Working Time

Overworking is increasingly becoming a legal risk. Cases in Europe are pushing the boundaries on what we consider to be working time. In Ireland, a business executive was awarded €7,500 after arguing that she was required to deal with out-of-hours work emails, some of which were sent after midnight.

This led to her exceeding the 48-hour working week in Ireland's working time laws. In France, a company was ordered to pay an employee €60,000 for failing to honour her right to "switch off" after work from her phone and computer. The case was raised under France's new "right to disconnect" law, which was brought in to stop the "always on" work culture. Similar test cases are predicted to reach the UK before long and could expose employers to claims from employees working at unusual hours through mobile devices.

The Working Time Regulations 1998 (WTR) stipulate an unambiguous right in the UK to work no more than 48 hours per week (averaged over 17 weeks). However, this can be contracted out of in certain circumstances and this "opt out" is quite regularly used by employers in their contracts. Other entitlements under the WTR include a right to 11 consecutive hours' rest in any 24-hour period, one day off each week (or two consecutive days off in a fortnight) and a statutory right to 5.6 week's paid annual leave. However, what counts as working time towards these rights is not always clear. An employee is generally not seen as being at their employer's disposal until they arrive at the office. For example, normal commuting is not seen as working time, since employers cannot control where their staff live or how they travel to work. However, when travel is a requirement, such as for a travelling salesperson, this can count as working time. It is not normally viewed as working time if an employee chooses to send emails or take calls outside of the office. However, the point has not been tested with cases involving mobile devices and informal after-hours work. Such cases could pose difficult questions of the WTR, particularly where there are company policies or expectations that employees remain available and connected to the workplace.

The uncertainty around when employees are working should also concern payroll departments, as employers may also be underpaying their workers as a result. Most workers are entitled to receive the National Minimum Wage (NMW). There is also a higher rate National Living Wage (NLW) for those over 25 years of age. Employers who don't pay their workers correctly can face fines from HMRC, a bill for backpay and suffer reputational damage. 240 UK employers have been named and shamed by HMRC so far this year for not paying the NLW and NMW, including the likes of Wagamama and KFC. This non-compliance is normally unintentional and occurs because organisations do not have systems in place to record working time and wages effectively. The NMW regulations have not been tested by cases involving informal after-hours work and mobile devices. Overworking can also be difficult to track, as it often goes unrecorded and is unlikely to be reported by workaholics and those who feel pressured to work longer.

Just as overworking raises working time and pay issues, it can also be a threat to data security. It has become normal for employees to check work emails on their phones, download attachments or use file sharing software to access work files remotely. A study by the University of the West of England found that 54% of rail passengers on commuter lines into London had used the trains' Wi-Fi to handle work emails, whether on their way to work, or on their way home (and many more are thought to have used their mobile data). If managed incorrectly, remote methods of working could lead to data being lost or stolen, which can result in claims for compensation from effected parties and costly fines from the Information Commissioners Office. Employees that are working remotely, particularly in public or on unsecured Wi-Fi networks, will also be more susceptible to cybercrime and could present a weak link in an organisation's security. If software is not regularly updated and IT security policies are not implemented, the risk presented by data breaches and cybercrime rises significantly. An employer's liability under data protection laws for such data breaches is wide. The fact that a data breach occurs because of an employee working on a mobile device outside of the office is unlikely to help an employer avoid liability.

Health

More worrying than the legal risks is the fact that this "always on" culture could be killing us. Working too much damages the body and the brain in two main ways: by boosting stress levels and by obstructing exercise, healthy eating and rest. When a research team at University College London analysed more than 10,000 civil servants in London, they discovered that workers completing three or more hours over the typical eight-hour day had a 60% higher risk of experiencing heart-related problems than those who did not work overtime. Studies have also shown that overwork negatively impacts sleep, particularly when staring at the glare of a computer screen and not having time to clear your head before bed. In the short-term, this sleep shortfall can cause memory damage. In the long-term, it can increase the risk of obesity, heart disease, stroke, and diabetes.

As if the health implications weren't problem enough, the harmful effects of overworking can also be felt on an employer's balance sheet in the form of absences, resignations, rising health insurance costs and legal claims. Even a Scrooge-like employer should be able to appreciate these tangible, bottom-line costs to employees burning the midnight oil.

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Discrimination

The discrimination risks attached to mental health issues are well-known to employers. Depression can qualify for protection from disability discrimination under the Equality Act 2010, along with many other mental health conditions. Disabled employees are entitled to a range of protections, including from being treated less favourably than someone who is not disabled; from policies or practices in the workplace that indirectly disadvantage them; from discrimination for something linked to their disability, such as needing more rest breaks or time off; not adjusting working conditions to help a disabled employee to work; and from offensive or degrading behaviour towards them. The danger is that, handled improperly, mental health issues sparked by overworking will develop into time-consuming and costly discrimination disputes.

Workforce Disruption

Overworking could also be damaging motivation and output. According to the Health and Safety Executive, absenteeism generally increased by 25% in 2016-17. Work-related stress, depression or anxiety affected 526,000 workers, with an average of 23.8 days lost per worker. Resignations have also been rising steadily since 2012. Meanwhile, a 2017 study by a UK-based company asked 1,989 office workers how much time they spent each working day "working productively". The response was two hours and 53 minutes. Instead of working, most respondents admitted to checking social media, browsing news websites or chatting with colleagues. It would be a stretch to blame overworking alone for these problems, but it is not too difficult to discern the picture of an unhappy UK workforce. The resignations and absences stemming from this dissatisfaction result in lost output, logistical expenses and recruitment costs for employers.

Solutions

There is a growing resistance calling for a re-think of working hours. "I believe that in this century, we can win a four-day working week, with decent pay for everyone," said Frances O'Grady, head of the Trades Union Congress, at the organisation's recent annual conference. This call followed trials of four-day weeks and six-hour days in countries like New Zealand and Sweden, which resulted in workers that were happier, healthier and more productive. Fundamental changes to the working week are not manageable for all businesses, but work-life balance should be considered by all employers and wellness programmes are becoming more popular amongst businesses.

Employers, like Elon Musk, who clock up the hours and push employees off a productivity cliff edge, would do well to reflect on where the traditional eight-hour working day comes from. In 1914, at a time when hours were long and worker rights were few, Henry Ford took the radical step of doubling his workers' pay and cutting shifts in his factories to eight hours. He was initially ridiculed for the bizarre move, but his competitors soon followed suit as production in his factories soared and costly accidents and mistakes were eliminated. The notion of having limits on working time spread around the world as best-practice, and something that was mutually beneficial for businesses and their workers. Over a century later, this lesson is in danger of being lost.

The solutions don't need to be extravagant or expensive, but the following points are a step in the right direction:

a) Engagement

Overworking won't show up on any records, so ask your employees to provide feedback on their hours and working conditions. This could be done through an anonymised survey looking into working hours, workload, the office environment and general job satisfaction. This data should allow you to tailor your initiatives to effectively target staff concerns.

b) Record keeping

An employer can mitigate against claims under the WTR and NMW regulations by accurately recording working time, holiday pay, wages and other earnings. Employers should consider using cloud-based software, which automates time-keeping and payroll processes and alleviates the administrative burden of spreadsheets and other manual recording methods.

c) Contracts and procedures

Ensure that your contracts clearly set out the hours that employees will be expected to work. If staff are exceeding their 48-hour weekly working time limit, consider whether this is necessary. If so, ask them to sign a letter opting-out of this requirement of the WTR. Employers should also review their sickness absence procedures, with the aim of encouraging a dialogue with absent employees and helping them to return to work.

d) Management training

A positive example from management might be needed.

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If managers are regularly working late, their teams might be feeling pressured to remain logged-on (even if they are just browsing Facebook until it feels safe to leave). Managers should encourage their staff to leave at an appropriate time.

Training aimed at improving the awareness of mental health problems could also be offered. If managers are alert to the signs of overworking, employers will be in a better position to pre-emptively address this at an early stage.

e) Flexible working

Rather than imposing rigid "core hours" across the organisation, it may be possible to let staff find their own work-life balance by being more flexible around their start and finish times. Furthermore, give serious consideration to any requests to work from home, though these arrangements must also work for the business and there are often health & safety and insurance considerations to employees working at home.

f) Switch off

There are many ways that employers can help staff switch off. In 2011, German car manufacturer Volkswagen began shutting down its BlackBerry servers at the end of the workday. Daimler, another German carmaker, deletes emails sent to employees while they are on holiday. Alternatively, you could have a friendly automated reminder pop up at 6pm encouraging people to leave the office or simply communicate to staff that they are not expected to work after-hours.

g) The little things

Small steps can make a big difference. Sedentary office workers might benefit from a cycle-to-work scheme or gym subsidies. You could also arrange a social room in the office to give colleagues a place to unwind and socialise.

For more information on this and other employment law issues please visit www.myerson.co.uk/employment or call 0161 941 4000.