

Hong Kong Employment Law Essentials in a Changing World (Part 3)

Top Ten Takeaways - Flexible and Agile Working

- There is no standard or statutory “definition” of flexible or agile working and both working arrangements are treated equally under the law. There are no specific roll-out requirements for flexible and agile working and it is a matter of contract between the employer and employees. Employees who fulfil the requirement of continuous employment (i.e. employees who are employed for at least 18 hours a week, for at least four consecutive weeks) continue to be eligible for statutory entitlements and benefits in accordance with the Employment Ordinance (Cap. 57) (EO).
- In managing flexible/agile working arrangements in particular part-time arrangements, employers should bear in mind any working hour/ time tracking requirements. Under the EO, time tracking of hours worked is required where wages paid in respect of the wage period (generally one month) is less than HK\$15,300. This is a separate obligation under the EO and is irrespective of the need to pay the employee not less than the minimum wage of \$37.5 per hour. In other words, unless the employee is explicitly exempt under the Minimum Wage Ordinance (Cap. 608), employees must be paid the minimum wage regardless of the time tracking requirement.
- Although there is no express statutory requirement to reimburse expenses, there is an implied duty to reimburse an employee for any expenses they incur when fulfilling duties under the employment contract. Employers should ensure that company policies specify how the responsibility for expenses will be apportioned in flexible and agile working situations.
- Work health and safety laws continue to apply to employees, regardless of whether they are working from home or working at another location.
- Prior to introducing a flexible or agile working arrangement, it will be prudent for employers to review and, if required, update their confidentiality policies to cover proper usage of personal devices and the handling of company information.
- Employers have a right to monitor employees' performance to ensure they are performing their duties properly. However, if as a result of such monitoring, employees' personal data will be collected and processed (e.g. through e-mail monitoring, telephone monitoring and internet monitoring), it is important to ensure that the Personal Data (Privacy) Ordinance (Cap. 486) is complied with.
- Employers may consider including specific rules or expectations (such as prohibitions on using working time for domestic, family or other commitments) in their flexible and agile working policy to manage productivity. Where there has been decrease in productivity following the implementation of a flexible or agile working arrangement, employers can impose disciplinary measures to address this.
- Before requiring an employee to work from another location, employers should check whether the employment contract contains a location clause or not. Where a contract does not contain a location clause, employers should seek the employee's consent prior to imposing a change in work location.
- Employers should ensure that the side letter and policy stipulating flexible and agile working arrangements expressly provide the employer with the right to unilaterally terminate such arrangements. The side letter and policy should explicitly note that flexible and agile working is subject to business needs and suitability.

- When re-introducing employees back to the office workplace, employers should note that employees can only lawfully refuse to attend their workplace where they reasonably fear for their health and safety.

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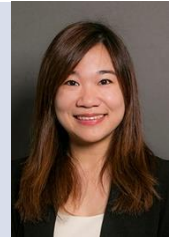
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