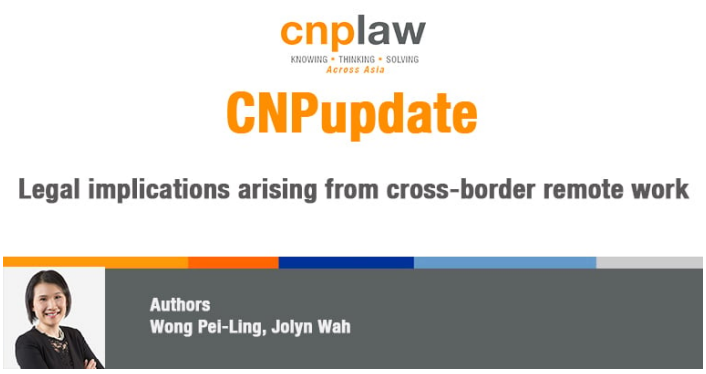

LEGAL IMPLICATIONS ARISING FROM CROSS-BORDER REMOTE WORK

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In early June 2021, Facebook announced that employees whose jobs could be done remotely may request to work remotely from wherever they may be, and that it would support remote work opportunities *inter alia,* in the Europe, Middle East, and Africa regions, allowing employees to move from anywhere to the UK. This is but one of the many examples of how the COVID-19 pandemic has radically altered the way we work. In response to the risks of virus transmission, travel restrictions, quarantines and lockdowns forcing employees to work from home, cross-border remote working arrangements have increasingly become prevalent and will likely be a permanent work arrangement for many employers after the pandemic ends, as employers seek to capitalise on the global workforce.

This article will broadly consider some of the issues that may arise when implementing remote work arrangements across borders.

Immigration and Business Registration Issues

As a start, an employer must determine if the local laws of an overseas jurisdiction permit an employee (who is not a citizen or resident), to work remotely for the employer from the overseas jurisdiction, and if not, whether any immigration visa or work permit is required. From the Singapore employer's perspective, the employer has to verify if the employee holds a valid immigration visa or work permit to live and work in the overseas jurisdiction,

even if the work is performed entirely for the employer's business in Singapore and not for the employer in the overseas jurisdiction. Additionally, an employer may be required to register the business or a legal entity in the overseas jurisdiction, if the employer is deemed to be carrying on a business in the overseas jurisdiction.

A company who intends to hire a foreign employee for work in Singapore will be required to obtain a work pass for the foreign employee from the Ministry of Manpower. Generally, the company must be registered with the Accounting and Corporate Regulatory Authority ("**ACRA**") in order to submit an application for a work pass. If the company is an overseas company, the company must have a sponsor registered in Singapore to submit an application for a work pass for its foreign employee.

Employment Laws and Protection

The Employment Act ("**EA"**) applies to almost all employees, including foreign employees who work in Singapore (subject to the exclusions in the EA), regardless of the choice of governing law in the employment contract between the employer and the employee. Under the EA, every term of an employment contract which provides a condition of service which is less favourable to an employee than any of the conditions of service prescribed under the EA shall be illegal, null and void to the extent that it is so less favourable .

In most cases, if an employee is employed by a foreign employer to work in Singapore, the employee would usually be covered by the minimum statutory protection offered under the EA.

On the other hand, if an employee is employed under a foreign law employment contract for an overseas employer, and the work that is required to be performed takes place entirely outside Singapore, then the EA would generally not apply. There are also no mandatory rules in the EA that will automatically apply to a Singapore citizen or permanent resident who is employed to work in an overseas jurisdiction outside Singapore.

Singapore employers of employees working remotely overseas should bear in mind that notwithstanding any agreement between the parties on the governing law (for example, parties have agreed that the laws of Singapore should govern the agreement), their employment relationship may still be subject to the prevailing laws of the overseas jurisdiction where work is performed and the protection offered to employees in the overseas jurisdictions - which may potentially be more onerous for the Singapore employer than initially considered. This is especially relevant in the case of retrenchment or termination of the employees stationed overseas.

The Tripartite Alliance for Dispute Management

If a Singaporean employee is working remotely for an employer who is not registered in

Singapore, the Tripartite Alliance for Dispute Management ("**TADM**") will not be able to assist the employee in any claims against the employer.

In a 2020 case of a salary dispute involving a Singaporean employee who was working remotely for a company based in Greece, the TADM found that the company was not registered with and had no records with ACRA. As the company was not incorporated in Singapore and had no local presence in Singapore, the TADM was not able to assist and found that the employee's only recourse was to seek extra-territorial legal assistance to pursue his claim for outstanding salary in Greece. The Ministry of Manpower has also advised that if an employee decides to proceed with accepting an offer from an employer who is not registered in Singapore, the employee should check if the employer is registered with its overseas authorities and the types of recourse that may be available to the overseas employee in the event of a dispute.

1. Data Protection and Security

Employees who work remotely are not exempted from and are expected to comply with their statutory obligations under the applicable laws of the place of business of the employer. This will include the duty to protect the confidential information of the employer, and personal data that the employee may be given access to or may process in the course of his or her employment. Working remotely from home or locations other than the office, can increase the risk of data breaches and cyber-attacks as employees may not be adequately protected by the office security systems that keep their IT devices and documents secure.

Employers should consider implementing the following security measures to better protect personal data and information handled by their employees. This will include:

- reviewing and updating data protection policies and guidelines on accessing, handling and disposing of data in remote working environments;
- reviewing and updating response systems in the event of security breaches;
- conducting relevant training for employees and alerting them of enhanced risks; and
- enhancing IT protections for systems accessed by employees (such as a virtual private network, multi-factor authentications, account lockouts after multiple failed logins).

2. Tax

Employers should also assess whether the activities of their employees in an overseas jurisdiction, including any work performed remotely by the employees in the overseas jurisdiction, may result in the employer being deemed to have a permanent place of establishment in the overseas jurisdiction, and thereby potentially creating a taxable presence.

Some of the factors to consider when determining whether an employer may have a permanent place of establishment are as follows: (i) the nature of an employee's work,

whether the employee exercises a managerial or executive function, whether the employee has the authority to negotiate and conclude contracts on behalf of the foreign company, whether the work is key to the employer's business; (ii) the number of employees stationed in the relevant overseas jurisdiction; (iii) the duration of time the employee spends in the overseas jurisdiction, whether there is intention for the employee to return to Singapore, whether the employee operates out of a fixed place of business and (iv) whether there are any COVID-19 administrative concessions in place in the overseas jurisdiction.

Given the various issues that may arise when an employee works remotely from a country that is different from the one that the employer is based in, employers should generally, and as a matter of good practice, have in place clear policies governing remote working and consult their legal and tax advisors in Singapore and the relevant overseas jurisdiction where the employees are intended to be stationed, prior to engaging in cross-border remote work.