

Work From Home and SME Digitalisation in Malaysia: Legal Challenges

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Abstract

Purpose: This paper aims to analyse challenges in implementing work from home for SMEs in Malaysia in the legal viewpoint. Apart from discussing relevant provisions, several court cases are also examined to identify the problems which arise in the implementation of work from home.

Design/methodology/approach: This paper mainly relies on primary sources of information in form of statutes and court cases. The analysis conducted in this research is supported by secondary data. Additionally, this paper also uses an analytical descriptive approach to analyse relevant provisions from statutes and to examine current court cases regarding the implementation of work from home in SME.

Findings: It is submitted that the current Malaysian legal framework on employment and safety and health at workplace is silent on the status for worker under work from home arrangement. Therefore, similar obligations and rules under the Employment Act 1955 and Occupational Safety and Occupational Safety and Health (Safety and Health Committee) Regulations 1996 is applicable to worker under work from home arrangement.

Research limitations: The employer's view must be taken into consideration into future studies. Future research should examine the employer's perception in dealing legal issues arises in WFH arrangement.

Practical implications: The study suggests that SMEs need to review their working policy with regards to WFH arrangement and ensure it is adhering to the provisions under the EA 1955. Therefore, understanding the legal issues arising in the work from home arrangement will help employer to review their company policy when dealing with workers under work from home.

Originality/value: This paper provides an analysis of the legal issues arising in the work from home arrangement in particular for Malaysian SME. It is hoped that the content of this paper can provide some insight into this particular area for digitalisation regulatory framework not only in Malaysia but also elsewhere.

Paper type: Conceptual paper

Keywords: Work from home, SME, Digitalisation, Employment law

Introduction

Digitalisation transformation is the foundation for Industry Revolution 4.0 and it is the government aspiration to transform Malaysia into a digitally-enabled and technology-driven high-income nation. Digitalisation has influenced business owners to reflect on their current strategy and explore new business opportunity. Malaysian Digitalisation Transformation Plan is further accelerated during the COVID-19 crisis. Numerous initiatives introduced by Malaysian government to encourage digitalisation among small, medium and enterprise (SME) such as National Fiberisation and Connectivity Plan to provide faster and cheaper internet connectivity across the nation. However, it is found that there is a lack of urgency among Malaysian SMEs in terms of adopting digitalisation measures (Lim, 2021). This is due to various factors such as human resource management, communication, data processing and document handling.

One of the key digitalisation areas highlighted under the digital transformation plan for SMEs is related to remote working. One of the measures taken by the government under movement control order is the closure of non-essential business as part of its effort to curb spread of COVID-19 at the workplace. This situation requires SMEs owners to adopt remote working in order to sustain their business. Remote working is one form of flexible working arrangement where employees are allowed to perform their work from home. However, it is reported that Ministry of Human Resources (MOHR) has received 1,769 complaints stating that employers not allowing their workers to work from home during the movement control order (MCO). This shows that despite MOHR has released an employment guideline stating only 60% employees can come to work in the office in the permitted sectors, however, there are employers that want all of their employees to come to work in the office (Lee, 2020). Therefore, the question is whether the existing labour law in Malaysia is accommodating the WFH practice for SME owners?

With this regard, there are several objectives set to contribute to the research literature in this field of study particularly on the Malaysian context. Firstly, to examine the legal challenges in work from home for SME. Secondly, to recommend changes to the current legal framework to digitalise SME in Malaysia. This paper is organised as follows, the first part presents the literature review from previous studies on the work from home concept and the legal framework on work from home in Malaysia. The next part of this describes the research methodology adopted to achieve the objectives of the study followed by discussion on the issues surrounding work from home in Malaysian SMEs in the legal viewpoint and the changes to be made to the current legal framework.

Literature Review

Digitalisation is a crucial element for transformation of industry and business in preparing for Industrial Revolution 4.0. SME represents more than 90% of global business and has given significant contribution in job creation and inclusive economic development (The World Bank, 2020). Additionally, SME make up 99% of the 920,624 business establishments in Malaysia. In 2019, SMEs employed 48.4% of the workforce in Malaysia, contributing 38.9%, to the Malaysian GDP (National SME Development Council, 2020). The nature of SME makes it easier for SME to adopt digitalisation because of the size of the firms and flexibility offered by SME. The unprecedented COVID-19 crisis and movement control order imposed by government has affected SMEs in Malaysia as only essential business is allowed to operate

during this period. Therefore, the effort for digitalising SME is further accelerated during the movement control period as online business becomes the main platform for SME owners in order to sustain their business (Tong & Gong, 2020). According to SME report, one of the main challenges for SME to adopt digitalisation is due to unclear regulation framework on issues such as data security and privacy (National SME Development Council, 2020). Additionally, Malaysian SME is facing human resource issues in handling employees in the work from home arrangement.

One of the digitalisation ecosystems requires Malaysian SMEs to be ready to conduct remote working in conducting their business. Remote working is a form of flexible working arrangement which is also known as teleworking, telecommuting, homeworking and work from home (Hassan & Nuruddin, 2011). During the COVID-19 crisis, remote working is widely practiced by employers and the term work from home is commonly used as referring to the arrangement for employees to work from their home instead of the office (International Labour Organisation, 2020). The nature of works, organisational factors and competitions are among the factors motivating industries to implement work from home for their employees (Saludin & Hassan, 2012). Study shows that information technology, financing, service, technology and advertising industries has adopted work from home for their employees (Lal & Dwivedi 2009; Mihailova et al., 2011; Kowalski & Swanson, 2005; Peters, et al., 2010). While research on work from home is now gaining increased attention, a research gap still exists in this field since study is still lacking on the legal issues that arises in the area of work from home for SMEs.

Methods

This research will address the research problems by applying qualitative contextual analysis by library research and literature reviews on the theory of work from home and digitalisation of SME. The goal of contextual analysis is to uncover manifest meanings within a text (Atkinson, 2017). Contextual analysis can help to uncover any underlying meanings behind a text (Krippendorff, 2012). Besides that, critical statutory analysis of the legislation, in particular the Employment Act 1955 and Occupational and Safety Health Act 1994, is adopted to analyse the loopholes and weakness of the legal framework of the work from home in Malaysia. Case law analysis is also conducted in order to analyse the issues confronted by SMEs owners when implementing work from home.

Results and Discussion

The first legal issue that arise in work from home (WFH) arrangement is on the rights of employees as provided in employment contract. Currently, the minimum rights and benefits of Malaysian employees are stipulated under the Employment Act 1955 ('EA 1955'). Failure of employer to provide benefits or lesser benefits in accordance to the EA 1955 is considered as breach of duty. Malaysian SMEs are facing difficulties in implementing working from home as the EA 1955 is silent on the status of worker's rights and benefits in the work from home arrangement. Thus, matters such as annual leave, sick leave and maximum working hours for WFH are treated similarly to traditional workers. For instance, employees have to apply for annual leave and emergency leave if they unable to perform their duties on working days despite working from home or if workers feel unfit to perform their duties they should be eligible for sick leave with support of medical certification and approval of employer. Additionally, workers in WFH arrangement should not be considered absent despite they are not in the office. Employers have to adhere to maximum working hours as stipulated in the EA 1955 which is 8 hours per day and 12 hours for overtime. Similarly, workers under WFH arrangement is expected to work not more than the maximum working hours provided under the EA 1955. Similarly, if workers are required to work more than the maximum working hours

as in the employment contract, employer is expected to pay for overtime accordingly. It is the duty of the employee to perform accordingly despite working remotely from home and without direct supervision from employer

Second issue that arise in WFH arrangement is regarding safety of workers under the WFH arrangement. Question arises on whether the duty of employer to ensure as so far as practicable, the safety, health and welfare at work his workers is extended to worker under the WFH arrangement? Section 15 of the Occupational Safety and Occupational Safety and Health (Safety and Health Committee) Regulations 1996 requires employer to conduct a suitable and sufficient risk assessment of all work activities carried out by their employees and to identify hazards and recommend remedial measures. Similarly, this obligation is also imposed to employer to review their work area to ensure it is free from hazards that can cause harm even when the worker is worker is working remotely (Yogarajah, 2020). Failure to provide a safe work environment for WFH arrangement and in resulting to work place injuries will subject the employer for civil suit claim. According to the principle, if the injury happened at home and during working hours, then workers can claim for compensation from employer. In the case of *Ketua Pengarah Pertubuhan Keselamatan Sosial v Vadivelan* [2009] 1 MLJ 238, the court states that ‘an accident happening to an insured shall be deemed to arise out of and in the course of employment’ must be given a liberal interpretation and thus this is applicable to WFH arrangement. The Employees’ Social Security Act 1969 must be construed with an objective to provide the insured employees with the widest possible insurance coverage, as observed by the High Court in *Ketua Pengarah Pertubuhan Keselamatan Sosial v Zaili* [2004] 1 MLJ 283.

Theoretical Implications

This study has contributed to the legal analysis of employment law and safety and health law as it studies the legal issues on WFH arrangement related to SMEs in Malaysia. This research can accelerate the effort for digitalising Malaysian SMEs in form of regulatory review of the current legal framework on relationship between employer and workers that work from home.

Practical and Social Implications

The study suggests that SMEs need to review their working policy with regards to WFH arrangement and ensure it is adhering to the provisions under the EA 1955. Therefore, understanding the legal issues arising in the WFH arrangement will help employer to review their company policy when dealing with workers under WFH.

Limitations and Suggestions for Future Research

This study has certain limitations. It analyse secondary data from library database and court cases and did not consider the employer’s perception on the legal issues in WFH arrangement. The employer’s view must be taken into consideration into future studies. Future research should examine the employer’s perception in dealing legal issues arises in WFH arrangement.

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