

# (Over)working from home and beyond



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Since a pandemic was declared in March 2020, working from home has become the new norm. Without physical barriers between work and home, it has become harder for many people to 'switch off', potentially creating a pattern of overwork. Less face-to-face time has also made it harder for employers to keep abreast of employees' work hours and circumstances. These changes can create risk for employers whose staff are working heavy hours. Risks include employees feeling exhausted or disgruntled and, in some cases, resulting in employment-related claims. The *Fair Work Act 2009* (Cth) provides that employers cannot request or require full-time employees to work more than 38 hours/week (pro-rated for part-time employees) – unless the additional hours are 'reasonable' (s 62(1) and (2)). 'Reasonableness' is determined by: risks to health and safety; employee's personal circumstances; needs of the workplace; entitlement to overtime; notice given to work extra hours; usual patterns of work in the industry; and the employee's role and level of responsibility.

## Cautionary tales

Several cases have considered the issue of 'overworking' and provide a cautionary tale for employers. In the unfair dismissal case of *Sathananthan v BT Financial Group P/L* [2019] FWC 5583, an employee (over a period of time) complained to his employer, BT, that his workload was excessive as he was doing his own job and that of his underperforming colleague. Ultimately, the employee resigned and lodged an unfair dismissal claim contending he was constructively dismissed.

The Fair Work Commission ('FWC') commented the applicant 'was regularly working in excess of 70 hours per week ... and this was objectively unreasonable in the context of that position and the reasonable expectations of the parties' (at [86]). The FWC was also concerned with BT's failure to investigate his complaints. The FWC concluded he had no option but to resign and ordered his employer pay him \$45,990 in compensation.

Similarly, in *Sagona v R & C Piccoli Investments P/L* [2014] FCCA 875, an employee was required to work 'whatever hours it takes' to reach sales targets. The employee argued, *inter alia*,

## Snapshot

- With working from home now the new norm in many industries, employees are often finding it harder to 'switch off', potentially creating a pattern of overwork.
- It's important for employers to take practical steps to address the risks associated with staff working excessive hours.

that she raised a 'workplace right' to refuse to work additional hours. The Court was 'satisfied that the demand to work additional hours, in the context of a threat to her ongoing remuneration and employment, did amount to an injury to the [employee] in her employment' (at [320]). The employer was ordered to pay over \$200,000 in damages and penalties.

While no cases relating to excessive hours in the legal sector have been reported, work health and safety regulators, including SafeWork NSW, have taken an

interest in employment practices in law firms. One recent example resulted in an improvement notice being issued to a prominent Victorian firm after employees were reportedly forced to work through the night during the Banking Royal Commission. Even without prosecution, investigations carry a real danger of reputational damage for firms competing for top talent.

The introduction of the Legal Services Award 2020 ('the Award') and increased regulatory focus on 'wage theft' may increase attention on excessive working hours of clerical and paralegal staff in law firms. The Award took effect on 1 March 2020 and places obligations on employers to ensure: (i) employees are informed about the maximum hours they can work before they are entitled to overtime, and (ii) that annual pay reconciliations are conducted.

As we take stock of lessons learnt from our fast-track into remote working, employers and managers need to address the risks of excessive working hours.

- **Communicate:** Sometimes long hours are required, but discourage overwork as a general practice. Invite employees to raise concerns before they become complaints and investigate any complaints properly.
- **Be a role model:** Balance work and life, and advertise it.
- **Provide resources** on managing workload, and on detaching from work.
- **Check payroll and HR practices:** Ensure employees covered by the Award are compensated for the hours they work.
- **Insurance:** Consider whether your practice might benefit from employment practices liability insurance, such as Lawcover's special Lawyers Management Liability Policy. To learn more, visit [lawcover.com.au](http://lawcover.com.au) or call 1800 650 748. **LSJ**