



## EMPLOYMENT & BENEFITS | What a Hong Kong Employer Should Consider before Agreeing to an Employee Working Remotely from Overseas

The COVID-19 pandemic has drastically changed many aspects of work, one of which is where people work. More and more employees are now allowed to work remotely, or work from home (WFH), whether as a temporary measure in response to the pandemic or a developing “new normal” in the way the employer wants to operate.

An employer should consider and address a number of issues before permitting an employee to work remotely from outside their usual “home jurisdiction”. By this we mean for an extended period beyond the usual business traveller who, for example, visits an overseas location for a few days to attend meetings. This article looks at some of the main legal issues an employer should consider before allowing the employee to perform the contract of employment outside the home jurisdiction in an “overseas jurisdiction”.

### **1. Will the Employer (Inadvertently) Create a Legal Presence and/or Permanent Establishment in the Overseas Jurisdiction?**

Perhaps one of the first questions to ask is whether the employer will be creating a legal presence (for tax or otherwise) in the overseas jurisdiction by allowing the employee to work there. What are the thresholds the employer needs to be aware of before triggering requirements to register a business and/or report or be liable for tax in the overseas jurisdiction? Understanding the requirements of the overseas jurisdiction will help the employer decide whether to grant permission for the employee to work there and if so, for how long and under what circumstances.

Creating (inadvertently) a tax presence in an overseas jurisdiction can be costly. As such, employers should seek the appropriate tax and legal advice to understand the requirements of the overseas jurisdiction before it agrees to an employee working in the overseas jurisdiction.

## **2. Does the Employee Create Their Own Personal Tax Liability in the Overseas Jurisdiction?**

This question is not just one for the employee but also for the employer. In some overseas jurisdictions, an employer will need to deduct taxes from an employee's wages (e.g., under a Pay As You Go or Pay As You Earn requirement). An employer will need to be aware of any obligations to deduct taxes from wages and how that arrangement may be implemented. In Hong Kong, the Employment Ordinance restricts deductions from an employee's wages to only certain limited circumstances and an offence arises in the event of breach. The deduction from wages for taxes required under the laws of an overseas jurisdiction is generally not one of the permitted circumstances.

As with the issue of corporate tax (discussed in 1. above) the employer should be aware of any thresholds for triggering the application of the tax regime in the overseas jurisdiction. For example, in some overseas jurisdictions, personal tax liability is triggered if the employee has been in the jurisdiction for more than 183 days. In working out this threshold the employer should also be careful to take into account any periods of personal or holiday time the employee may have spent in the overseas jurisdiction in addition to working time.

## **3. Does the Employee Have the Legal Right to Work?**

While having the right to work in the overseas jurisdiction will be an issue for the employee, there may be impact on the employer if the employee does not have that right. For instance, the employer may lose the services of the employee if the employee is detained in the overseas jurisdiction. Depending on whether the employer has operations in the overseas jurisdictions, the laws of that overseas jurisdiction may attach to or remedies may be sought against the employer's operations in the overseas jurisdiction. If the employer grants permission to the employee to work in the overseas jurisdiction, it may be complicit in any offences committed by the employee if they work without the right to do so in that overseas jurisdiction.

## **4. Will the Employer Need to Comply with Regulatory & Compliance Obligations in the Overseas Jurisdiction?**

An employer that operates in a regulated sector (e.g., financial institutions) should consider whether the relevant employee will be performing any regulated activities in the overseas jurisdiction for which the employer (and possibly the employee) will need to comply with local regulatory and compliance requirements. Depending on the circumstances, it may be necessary to obtain licensing or approval for both the employer and the employee from the local regulators.

## **5. Will the Employment Law of the Overseas Jurisdiction Apply?**

An employer should check whether and from when local employment law will apply to the employee if they work in the overseas jurisdiction. The laws of the overseas jurisdiction may

apply despite the express agreement in the contract of employment that Hong Kong law applies.

The employer may be required to comply with various obligations required in the overseas jurisdiction such as making superannuation and social security/statutory pension contributions, granting local holidays, providing local insurance and complying with local laws relating to standard working hours or minimum wage.

Some local employment laws may also provide greater protection to the employee than under Hong Kong law. For example, an employee may be entitled to unfair dismissal protection or more generous payments on termination of employment, which may be an issue if the employer is looking to implement a redundancy exercise while the employee is overseas.

**6. Will the Employee's Current Benefits and Insurance Coverage Extend to the Employee while in the Overseas Jurisdiction?**

An employer should consider whether the benefits and insurance coverage (e.g., medical and dental plans, employees' compensation insurance or any other insurance to which the employee is contractually entitled) that the employee is entitled to under their contract of employment will continue to cover the employee while working in the overseas jurisdiction for an extended period of time. For example, is there an exclusion in the insurance policy for employees who work outside of Hong Kong?

**7. How will the Employer Ensure Workplace Health and Safety while the Employee Is in the Overseas Jurisdiction?**

An employer will continue to owe a duty to take reasonably practicable steps to ensure the workplace health and safety of their employees, even when they are working outside of Hong Kong.

A risk assessment should be conducted to determine what the reasonably practicable steps should be. This will depend on the circumstances, e.g., what the employee's job duties are and how the employee will be doing his/her job.

**8. Does the Employer Need to Amend the Contract of Employment to Reflect the Agreed Arrangement for the Employee to Work in the Overseas Jurisdiction?**

Depending on the circumstances and the arrangement reached with the employee, an employer should consider whether they should document any amendment to the contract of employment in writing. From an employee relations perspective, it is good to manage expectations to reduce the chance of subsequent dispute. If there are parameters that the employee needs to abide by (e.g., not staying longer than a certain period or not engaging in any particular activities), these should be documented. If the arrangement is only temporary, this should also be documented.

The above list is not meant to be exhaustive. It should, however, be a good starting point for an employer to identify issues when considering whether to allow an employee to work remotely in a place outside of Hong Kong.

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