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## **Employment Spotlight: Remote Working from Overseas - Key Legal Implications Employers Should Know**

Remote working arrangements have become prevalent in response to the challenges posed by the pandemic such as risk of infections, travel restrictions and quarantine requirements in Hong Kong and elsewhere. Many employers are also considering remote working as 'the new normal' given the reduced operational costs. For some employees, remote working may mean working overseas. In this article, we discuss the legal implications that employers in Hong Kong should have regard to before allowing their employees to work overseas.

### **Immigration Related Implications**

#### *Whether the employee has a right to work in the overseas jurisdiction?*

Prior to allowing an employee to work remotely from an overseas jurisdiction, the employer should consider the legal status of the employee in that jurisdiction. In cases where the employee is a national or a resident of the overseas jurisdiction or holds an employment visa for that jurisdiction, they would generally have a right to work there. However, there are likely to be concerns if the employee merely holds a visitor visa or a business visa. As a tourist, the employee typically has no right to work; whereas a business visitor's scope of activities would generally be restricted to meetings or training only or restricted to a specific period. Depending on the laws of the overseas jurisdiction, along with potential liabilities for the employee, the employer may also find itself to be liable should the employee be found to have violated immigration laws. Such liability may also extend to subsidiaries or affiliates of the Hong Kong company, especially if the employee works from the premises of the subsidiary or affiliate.

Moreover, due thought must be given to implications on the employment visa in Hong Kong, and the impact of the employee's stay abroad on any future plans of applying for right to abode in Hong Kong. Any extended stay outside of Hong Kong may break the employee's deemed years of unbroken residence in Hong Kong. Necessary arrangements should also be made for timely extension of stay in Hong Kong.

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## Tax Related Implications

### ***Whether the employee remains liable to pay salary tax in Hong Kong?***

In Hong Kong, territoriality is the basis on which salary tax is charged. This means that only if the source of income is in Hong Kong will it be subject to tax in Hong Kong. In some cases, an employee working remotely from an overseas jurisdiction may be liable to tax in Hong Kong as well as in the overseas jurisdiction. If there is a double tax treaty (“DTT”) between Hong Kong and the overseas jurisdiction, relief from double taxation may be available provided the prescribed conditions in the DTT are fulfilled. One of the conditions by which an employee working remotely generally creates a tax presence in the overseas jurisdiction, including mainland China, is when the presence exceeds 183 days in a 12-month period (irrespective of the purpose and whether consecutive or not).

In Hong Kong, payment of salary tax remains the obligation of the employee whereas in certain jurisdictions, the employers are expected to deduct taxes / withhold proportionate amounts from the wages payable to employees. This can include subsidiaries or affiliates of the Hong Kong employer in certain jurisdictions, including the UK. Given that the rules prevalent in the overseas jurisdiction may become applicable, it is prudent for employers to seek necessary legal advice and tax advice prior to allowing employees to work remotely from overseas.

### ***Whether the employer will create a tax presence in the overseas jurisdiction?***

Employers should also seek legal advice on whether the presence of an employee or a specific number or threshold of employees in an overseas jurisdiction could create a tax presence (or permanent establishment) for the employer in that jurisdiction. This will largely depend on the laws of the overseas jurisdiction which may take into account the number of days an employee is present, the number of employees present and the nature of their duties (such as whether they enter into contracts on behalf of their employer and whether they provide consultancy services in the overseas jurisdiction). If a tax presence is established, an employer may become liable to pay corporate taxes in the overseas jurisdiction.

## Regulatory and Employment Law Implications

### ***Whether regulatory, compliance and legal requirements of the overseas jurisdiction become applicable?***

Where an employee is a regulated individual (such as in the financial sector or the legal sector), employers need to consider the compliance requirements in Hong Kong as well as the overseas jurisdiction and whether the employer and employee need to report the absence to any Hong Kong regulatory bodies, or to separately register or require approvals in order to perform the role lawfully from the overseas jurisdiction.

Appropriate legal advice should also be sought when an employee negotiates and enters into contracts on behalf of the employer in the overseas jurisdiction as there may be a risk that the relevant foreign law becomes the governing law of the contract contrary to the employer’s intention.

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## *What is the impact on the employment laws and protections available to employees?*

All Hong Kong employment laws and protections continue to apply to an employment relationship governed by Hong Kong law even when the employee works remotely overseas temporarily. While Hong Kong does not have social security requirements, employers remain liable to make contributions under the Mandatory Provident Fund Schemes Ordinance (Cap. 485). Employers may mutually agree with the employee to vary the employment contract to factor in the remote working arrangement. However, any agreement in contravention of the Employment Ordinance (Cap 57) is considered void.

The employment relationship may also be subject to the employment laws and protections available in the overseas jurisdiction irrespective of any agreement with the employee. These protections may potentially be more onerous from an employer's perspective, such as in mainland China for example. To understand the potential rights and obligations, employers should consider seeking legal advice in respect of the overseas jurisdiction.

## *Will the employer remain liable for the health and safety of employees working overseas?*

Employers in Hong Kong have a common law duty alongside a statutory duty under the Occupational Safety and Health Ordinance (Cap 509) to take measures as far as reasonably practicable for ensuring the health and safety of all employees at work. Under the Employees' Compensation Ordinance (Cap 282), an employer is liable to compensate employees for personal injury from an accident arising out of and in the course of employment. Since the employees are working overseas, these obligations may remain applicable depending on the circumstances. Considering the challenges and ambiguities an employer may face in controlling the health and safety concerns, employers should consider seeking lawful undertakings from employees regarding remote work arrangements and put in place detailed employment policies setting out requirements and best practices. Although insurance policies are not a substitute for the employer's obligations, they can reduce the financial burden if liabilities arise. Employers should review the coverage of the existing policies as well as consider taking out insurance (in Hong Kong and/or overseas) where necessary.

## **Key Takeaways**

- Prior to allowing any employee to work remotely overseas (especially if the employee will be present in the overseas jurisdiction for more than 183 days in a 12-month period), it is suggested that employers seek appropriate legal advice and tax advice in Hong Kong and the overseas jurisdiction.
- It is important to ensure that the employee has a right to work in the overseas jurisdiction.
- Any agreement to work remotely overseas should be documented in writing along with sufficient details on the applicable law, nature of duties, length of stay overseas, and necessary indemnities in relation to taxes and in the event the employee contravenes any law while working overseas.
- Depending on the role of the employee, employers may also consider varying the employment contract and engaging the employees on an independent contractor basis.

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- Employers should also review their existing policies and insurance coverage and consider updating their policies or implementing new policies for employees working remotely.

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