

# Remote working – a new play book

2020

We gathered senior lawyers, thought leaders and innovators, many connected with technology and financial services for a roundtable discussion, conducted via Webex, to take the temperature of the current economic and social changes imposed by trade differences and COVID-19 and to peer into the future for Hong Kong and its place in a newly-calibrated world.

One of the many significant and important themes that emerged was how firms were innovating how they conducted business. Some signalled that they were adopting more permanent flexible work arrangements for staff, or at least making sure that they were ready if a situation like this occurred again.

It was evident that a "play book" for this potential transition is needed, dealing with employment issues, tech upgrades, operations, regulatory engagement and structural adjustments. Ideally, government support would bolster this through incentives for innovative businesses and ongoing encouragement of private sector (including bank) support for struggling businesses committed to building a competitive model for the 21st Century.

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## Designing the play book

So what should a play book address?

From a legal and regulatory standpoint, the following are essential.

### 1. Employment and resourcing

Most of us found ourselves working from home, or in lockdown perhaps overseas in unfamiliar surroundings, for some period recently. It is quite likely that we will be obliged to do some more of this before we can put the current uncertainties behind us. With a modicum of planning, we have largely made this work, at least on a short term basis. But most employment relationships anticipate a place of work designated and provided by the employer, and risk management is normally centered around that workplace and how the employee performs within it.

Irrespective to where the debate over the future of flexible working leads, it would be timely for employers to review a number of aspects of the employment contract and associated policies:

- The location of where the work is performed has legal implications as an employer in Hong Kong is legally required to provide and maintain a reasonably safe workplace and to take reasonable care regarding their employees' health and safety<sup>1</sup> (see also our [earlier article](#) on an employer's obligations in a COVID-19 outbreak). Normalisation of home working would mean that employers need to take into consideration household hazards not commonly seen in an office setting. This raises the question how far does an employer's responsibility reach – will an employer be liable for employee's chronic back pains due to unsuitable chairs at home?

<sup>1</sup> These duties can be found in statute (such as section 6 of Occupational Safety and Health Ordinance, Cap 509 and section 6A of Factories and Industrial Undertakings Ordinance, Cap 59) and common law

- The location where work is performed may also have **tax implications for employers as well as employees**. In particular, if employees are working remotely from another jurisdiction (e.g. PRC or a foreign country) for an extended period, the question arises whether the employee's salary is taxable in Hong Kong and/or the jurisdiction where the work is actually performed. Does this create additional tax obligations for the employer in another jurisdiction through the presence of employees – to date a number of jurisdictions are taking a more relaxed approach but as the current circumstances come to an end the employers and employees must be mindful of such obligations.
- A scattered workforce will make it difficult for management to monitor and attend to the needs of its people. Consideration needs to be given to appraise non-work attributes of a staff (for example people engagement, leadership skills) in a setting where there is limited people exposure.
- Both in terms of the positive sides of appraisal (leading to employee promotions) and, perhaps even more problematic, performance management, the lack of visibility of staff can lead to less rigorous treatment of individuals. This can have significant costs in efficiency and morale, and may lead to increased propensity for Labour Tribunal and discrimination claims. There may be a tendency for employers to seek to monitor their remote working employees' online activities (not only internet but key stroke analysis, in the hope of establishing their psychological condition). It seems unlikely that the introduction of remote working would justify the adoption of more intrusive monitoring in the eyes of privacy regulators.
- **Work life balance is also a significant component of employee well-being.** A [report](#) from the United Nations International Labour Organization found that while employees are more productive when they work outside a conventional office, they are also more vulnerable

to working longer hours, a more intense work pace, work-home interference, and, in some cases, greater stress. Flexible working may mean more family time for some but to those who live alone might mean “cabin fever” in the short term and at worse, social isolation. This can be very detrimental to maintaining a healthy and motivated workforce if not managed properly.

## 2. Technology upgrades and procurement

Before recent events necessitated advancement, flexible working 1.0 highlighted all sorts of difficulties surrounding the use and misuse of technology, primarily leading to compromised data security and breaches of the requirements of regulators. These incidents ranged from personal and/or other confidential data being taken home by added office workers on USB drives (whether or not encrypted), or files or laptop computers being left in taxis or stolen from private cars. Remote workers may use their personal email accounts if they are unable or untrained in accessing the full employer suite of applications from home.

Perhaps these incidents may reduce in frequency were the adopters of remote working to make offsite data access “business as usual”. However, there would be many other questions to answer, such as whether home wi-fi security is up to snuff and whether employees should each be issued with a crosscut paper shredder. Overall, however, this may not be seen as any more revolutionary than **Bring Your Own Device (BYOD)** was a decade ago.

The tools for video enabled remote working have been around for some time. Yet, large scale adoption has only been seen recently and their explosive use has **highlighted issues (in terms of secure data management, and the potential for eavesdropping) which will need careful management.** Some employers have outlawed the use of certain video call platforms by their employees.



### 3. Outsourcing

A more sophisticated tech stack is essential to creating diverse work environments. This is particularly the case where staff may be working at home as well as the office (not just on the odd occasion). Further complexities arise if they are in remote locations with different accessibility requirements. Pandemics themselves demonstrate that back-up locations are not foolproof.

As noted above, this will involve wrangling basic procurement contracts, but it also likely requires a rethink on outsourcing strategies and arrangements.

Outsourcing strategy requires mapping:

- how the execution of particular functions and the functions themselves (whether at front, middle or back-office) need to change;
- whether any additional functions need to be outsourced, or indeed if existing outsourced functions need to be removed or adjusted;
- if the company's jurisdictional footprint has changed – whether at the individual, corporate, customer, technology or data level; and
- any regulatory updates and/or approvals required.

For example, if a regulated financial institution decides to allow staff to work from offshore locations, they will need to consider data storage and whether that contravenes data localisation obligations or triggers additional conditions such as registrations or requirements for cloud usage. It will also need to assess if there is a change to its outsourcing requirements that requires a distinct notification and approval, as well as documentary enhancements to meet regulatory standards. If it also chooses to bolster its business continuity plan and engage additional back-up service providers, similar considerations apply.

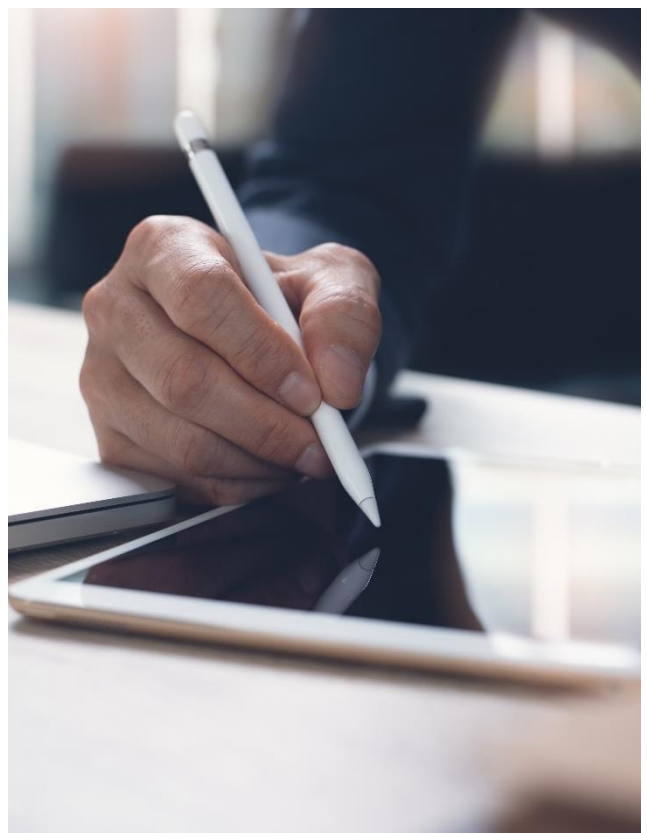
### 4. Electronic execution

The Electronic Transactions Ordinance (Cap. 553) ("ETO") which was enacted in January 2000 and updated in June 2004 ensures that documents executed electronically have the same legal backing as their paper counterparts.

For transactions that do not involve Government entities, so long as the parties consent to the use of electronic signatures and where the method used is reliable and is appropriate having regard to all the relevant circumstances, then a document **will be regarded as duly signed by the person using electronic signature**<sup>2</sup>. Furthermore, an electronic record shall not be denied admissibility in evidence in any legal proceeding on the sole ground that it is an electronic record<sup>3</sup>.

What this means in practice is that transactions between private businesses may adopt any technology to conclude commercial contracts and such contracts will be legally valid and binding subject to reliability and appropriateness of the technology and consent from the parties involved. The methods could be signing in wet-ink followed by scanning and sending the PDF document via email to the counterparty, or adoption of e-signature software that is increasingly popular (such as DocuSign, Adobe Sign etc.)

However, note that the ETO is mainly applicable for **day-to-day commercial use and does not apply to certain legal documents**<sup>4</sup> such as testamentary documents, trusts, powers of attorney, documents concerning land and property transactions. Also, for transactions that involve a Government entity a **digital signature**, which is generated using an asymmetric cryptosystem and a hash function, must be used<sup>5</sup>.



<sup>2</sup> Section 6(1) of the ETO

<sup>3</sup> Section 9 of the ETO

<sup>4</sup> Schedule 1 to the ETO

<sup>5</sup> Section 6(1A) of the ETO



## 5. Data protection

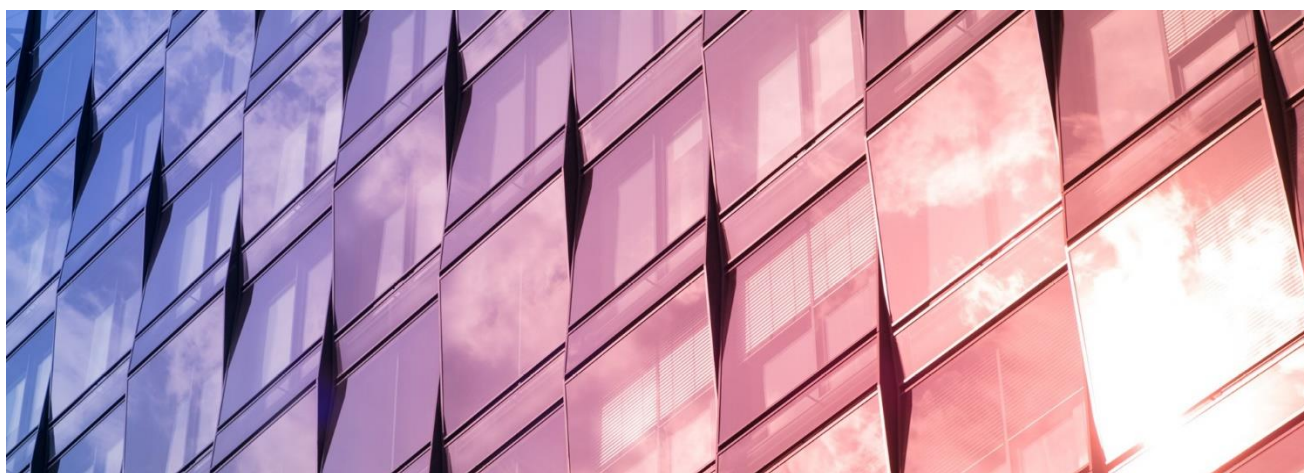
So long as security issues are fully addressed, and remote working does not translate to processing data outside the employer's information and communication systems, then the fact that customer data is being handled in the home office rather than in an office tower does not alter the purpose for which it is being used and does not automatically fall foul of data laws (including the Personal Data (Privacy) Ordinance (PDPO) locally).

Remote working may, however, raise red flags for regulators in relation to customer data. It may be necessary to establish (whether to data privacy regulators, financial services or professional regulators) that the oversight imposed over employee practices whilst individuals are working from home is no less stringent than for those working at the office.

Multiple regulators are issuing specific guidance on the new environment, including expectations on record-keeping, order handling, cloud and other data-heavy processes.

In terms of the potential over-collection of employee data (as to which, see the comments above relating to key stroke analysis), there may be contradictory pressures between regulators protecting personal data, and regulators undertaking the oversight of market participants.

For more on this and related topics, see our paper "[All about the data](#)".



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