

THE FUTURE OF WORK: FLEXIBLE WORKING ARRANGEMENTS IN MALAYSIA

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Not too long ago, flexible working was an uncommon concept practised only by eccentric-work-alone entrepreneurs. When the Covid-19 pandemic hit, “Work from Home” seemed to have been instructed overnight in line with circuit breakers and lockdowns imposed by governments worldwide in an attempt to fend off increasing Covid-19 infections. Malaysia was no different.

This has significantly changed the landscape of work. Fast forward four years, “Work from Home” has now not only become an irreversible international working norm but increasingly, the default, even in Malaysia. Employees now look for this additional perk to be entrenched in their terms and conditions of employment. “Work from Home” has also taken on new meaning and has evolved into telecommuting or remote working.

In this article, we provide insights into some common issues that may arise from implementing flexible working arrangements (“**FWAs**”) in Malaysia.

1. Are FWAs permitted or regulated in Malaysia?

Yes, FWAs are permitted in Malaysia.

However, FWAs are only regulated to a certain extent in Malaysia. The amendments to the Employment Act 1955 (“**EA**”), which came into force on 1 January 2023, first introduced the concept of FWAs under statute. The law under the new Sections 60P and 60Q of the EA now provides that employees may apply in writing to their employer(s) for a flexible working arrangement (“**FWA**”) but does not go on to specify how the employers should respond to such applications, leaving it entirely to the employers’ discretion to approve or reject FWA applications. No guidelines have been issued by the Ministry of Human Resources prescribing how such discretion should be exercised.

Most employers have begun to accept ad-hoc written applications made by their employees in exercise of their duty under Section 60Q(2) of the EA even though Section 60Q(1) of the EA states that the application is to be made “in the form and manner as may be determined by the Director General of Labour”. Employers are required to respond in writing to the application within 60 days to either approve or refuse the application.

Prior to the amendments, FWAs were not regulated in Malaysia and were purely a matter of contract between the employer and employee.

2. What type of FWA can be applied for?

The EA permits applications for FWA to be made to vary the hours of work, days of work or place of work in relation to employment.

However, an employer may choose to expand the types of FWA that it offers to its employees, such as offering job-sharing, remote working from other countries or states, work-sharing, staggered hours or condensed work weeks.



3. Can employees expect that their FWA application will be approved as a matter of course since FWAs are regulated under the EA?

No. The EA does not compel an employer to approve a FWA application, but only to consider such application. Put simply, an employer may refuse the FWA at its sole discretion.

In fact, the EA does not even require an employer to inform its employee of the right to apply for FWA or to offer it generally as part of terms and conditions of employment. The EA also does not prescribe any minimum criteria which the employer must consider in its assessment of FWA applications received. Hence, it appears that employers still retain full prerogative in deciding whether to allow FWA in their business notwithstanding the statutory right of application provided for under the EA.

The EA does, as a minimum, require the employer to provide grounds of its decision if an FWA application is refused but does not prescribe a mechanism for employees to appeal the employer's decision in such circumstances.

4. Can FWA apply to select employees or a select group of employees only?

Yes. As the EA only affords an employee a right to apply for FWA but does not compel an employer to provide FWA, it naturally follows that an employer has full discretion to not only to decide whether to offer FWA at the workplace but also to decide which employees or groups of employees the FWA may apply to.

5. Is an approved FWA permanent?

An approved FWA may or may not be permanent depending on the agreement between the employee and employer. An employer may permit the FWA for only a specified period or limit its duration of application. An employer may also reserve its right to revoke the FWA for reasons deemed fit, including poor performance or misconduct.

6. Is the employer still bound by the provisions of the EA in respect of an employee's FWA?

Yes. Pertinently, employers are reminded that under Section 60A(1) of the EA, there are specific limitations as to the number of hours of work per day and per week which an employee may be required to work. Employees also continue to enjoy statutory minimum annual leave, sick leave, public holidays, and where applicable, additional payments for working in excess of the number of work hours per day under the EA notwithstanding any FWA. Employers must not introduce conditions in FWAs as a way to circumvent these statutory requirements.

7. Is an employer required to introduce a written FWA policy at the workplace?

No. Neither the EA nor any other laws require an employer to formulate and introduce a written FWA policy at the workplace although this is highly recommended. A FWA policy should clearly state its ambit of application, including whether FWAs are allowed, eligible employees, method of application and type(s) of FWA offered.

8. How will a collective agreement impact FWA offered by an employer?

Section 60P(2) of the EA states that any application made by an employee for FWA shall be consistent with the terms and conditions in the collective agreement. Hence, employers may first have to consult the relevant trade union on any proposal for FWA involving employees who fall within the scope of the collective agreement before introducing the same.

9. How should an employer monitor the work performance of an employee on an FWA?

The employer's management of an employee's work performance under law does not change even if the employee is on FWA. Hence, employers must ensure that they have an effective system in place to monitor the performance of the employee even if the employee is not physically present at the office or works outside normal business hours.



To monitor an employee's performance while on FWA, some employers have resorted to installing tracking software on their employees' laptops to gauge their level of work activity while away from the office. While such methods are not impermissible insofar as employment law is concerned, it is not recommended for an employer to do so without first informing the employee of the same. If the employer wishes to install such software, it is advisable to stipulate the same as one of the terms for approving a FWA application.

If the employee's performance cannot be adequately monitored while on a FWA, employers should take this into consideration in deciding whether or not to approve the FWA application. An employer may choose not to approve a FWA application on the ground that it cannot satisfactorily monitor the employee's performance if the employee is not working from the employer's premises, depending on the work scope and nature of the employee's job.

10. Does FWA create any occupational safety and health obligations on the part of the employer?

Under the Occupational Safety and Health Act 1994, employers have an obligation to ensure the safety, health and welfare of their employees at the workplace. Insofar as FWA is concerned, this may potentially extend to an employer having to ensure a safe and conducive workplace for its employees, even if the employees are not working from the employer's premises but remotely from other locations including the employees' own homes. It is doubtful that a condition can be imposed in a FWA that absolves the employer from this statutory duty. Hence, if an employer is not confident of fully discharging its health and safety obligations insofar as such FWA is concerned, the employer may choose not to approve the employee's FWA application.

Comments

A recent survey showed that 71.6% of respondents seek FWAs.¹ In another survey, 33% of the respondents said that working from home is a non-negotiable feature and 39% said they would consider quitting if they are required to spend more time in the office.² It is evident from these findings that it is inevitable that employers in Malaysia will have to offer some form of FWA to attract and retain talent for work that can be performed outside the traditional workspace.

Is flexible working how the future of work in Malaysia looks like?

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¹ Survey by Hays (M) Sdn Bhd; "Flexible work arrangements important to employees"; The Star Online; 9 May 2024.

² Survey by Randstad Malaysia; "Flexi-work not the only way to go"; The Star Online; 7 May 2024.



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