



Amardeep Singh Toor
Partner
**Employment &
Industrial Relations**
E: ast@lh-ag.com



Ashreyna Kaur Bhatia
Associate
**Employment &
Industrial Relations**
E: akb@lh-ag.com

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Flexible Working Arrangements: Modern Practices for Contemporary Establishments

Flexible working arrangements (“**FWA**”) are part and parcel of global contemporary labour practices, especially in the aftermath of the Covid-19 pandemic:

- (a) The United Kingdom: Employees have the right to make two FWA requests each year. There is no longer a requirement for employees to explain the effect of the change in their working setup to their employer and how to manage the same.¹
- (b) Thailand: Employers may agree to remote working arrangements with their employees. This agreement must be prepared in writing by the employers. The agreement should specify the scope of work, scope of supervision, procurement of work-related equipment, and related expenses. Employees working from home, or any other

¹ <https://www.legislation.gov.uk/ukpga/2023/33/enacted>

place, shall have the same rights as those based in the office.²

- (c) Australia: The Fair Work Commission will now have the power to arbitrate any disputes arising and obtain an order mandating the approval of an FWA request.³ An employee can access this new jurisdiction if the employer does not grant the request or does not respond within 21 days with a written explanation for the refusal.⁴
- (d) Singapore: A Tripartite Work group has been assembled to formulate a set of guidelines concerning FWA requests. These guidelines, due to be rolled out in 2024, are intended to assist employers in effectively implementing FWA across diverse sectors and job positions. They are anticipated to detail the procedures for employees to submit requests for FWA and offer advice to employers on how to evaluate and communicate the outcomes of such requests appropriately.⁵

In Malaysia, FWA is gaining traction as well. The expansion of the Employment Act 1955 (“**EA 1955**”) to all employees brought with it the option for employees to apply for FWA.⁶ Employees are permitted to make an application in writing to vary their working hours, days of work, or place of work. In the event of a refusal, the employer must provide

² <https://www.thaipbsworld.com/no-more-commuting-thailand-enshrines-work-from-home-culture-in-law/>

³ <https://www.hrmonline.com.au/section/featured/how-the-secure-jobs-better-pay-bill-will-impact-flexible-work/>

⁴ <https://www.pwc.com.au/workforce/diversity-and-inclusion/secure-jobs-better-pay-act-new-changes-to-flexible-working-arrangements.html>

⁵ <https://www.mom.gov.sg/newsroom/speeches/2024/0304-speech-by-mos-gan-siow-huang-at-committee-of-supply-2024>

⁶ Employment Act 1955, Sections 60P & 60Q.

written grounds for such refusal. Recently, the Human Resources Minister, YB Steven Sim, stated that the Ministry is prepared to offer consultation services to employers keen on adopting FWA.⁷

There is a wide range of FWAs, which may be considered as set out below:

Compressed Work Week	Working less days than a standard workweek but longer hours on certain days
Employee's Choice of Day Off	Employees plan their work days and off days
Flexi Hours	Employees choose and adjust their daily working hours as long as they meet the required working hours within a day/week
Leaving Early from Work	Leaving early from work but not altering daily/weekly hours.
Leaving Late to Work	Arriving late to work but not altering daily/weekly hours.
Phased Retirement	Employees approaching retirement gradually transition from full-time schedules and workloads to a more flexible schedule and/or reduced workloads.
Reduced / Part Time	Work less than the standard full-time hours, typically involving shorter work days, fewer work days, weekend work, or a combination of any of the options.
Shift Swapping	Flexibility for shift workers to trade shifts with each other
Staggered Hours	Employees are able to adjust their start and end working hours, provided they work the normal hours
Work-From-Home	Apart from the office, employees are also able to work from home.

Potential Pitfalls

Employers must tread cautiously and be aware of the various legal issues and concerns that come with FWA.

In ***Choong Siew Fong V Bru-Haas Sdn Bhd*** [2024] 1 ILR 500, the Industrial Court held that the actions of the employer, including retracting a prior agreement allowing the employee to work from home during her pregnancy, and insisting on physical office attendance despite medical advice, undermined the trust and confidence between the employer and the employee.

In ***Karen Pamela Soh v Quality Health Care Sdn Bhd*** [2023] ILRU 1375, the Industrial Court held that

⁷ <https://www.malaymail.com/news/malaysia/2024/04/21/human-resources-ministry-provides-consultation-on-flexible-working-arrangements-says-steven-sim/130020>

the employer had failed to produce evidence establishing that the employee was guilty of being absent from work, as she had continued to perform her work remotely, with her work records evident in WhatsApp conversations and e-mails to various parties.

Performance Issues

Under Section 20 of the Industrial Relations Act 1967 (“IRA 1967”), an employer can only dismiss an employee with just cause or excuse, including poor performance. These principles apply equally in remote work scenarios. To justify dismissal for poor performance, the company must address three questions⁸: (1) Did the employee receive warnings about poor performance? (2) Was the employee given sufficient opportunity to improve? (3) Despite interventions, did the employee’s performance remain unsatisfactory? These criteria ensure fairness and legal compliance in the dismissal process.

A warning serves as a prompt notification to an employee regarding the employer’s dissatisfaction with their work performance. It enables the employee to recognise their shortcomings impacting performance and specifies a timeframe for improvement targets. Importantly, it clearly communicates the risk of dismissal if performance remains unsatisfactory. Next, an employee must be provided with a sufficient opportunity to improve, i.e., providing sufficient time and reasonable targets to achieve.⁹ If upon completion of a sufficient opportunity to improve, the employer may dismiss the employee if the employee’s progress remains stagnant.

Superiors play a crucial role in conducting effective performance reviews by providing continuous

⁸ Kedah Marble Sdn Bhd v Jaafar Mohamed [2000] 1 ILR 794

⁹ Hong Leong Islamic Bank Berhad v Azhar Abdullah & Anor [2020] MLJU 286

feedback and fostering an environment of trust. This entails being present, offering written guidance and feedback, counselling employees when necessary, and maintaining consistent check-ins, as well as weekly calls to plan future work and update on past tasks. Regular virtual meetings with remote employees are paramount for effective supervision to serve as a platform where employees feel comfortable consulting their superiors, knowing their concerns will be heard.

Health And Safety

Effective 1.6.2024, the scope and applicability of the Occupational Safety and Health Act 1994 will extend to all workplaces throughout Malaysia. Consequently, all employers are now mandated by law to ensure, so far as is practicable, the safety, health, and welfare of all their employees at the office.¹⁰ While it is relatively straightforward for employers to implement health and safety protocols in workplaces under their direct supervision, they encounter challenges in ensuring the same level of control over employees' safety when they work under FWA.

Issues may arise if an employee sustains an injury during regular working hours while engaged in FWA. Employers may encounter difficulties in determining whether such an injury qualifies as an "occupational" injury, particularly if it occurred while the employee was engaged in a non-work-related activity.

Confidentiality and Cybersecurity

Confidentiality and cybersecurity are issues of paramount concern in every organisation. Disclosing confidential information constitutes a serious act of misconduct, even when such disclosure is unintended. FWA create room for the unintended leakage or disclosure of confidential information by

¹⁰ Occupational Safety and Health Act 1994 [Act 514], s. 15(1).

employees. Likewise, they give rise to potential cybersecurity risks. Abroad, it was reported that the spouse of an employee made \$1.7 million in stock trading based on his wife's conversations, overheard while both worked from home.¹¹

Employers should implement clear policies to safeguard sensitive information in FWA – storing documents under lock and key, setting protocols to avoid and handle cyberattacks such as the usage of public Wi-Fi, and conducting regular audits to ensure compliance with company policies, etc.

Time Management

FWA can pose disciplinary challenges, particularly regarding time management. Employees working irregular hours may hinder client accessibility, especially in service industries, while being uncontactable during working hours can lead to task delays. FWA may also result in dubious overtime claims under the EA 1955, and time theft, where employees remain online but are away from their desks or engage in secondary employment during work hours, including gig jobs like Grab. Employers must address these concerns by implementing effective monitoring systems, especially for overtime-eligible employees.

Conclusion

A comprehensive FWA policy can be a critical tool to manage issues on FWA, addressing the following points:

- (a) The forms of FWA available to an employee;
- (b) Eligibility requirements for which FWA may be made available (e.g., designations in which work need not necessarily be

¹¹ <https://www.foxwilliams.com/2024/03/21/insider-trading-case-highlights-remote-working-risks/>

Head Office

Level 6, Menara 1 Dutamas
Solaris Dutamas
No. 1, Jalan Dutamas 1
50480 Kuala Lumpur
Malaysia
Tel: +603 6208 5888
Fax: +603 6201 0122

Johor Office

Suite 21.01
21st Floor, Public Bank Tower
No.19, Jalan Wong Ah Fook
80000 Johor Bahru, Johor
Tel: +607 278 3833
Fax: +607 278 2833

Penang Office

51-12-E, Menara BHL Bank,
Jalan Sultan Ahmad Shah,
10050
Penang
Tel: +604 299 9668
Fax: +604 299 9628

Email

enquiry@lh-ag.com

Website

www.lh-ag.com

performed on-site, or may be capable of being completed over electronic devices) etc.;

- (c) The role of different stakeholders, e.g., the superiors, employees, etc;
- (d) Policies to deal with issues such as confidentiality, cybersecurity, performance management, time management, scope of supervision, procurement of work-related equipment and related expenses, etc;
- (e) Occupational safety and health obligations; and
- (f) Other details such as description of the arrangement; duration for arrangement, etc.

In conclusion, the evolution of employment laws towards FWA reflects a global trend aimed at enhancing work-life balance and productivity. However, challenges like performance supervision and confidentiality concerns underscore the need for careful implementation and comprehensive policies.

If you have any queries, please contact Associate, **Ashreyna Kaur Bhatia** (akb@lh-ag.com), or her team Partner, **Amardeep Singh Toor** (ast@lh-ag.com).