

# Technological Innovation and Its Challenges to Taiwan's Employment Law: Telework as an Example

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## I. The changing from the technological innovation

Traditional employment law in Taiwan, generally speaking, can be interpreted as a system that is built on a workplace-centered presumption, and the related laws and regulations are designed to cover cases that occurred under this model. When the wave of technological innovation arrived at Taiwan's industries, the new technologies accompanying the new approaches to produce products and provide services substantially altered the traditional idea of running a business.

So-called teleworkers are this report's main focus. The revolution in digital technology has stimulated both employers and employees to imagine more-flexible and customized ways of submitting and receiving labor. New working arrangements, such as work-from-home, satellite offices, or simply just working in a quiet coffee shop, have become options to consider. The employer may benefit from having professional employees in multiple locations, and the employee can enjoy the flexible working conditions with lower commuting costs. This is particularly true for the modern companies in which the job merit, not the time spent in the office cube, is of the essence in performance evaluation.

These new technologies and working arrangements, however, also bring new challenges in implementing the employment laws. Taking working hours and the prevention of occupational accidents as the examples, the authority's supervision of working hours relies heavily on the records kept by the employer, and the prevention of occupational accidents also depends on the employer's diligence in maintaining the workplace he/she is able to control. Unfortunately, the employer's ability to track accurate working hours and control the workplace happens to be the most cited difficulties in telework arrangements.

To shed light on the impact and the governmental response on telework issue, the following chapter will focus on related labor legislations and the directive on telework, and conclude this report with brief recommendations.

## II. Taiwan's modern employment laws and the challenges it faces with telework

### 1. What lies outside employment laws

#### a. Work hours and wages

Taiwan's major employment laws are often decades-old and were written to regulate the traditional employment model: a central workplace and 9 to 5 regime. In the Labor Standards Act,<sup>1</sup> Article 30 (1) sets up a general work hours criterion that establishes a regular work time of 8 hours per day, 40 hours per week. If there is a need to extend regular work hours, there are requirements in Article 32 (1) and (2) which specifies that the

1. The full English text of the Labor Standards Act can be found at <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=N0030001> (Last reviewed on February 25, 2018).

employer will need permission from the union (if there is no union, then from the worker-management meeting) to work overtime. The maximum overtime hours, including the regular hours, shall not exceed 12 hours per day. Both the regular work hours and the overtime hours cap are subject to flexible use with the prior permission from the union or labor-management meeting.<sup>2</sup> The employer is obligated to keep the employee daily attendance records to minutes for 5 years and must provide a copy of the record per the employee's request.<sup>3</sup>

Moreover, the statutes on wage and overtime payment are also listed in the Labor Standards Act, the implementation of which is strongly associated with the accuracy of calculating work hours. Generally, for ordinary work days, if overtime work is less than 2 hours, the employer shall pay the employee 1.34 times the regular hourly rate. If overtime lasts from 2 to 4 hours, the rate increases to 1.67, and 2.67 times the regular rate may be imposed when the employee is requested to work on rest days.<sup>4</sup>

Simply aligning the laws does not mean the law can be implemented well. As mentioned above, the core innovation of telework is its flexibility to customize the needs of the employer and the employee and reshape the employment format. For the higher ranking white collar teleworkers, who usually have commensurate negotiating power, telework is more like a benefit. They may enjoy quiet discretion on when and how to do their jobs, and the daily 9-5 work rule cannot represent their actual work time. The ordinary teleworker may still need to respond to the employer on the 9-5 work rule basis, in which case the problem becomes how the employer can verify the actual billable hours and pay the appropriate rate while the teleworker is not working in the office or somewhere else he/she can be observed.

There are other professionals who also work in a telework and flexible working arrangement. For example, a reporter may need to work continuously for a period of time to report on breaking news; a writer may need to write at midnight at a coffee shop when he/she catches the inspiration. All of these situations reveal the difficulties for the traditional employment law regime to supervise and implement the working hours criteria and base the related wage payment on actual hours of work.

#### b. Occupational safety and health

Another omission in the employment law may come from the Occupational Safety and Health Act.<sup>5</sup> Article 5 of the act explicitly assigns the obligation to provide a safe workplace and prevent occupational accidents to the employer. The employer shall apply necessary precaution measures and provide appropriate equipment to avoid accidents. Moreover, the employer is also responsible for exercising prior risk evaluation on machines, other equipment, and raw materials before they are used on the job. These duties allocated to the employer seem reasonable because the law can properly assume the employer is the most capable party to maintain his/her own property. Given that the employer provides the place and necessary tools and materials for the work, it makes sense to hold the company owner, who is also the final beneficiary of the work, responsible for workplace safety and health.

The teleworker, again, does not seem to fit in this regulatory regime. One of the most obvious characteristics of teleworkers is that they work outside of the traditional office which the employer is able to maintain and control. This raises the question of whether it remains possible and reasonable to require the employer to play the role allocated in the Occupational Safety and Health Act. If the employer may not be able to maintain and pre-evaluate the workplace, should he/she be liable when an accident occurs? This also touches upon the issue of privacy rights if the employer is obligated to inspect the workplace when the workplace is the teleworker's private home.<sup>6</sup>

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2. Please refer to the Labor Standards Act, Article 30 (2) and (3), Article 30-1, Article 32 (2) and (4).

3. Please refer to Labor Standards Act, Article 30 (5) and (6).

4. Please refer to Labor Standards Act, Article 24.

5. The full English text of Occupational Safety and Health Act can be found at <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=N0060001> (Last Reviewed on February 20, 2018).

6. Wan-Ning Hsu, Labor Protection for Teleworkers in Japan: New Legislation in Taiwan?, *Taipei University Law Review*, vol.99 (2016), 187-248, 236.

Another interesting issue will be the production equipment of teleworkers. Many recruitment announcements require applicants to prepare their own laptop or motorcycle for business use. Sidestepping the controversy on asking a worker to invest in work equipment, it would seem to be the employer's legal obligation to assess the risk of the teleworker's laptop and other devices for occupational safety and health purposes. To some extent, if necessary, the employer may need to request that the teleworker replace his/her computer or commuting device for safety purposes, and objectively, I cast doubt on this kind of measurement's practicability.<sup>7</sup>

### c. Employment discrimination

Employment discrimination legislation is another area of employment law that fails to address the unique situation of teleworkers. In Taiwan's Employment Service Act, Article 5 (1),<sup>8</sup> the employer is prohibited from discriminating against an applicant or current employee on the basis of these protected characteristics: race, class, language, thought, religion, political party, place of origin, place of birth, gender, gender orientation, age, marital status, appearance, facial features, disability, or past membership in any labor union. Moreover, in the Act of Gender Equality in Employment,<sup>9</sup> Articles 7 to 13 emphasize especially on discrimination based on gender and sexual orientation. This act also includes workplace sexual harassment and deals with it as gender discrimination. These two acts together build the basic foundation of Taiwan's employment discrimination laws.

The fundamental idea of discrimination law is that simply receiving different treatment from the employer may not automatically be seen as illegal discrimination unless the complainant can successfully prove that the disparate treatment is based on the complainant's protected trait<sup>10</sup> or an allegedly neutral policy has a disparate impact on a particular protected group.<sup>11</sup>

Employment discrimination law cannot protect a teleworker from disparate treatment (direct discrimination) because the identity of the "teleworkers" has not been recognized as among the protected traits listed above. In this circumstance, the employer can discriminate against the teleworker just because of his/her special work arrangement, in contrast to workplace-centered workers. This initially does not seem to be a wrong policy until we discovered that, ignoring the high ranking white collar teleworker, it is possible a good portion of teleworkers could be less competitive laborers such as worker with disability, part-time females with family care obligation, or suburban workers.<sup>12</sup> Many of these workers are those who deserve anti-discrimination protection, but may face disparate impact (indirectly discriminated against) because of the stereotype surrounding the teleworker group. Without a clear protection of their characters or identity as teleworkers, they may face difficulties in mobilizing employment discrimination law when these cases usually lack sufficient evidence and support.

## III. The directive on the work hours of employees working outside of the company: The government response

To respond to the problems above, the Ministry of Labor has promulgated the "Directive on the Work Hours of Employees Working Outside of the Company (hereafter, the directive)" in 2015. An update of this directive was announced in 2017<sup>13</sup> and the Ministry has expanded its coverage from reporters, teleworkers,

7. This issue may be solved if the employer is willing to provide all of the equipment for the teleworkers.

8. The full English text of Employment Service Act can be found at <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=N0090001> (Last reviewed on February 20, 2018).

9. The full English text of Act of Gender Equality in Employment can be found at <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=N0030014> (Last reviewed on February 20, 2018).

10. This kind of discrimination is also called disparate treatment or direct discrimination.

11. This form of discrimination is also called disparate impact or indirect discrimination.

12. Fang Wang, The New Labor Issue in the "E Generation": The Sociological Studies on the Teleworker's Labor Rights, *Journal of Labor Research*, vol. 4 (2004), 7-38, 16-17.

13. The Chinese version of the directive can be found at <https://www.mol.gov.tw/topic/3067/14530/24411/> (Last reviewed on February 22, 2018).

field salespersons, and drivers to all employees who work outside of an office. The new version of the directive also lifts the agency pre-approval to apply this directive; now all employees who work out of the office may be covered under this directive.

### 1. General rules

The general rules of the directive focus on the verification and the record keeping of work hours. Article 2 of the directive states that when verifying the work hours of employees who perform their duties out of the office, the following circumstances shall be noticed (abstracting the relevant points below.)

- (a) The initiation and the end of the regular hours, overtime hours, rest time, and the shift shall be agreed on by the employer and the employee in a written contract. This contract shall be included in the workplace rules.
- (b) The traditional definition of work hours refers to the time that the employee is under the supervision and disposal of the employer or the time that the employee is on-call per the employer's request. However, if the employee is not under one of these circumstances, and is out on a business trip or simply working outside of the office, the work time calculation can be agreed upon. The employer and the employee may agree on a start and finish time to define the work hours. The overtime hour, however, is still being verified on the actual time worked basis.
- (c) The employer is obligated to keep the work records of the employee. If there is a need to work overtime, the employer shall record the actual time spent on the assigned task. When the employee cannot complete the assignment within the regular hours, he/she needs to request the employer's permission to work overtime. After completing the assignment, the worker needs to report the actual time worked to the employer so that he/she can record the ending time of the assigned task.
- (d) Under special circumstances, when the out-of-office assignment often requires working overtime, the employer and the employee may agree on a particular amount of work hours that do not need to get the employer's prior approval. The employer, however, is still obligated to keep tracks on the work hours in the worker's actual overtime hours.
- (e) The record keeping methods for the out-of-office worker include but are not limited to sign up sheet or punch card. Other electronic devices and records can also be considered, including car dash camera, GPS tracker, phone record, electronic clock-in, Internet report, customer signature sheet, communication software and other devices that may be helpful. All of these records shall be prepared in written format when undergoing a labor inspection.
- (f) After the regular work hours, if the employer assigns a new task to the employee through the communication software or telephone or other methods, the employee can track the initial and end time of the assignment. The record accompanied by proof on the software or the phone can be seen as the evidence of working. Once the employee submits these materials to the employer, he/she shall register the extra hours in the record.

These general rules in the directive strive to establish a way to calculate the actual work hours and overtime hours that are not easy to catch under the telework work style, and included these working records into the current supervision and regulatory regime.

### 2. Special rules for particular professions' employees who work outside of the office

The directive also lists several special professions that are hard to verify work hours and provides guidance on the proper way of calculation.

- (a) News reporter
  - (1) Recognizing reporter's special time pattern when they often perform their duties outside of the office, not required to clock out, and difficult to track their actual work hours, a special verification method

is needed. The employer and the reporters may agree upon a written contract with regard to the initial and end of the regular hours and overtime hours. This contract needs to be included in the workplace rules.

- (2) To cover breaking news, reporters often receive assignments after regular hours. In this case, the employee's actual start and end time of the overtime work can be verified on different kinds of supplemental records. It can be the publication record, car dash camera, employee self-record, communication software, and phones. The employer is obligated to keep the record once the worker submits it.
- (3) The employer and the employee may agree upon a particular amount of time that does not require employer's pre-approval. The employee still needs to submit the initial and end time record to the employer after completing the job, and the employer is obligated to keep the actual overtime hours on file.

(b) Teleworker<sup>14</sup>

- (1) The definition of "teleworker" in this directive means employees who work under the supervision and disposal of the employer and submit the fulfillment of their contract obligation through electronic technology.
- (2) The work hours of a teleworker, due to the worker's autonomy, shall be agreed upon by the employer and employee. The actual work hours and rest time shall be recorded by the employee and logged through an electronic device to submit to the employer.
- (3) Recognizing that teleworkers usually do not work in the employer's workplace, the employer does not always get to control an employee's overtime hours. Therefore, overtime work hours shall be allowed on a pre-approval or agreed-upon basis.

(c) Field salesperson

- (1) Field agents, such as insurance or real estate agents, are seldom fixed in one office but traveling around different places to meet customers. Their actual work hours and overtime hours are thus hard to verify. To solve this issue, their work hours and overtime work, accompanied by a verification method, shall be put into the written contract and included in the workplace rules.
- (2) The record keeping methods include but are not limited to sign up sheet or punch card; other documents and electronic records can also be submitted to the employer for recording.
- (3) If the employer assigns a new task to the field agent after regular hours, the employee shall submit the actual end time to the employer for the record. If the customer requests a service outside of regular hours, the field agent shall ask for the employer's approval and report the actual hours to the employer after finishing the job.

(d) Car driver

- (1) The actual work hours for all kinds of drivers (cars for different purposes) need to be verified. It shall include but not be limited to time spent on pre-heating the car, driving, ticket verifying, shifting, car-washing, fueling, maintenance, on-call time, loading time, and other work times under the employer's supervision or disposal.
- (2) Rest time means the block of free time when the driver is not subject to the employer's disposal and control.
- (3) Whether the waiting time can be counted into the work hours depends on whether the employer still controls and supervises the driver during those times. If the driver has a two-hour break when he can freely conduct his/her own business after taking people to a location, it should not be included as work hours. In contrast, if one or more customers remain in the car, it shall be seen as work hours.

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14. The definition of "teleworkers" in the directive is narrower than the one this report uses as the topic. This report's definition included but not limited to the teleworkers who submit their labor and working achievement electronically, but also included people who work remotely, who seldom goes back to the office, and who is not required to report to a particular workplace.

- (4) The verification of the driver's work hours can be supplemented through various ways. The car dash camera, GPS, car assignment sheet, or the customer signature sheet will be accepted. The supervisor of the car shall bear the burden to keep the record and verify the work hours for the driver.

#### **IV. Conclusion: Problem is only partially resolved**

It is fair to say the government directive in 2017 partially resolved some of the problems identified in this report, especially the difficulties in verifying the actual work and overtime hours for teleworkers. The related wage and overtime pay issues may also be solved after successfully generating the working hours record.

Some other issues, such as employer's obligation to maintain a safe and healthy workplace, may be partially resolved by pre-assessing the workplace and providing sufficient advice and guidance on workplace safety and health to the employees.

Other problems, take employment discrimination as an example, are still unsolved through the limited circumstances that the directive covers. It may require further research and amendments to fundamentally reconsider the proper approach to deal with these emerging new working arrangements under the technology innovation.

Although there still have some difficulties need to be overcome, we shall be optimistic that through the continuingly discussion and research, a more tailored and comprehensive regulatory regime for the teleworkers will be revealed soon.



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