

Working From Home: Legal Issues and Concerns

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The COVID-19 global pandemic has made working from home (**WFH**) become more commonplace than the daily commute to the office. Even with the gradual lifting of the movement restrictions in Malaysia, many employers continue to encourage WFH arrangements. There are undeniably many advantages, for employers and employees alike, in having a WFH arrangement. Employers should, however, be aware of the various legal issues and concerns that come with working remotely.

Confidentiality and cybersecurity

Confidentiality and cybersecurity are issues of paramount concern in every organisation. Leaking or disclosing confidential information constitutes a serious act of misconduct, even where it is unintended.¹ In the same vein, there are severe consequences arising from an employee's act of providing unauthorised persons with access to company property, such as by divulging his login credentials for an internal system.²

WFH arrangements create room for the unintended leakage or disclosure of confidential information by employees and give rise to potential cybersecurity risks. An example may be where an employee allows a family member to use his work laptop or leaves the laptop unattended while confidential documents are left open and/or easily accessible. Another possible scenario is where the employee does not use a secured Wi-Fi or a virtual private network when working on the laptop, hence leaving it vulnerable to a cyber-attack.

Considering the above situations, employers should take steps to ensure that confidential transactions, deals or documents are not in any way compromised by employees who are WFH. Documents should be stored under lock and key, especially if the employee does not live alone or if his workspace is frequented by others. Employers who provide work laptops to employees need to regulate their use to ensure that employees always keep them secure. Employers should also set out clear protocols for employees to follow in the event of a cyber-attack so that employees are well-equipped to manage cybersecurity risks presented by WFH arrangements.

Health and safety

Every employer has a duty under the law to ensure, so far as is practicable, the safety, health and welfare of all his employees at the office.³ It is relatively straightforward for employers to take such health and safety measures when their employees are working at a place under

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¹ *Robert TI v ECM Libra Avenue Securities Sdn Bhd* [2013] 1 ILR 112

² *Mohd Rosli bin Mohd Noor v Perodua Sales Sdn Bhd* (Industrial Court Award No 2329 of 2019)

³ Occupational Safety and Health Act 1994 [Act 514], s 15(1)

their control. Employers, however, do not have the same sway when it comes to an employee's home.

Issues may arise should an employee sustain an injury during normal working hours while WFH. Employers may face difficulties in determining whether the injury can be classified as an "occupational" injury if the employee had sustained it while carrying out a non-work related activity. There should be clear instructions and procedures for reporting work-related injuries sustained during WFH arrangements.

Employers should also be wary that there may be a need to review existing insurance policies to ensure that their WFH arrangement does not contravene any terms and conditions of such policies.

Time management

While WFH can boost employee morale due to the obvious savings in costs and lower stress levels associated with commuting, WFH may also give rise to disciplinary concerns, especially in the aspect of time management.

WFH arrangements inevitably cause a blurring of lines between working and non-working hours. This may lead to employees working at irregular or erratic hours instead of their normal working hours. Employees may even be uncontactable during working hours, leading to unnecessary delays in completing tasks. For employees covered by the Employment Act 1955,⁴ WFH arrangements may also lead to dubious overtime claims if not properly regulated.

Employers will need to seriously consider effective steps to manage these disciplinary concerns arising from WFH arrangements. This may include the implementation of appropriate mechanisms to monitor timekeeping for employees, especially those who are entitled to overtime claims.

Assessment of probationers and performance

WFH arrangements present considerable challenges in assessing the performance of employees. This is especially so in regard to a probationer. It is trite law that employers need to provide a fair opportunity for a probationer to prove his suitability for permanent employment.⁵ In doing so, the employer would need to assess whether the probationer possesses the right skill, competence, temperament, aptitude, attitude and suitability.⁶

It may not be too difficult to monitor a probationer's skill or competence while he is WFH. Without face-to-face interactions, however, employers may find it challenging to assess a probationer's temperament and attitude having regard, *inter alia*, to the organisation's corporate culture.

Employers may need to consider how they can reconfigure their employee performance management system, including yearly appraisals and performance improvement plans, to cater to WFH arrangements.

⁴ Employees who are covered by the Employment Act 1955 are as follows:

- (a) any person who, irrespective of his occupation, has entered into a contract of service with an employer under which his monthly wages does not exceed RM2,000 a month; or
- (b) any person who, irrespective of the amount of wages he earns in a month: (i) is engaged in manual labour; (ii) is a supervisor of employees engaged in manual labour; (iii) is engaged in the operation or maintenance of any vehicle used for transport of passengers or goods or for reward or for commercial purposes; (iv) is engaged in any capacity in any locally registered vessel but is not a certified officer; or (v) is engaged as a domestic servant.

⁵ *Inti labs Sdn Bhd (Inti College Sarawak) v Frank Samuel Agong* [2000] 3 ILR 204

⁶ *Roslina Baba v Puncak Niaga (M) Sdn Bhd* [2013] 3 ILR 216

Conclusion

WFH arrangements are being increasingly accepted as part of the “new normal” and the practice appears to be here to stay as long as the global pandemic persists. With WFH being a relatively new practice among Malaysian organisations, employers may find themselves struggling to navigate through the waves of various legal issues and concerns that may come with the implementation of WFH arrangements.

It is imperative for employers to implement a written WFH policy to manage and address such issues and concerns as failure to do so can have serious implications.

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