The Employment Law Review

Sixth Edition

Editor
Erika C Collins

Law Business Research

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EDITOR'S PREFACE

It is hard to believe that we are now on our sixth edition of *The Employment Law Review*. When we published the first edition of this book six years ago, I noted my belief that a book of this sort was long overdue given the importance to multinational corporations of understanding and complying with the laws of the various jurisdictions in which they operate. It has given me great pleasure to see the past editions of this book used over the last several years for just this purpose – as a tool to aid practitioners and human resources professionals in identifying issues that may present challenges to their clients and companies. The various editions of this book have highlighted changes in the laws of many jurisdictions over the past few years, making even clearer the need for a consolidated and up-to-date reference guide of this sort.

Global diversity and inclusion initiatives remained a hot topic in 2014. Many companies have unrolled initiatives regarding 'unconscious' bias, which is addressed in the first general interest chapter on global diversity. Looking abroad, recent legal developments regarding gender and transgender recognition will affect multinational corporations both in terms of law and policy, as underscored by recent legal developments out of India.

Our second general interest chapter tracks another active year of mergers and acquisitions after a brief decline following the financial crisis. This chapter, which addresses employment issues in cross-border corporate transactions, along with the relevant country-specific chapters, will aid practitioners and human resources professionals in conducting due diligence and providing other employment-related support in connection with cross-border M&A deals.

The third general interest chapter covers the increasing trend of clients considering or revising company's social media and mobile device management policies. In particular, there is an increase in the number of organisations that are moving toward 'bring your own device' programmes and this chapter addresses issues for consideration by multinational employers in rolling out policies of this sort. 'Bring your own device' issues remain a topic of concern because more and more jurisdictions have passed or are beginning to consider passing privacy legislation that places significant restrictions

on the processing of employee personal data. This chapter introduces practice pointers regarding monitoring of employee social media use at work as well as some steps to consider before making an employment decision based on information found on social media.

In addition to these three general-interest chapters, the sixth edition of *The Employment Law Review* includes 48 country-specific chapters. This edition has once again been the product of excellent collaboration. I wish to thank our publisher, particularly Gideon Roberton, Katherine Jablonowska, Adam Myers, Eve Ryle-Hodges and Shani Bans, for their hard work and continued support. I also wish to thank all of our contributors, as well as my associates, Jon Dueltgen and Courtney Bowman, for their efforts to bring this edition to fruition.

Erika C Collins
Proskauer Rose LLP
New York
February 2015

Chapter 48

UNITED ARAB EMIRATES

Ibrahim Elsadig[1]

I INTRODUCTION

The United Arab Emirates is a federal state with seven emirates. Legislative and executive jurisdiction is divided between the various emirates and the Union. The federal government is entrusted with promulgating legislation concerning the principal and central aspects of the Union and each emirate has the authority to enact its own laws and regulations in other matters. According to Article 121 of the UAE Constitution (as amended by Constitutional Amendment No. 1 of 2003) employment matters are restricted to the exclusive legislative powers of the Union.

An exception to the exclusive power to legislate in employment matters, which is also contemplated in Article 121 of the UAE Constitution, are the financial free zones, which are independent jurisdictions and have therefore been granted powers to self-legislate on civil and commercial matters, including employment matters. That is the case for the Dubai International Financial Centre (DIFC), which has enacted its own employment law, DIFC Law No. 4 of 2005. In our chapter we will not cover this law and will focus on the federal regime only.

The main law governing employment relations in the UAE is Federal Labour Law No. 8 of 1980 (as amended) (the Labour Law). There are also several ministerial decrees and orders regulating particular aspects of employment relations, for instance, inspections of workplaces, employment of women and young persons, and health and safety issues.

The Labour Law is protective of employees and any contractual provisions less beneficial to the employees than those provided for in the Labour Law will be null and void. The Labour Law fixes the minimum employment benefits and cannot be contracted out of.

1 Ibrahim Elsadig is a partner at Dentons.

The Ministry of Labour is the main body responsible for the regulation of employment in the UAE. The Ministry of Labour's role includes approving employment contracts and issuing work permits and is also responsible for the health and safety of employees by undertaking workplace inspections. Any employment-related disputes must be heard by the Labour Disputes Committee at the Ministry of Labour before being taken to the courts. The Labour Disputes Committee does not issue judgments or binding decisions; rather, it offers settlement for acceptance by the parties in dispute.

The courts in each emirate will have jurisdiction to hear employment disputes not settled by the Labour Disputes Committee. In principle, cases brought by employees under the Labour Law are exempt from court fees at all stages of litigation, unless the claim is not accepted or is dismissed, in which case the court may order the employee to pay all or part of the court fees.

II YEAR IN REVIEW

The recent improvement in the global economy and the stabilisation in domestic markets helped the recovery of the country's economy, which has resulted in some improvements in hiring activity and the stability of employment.

No new regulations of any significance have been issued by the Ministry of Labour this year.

III BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

The Labour Law requires that employers and employees enter into a written contract. If the parties fail to enter into a written contract, the existence, validity and terms and conditions of the employment relationship may be proved by any means of proof. It is common practice in the UAE for businesses to issue two employment contracts. A short-form contract in Arabic and English bearing minimal details as required by the Labour Law is filed with the Ministry of Labour for processing the employee's employment visa and work permit, while a long-form contract is also signed between the employer and the employee to provide for the terms and conditions of the employment in further detail, but is not submitted to any government authorities. In situations where there are discrepancies between the short-form contract and the long-form contract, the UAE courts, whose decisions are binding, have in the past upheld the terms of the long-form contract with detriment to the terms in the short-form contract, where these terms were more advantageous for the employee than the terms in the short-form contract. The Labour Law provides that contracts, if written, need to specify at least the following:

a date of its conclusion;
b commencement date;
c type of work to be conducted;
d place where the work is to be conducted;
e duration of the contract (if for a specific term); and
f remuneration.

Once a contract is executed, it cannot be amended unilaterally, that is, without seeking the prior consent of the employee. Any amendment to the contract must be agreed between the parties.

Article 38 of the Labour Law provides for a distinction between contracts for a limited period and contracts for an unlimited period. A contract is for a limited period when the parties provide for a term of the contract. In such case, the term should not exceed four years. However, in practice, limited-term contracts are for a three-year term. At the end of the term, the parties may agree to renew the contract for similar or shorter periods.

A contract is for an unlimited period when the contract is not in writing, does not provide for a term, or the parties continue to perform a limited term contract after the expiry of its term without a written renewal or after the tasks for which the employee has been hired are complete and the employee continues to work. An unlimited-term contract is in effect until terminated by any of the mechanisms provided for in the Labour Law. The major difference between limited-term and unlimited-term contracts relates to the end of service gratuity (see Section XI, *infra*).

ii Probationary periods

Under Article 37 of the Labour Law, employers may determine a probationary period, which shall not exceed six months. During the probationary period, the employment may be terminated by the employer without notice and without end of service gratuity and there would be no recourse to compensation for arbitrary dismissal if termination is during or at the end of the probationary period. The Labour Law does not provide for different probationary periods based on the type of work, the seniority of the employee or whether the contract is for an unlimited or limited term.

iii Establishing a presence, secondment agreements and independent contractors

Any foreign company wishing to hire employees to conduct business in the UAE must be established and licensed in the UAE. The general principle is that no foreign entity can conduct business in the UAE unless it has a valid licence to do so. Hiring employees is considered a business activity undertaken in the UAE, and, as such, a licence issued by the local authorities is required. In addition, strict immigration requirements make it impossible for companies not established and registered in the UAE to hire foreign employees as employees must be 'sponsored' by companies registered in the UAE to obtain work permits and residence visas. Furthermore, the Minister of Labour Resolution No. (1215) of 2005 is amended by the Minister of Labour Resolution No. (323) of 2012, to stipulate that companies registered in the UAE who hire employees who are nationals of another Gulf Cooperation Council (GCC) country must have registered them with the Ministry of Labour and apply for work permits for them within three months from the date of issuance of the Resolution on 29 October 2013.

It follows from the above that employees working in the UAE must be working for companies registered in the UAE. However, the Labour Law does not prevent employees working for companies registered in the UAE from being seconded by foreign companies. This is a common practice between subsidiaries of international companies where an employee is required to work with subsidiaries in various jurisdictions and

continue to be employed by the foreign parent company. There are no legal provisions in this regard, but many companies employ seconded employees, in particular when the employment is required for a short time or it requires high expertise. Seconded employees to subsidiaries in the UAE will have their employment contracts with the foreign entity, but provide their work to the subsidiary in the UAE. The foreign entity will bear all employment costs and the subsidiary in the UAE will handle the formalities for issuing the work permit and residence visa. Such formalities will require a short-form employment contract between the employee and the subsidiary in the UAE for submission to the labour and immigration authorities in the UAE, as mentioned above. Such short-form contract is a formality and the foreign company will be responsible for all employment costs. The secondment arrangements should be documented and agreed in a secondment agreement between the foreign company and the subsidiary in the UAE.

Foreign companies not registered in the UAE may hire independent contractors to undertake particular work for their benefit, provided such independent contractor is established and licensed to perform such work in the UAE. Such independent contractor should not, however, present itself as an employee of the foreign company. Establishing a presence in the UAE is a well-established procedure that requires the foreign company itself to register with the local authorities.

IV RESTRICTIVE COVENANTS

Theoretically, non-compete agreements between employers and employees are enforceable in the UAE both through the courts and through administrative channels at the Ministry of Labour. In practice, however, only the administrative route is effective, although its ambit is limited to restrictions applicable only in the UAE and to the short-form employment contracts lodged with the Ministry of Labour.

The Labour Law allows employers to seek a restraint of trade agreement that would apply after the termination of the employment contract. Article 127 of the Labour Law provides for some conditions for the validity of a non-compete clause. The employee must be 21 years of age or older and the non-compete clause must be limited in relation to the time, place and nature of the work to the extent required to safeguard the reasonable interests of the employer. Therefore, to enforce a non-compete agreement the employer must demonstrate that the non-compete restraint is reasonable and necessary to protect its legitimate interests. The corporate and geographical scope of the restraint must also comply with this test to be enforceable. As explained above, there is no statutory limit to the non-compete period clause signed between an employer and its employees, but the Ministry of Labour has indicated that it considers 12 months to be a reasonable period to limit competition.

To enforce a non-compete covenant it is crucial that the employer includes the non-compete provision in the short-form employment contract deposited with the Ministry of Labour. As to judicial enforcement, local courts rarely order specific performance under contracts. There have been no recent cases where the Dubai Court of Cassation or the Federal Supreme Court ordered an employee to abide by a non-compete covenant. Although the local courts recognise the right of an employer to bind

its employees by non-compete obligations, they would usually only award damages for losses sustained by the breach. Such losses can be very difficult to establish.

V WAGES

Salaries, which under the Labour Law must be paid in the national currency irrespective of the nationality of the employee, are commonly structured by breaking down the monthly figure into basic salary and other separate allowances (such as housing and car allowances). The Labour Law does not impose any particular allowances apart from a salary; however, employers opt to divide this amount to minimise the amount of the end of service gratuity, which is calculated on the basis of the basic salary only. To prevent employers circumventing in practice the proper payment of the end of service gratuity, although the Labour Law is silent on the proportions granted by the employer, the Ministry of Labour requires that the basic component is at least half of the gross salary.

i Working time

Under Articles 65 to 73 of the Labour Law, the maximum working hours are eight hours each day and 48 hours a week, and no more than five consecutive work hours may be worked without a rest period. The maximum number of daily hours may be increased to nine hours per day in commercial establishments, hotels and cafes, security services and any other operations where such increase is authorised by order of the Ministry of Labour. The maximum number of working hours may also be reduced by order of the Ministry of Labour in relation to operations that create health risks to the employee. During the month of Ramadan, daily working hours are reduced by two hours. The working hours may be organised in shifts and there is no limit as to the amount of night work that may be performed.

ii Overtime

Work performed by an employee in excess of the maximum daily working hours shall be treated as overtime. The Labour Law provides for a maximum of two hours of overtime daily. In principle, overtime will be paid at a rate 25 per cent higher than the normal hourly rate. If, however, the overtime is worked between 9pm and 4am or on Fridays (Fridays are not working days in the UAE) the overtime will be paid at a rate 50 per cent higher than the normal hourly rate. Some special classes of employees are excluded from overtime pay, for instance, senior employees with managerial and supervisory positions.

VI FOREIGN WORKERS

The UAE relies heavily on its foreign workforce. The pace of economic growth in the past few years in the UAE has demanded a workforce that the national population growth was not able to match. For this reason, the vast majority of workers in all business sectors is comprised of foreigners and in some emirates the number of foreigners amounts to as much as 80 per cent of the population.

The Labour Law applies to all employees working in the UAE irrespective of nationality. Foreign workers enjoy the minimum benefits provided for in the Labour

Law. This notwithstanding, the Labour Law establishes a preference for the employment of nationals, and foreign nationals may only be employed after fulfilling the conditions set out in the Labour Law. In theory, under the Labour Law, foreign nationals should only be employed if there are no national employees available. In such case, preference should be given to Arab nationals and then to other nationalities. Nevertheless, demand is such that these requirements often are not implemented in practice.

The preference for UAE nationals has been reconfirmed in some 'Emiratisation' policies that have been approved through ministerial resolutions and circulars, which basically set a certain quota of Emiratis that must be employed in a particular sector. The banking sector is one of the areas in which Emiratisation is a focus. Generally, however, such Emiratisation policies have not been fully implemented or enforced and there is no limit currently on the number of foreign workers a company may hire. Generally, employers in the UAE are not required to pay any taxes or social benefits to the employees. Employers may create a savings fund for employees or may put in place a retirement or insurance scheme for the benefit of employees. As an exception to this rule, Federal Law No. 7 of 1999 regulating pensions and social insurance requires employers to pay in respect of UAE nationals (recently extended to cover the nationals of GCC countries) a contributory pension to the Public Authority of Pensions and Social Security. This could be seen as an extra cost of hiring UAE nationals or nationals of another GCC country.

VII GLOBAL POLICIES

The Labour Law has a section dedicated to disciplinary rules. Under the Labour Law it is not required that employers have their own disciplinary rules, and in the absence of disciplinary rules the provisions of the Labour Law apply. Any disciplinary rules put in place by employers must comply with the minimum procedural requirements set out in the Labour Law. The Ministry of Labour has issued by Order No. 28/1 of 1981 a guide for employers issuing their own disciplinary rules. The Order serves only as a guide and is not mandatory. The Order provides that any new disciplinary rules must be approved by the Ministry of Labour before they come into effect. The disciplinary rules must be in Arabic (and, if necessary, in any other language) and must be fixed in an appropriate place. The law does not specify what an appropriate place is but it is understood that the same must be made available to employees. Notification of the disciplinary rules to the employee, or their incorporation in the employment contract, is not a legal requirement but is recommended as best practice.

VIII EMPLOYEE REPRESENTATION

The Labour Law does not contemplate any rules in relation to employee representation bodies, including works councils or trade unions. Although not strictly forbidden, there are no employee representation bodies or trade unions in the UAE. The Labour Law seems to assume that the interests of the employees are protected by the Labour Law and the Ministry of Labour in its capacity as the administrative body responsible for enforcing the Labour Law and other labour regulations.

In the case of collective disputes, the Labour Law provides for a procedure to settle such disputes that must be followed. If the dispute cannot be settled amicably, then a conciliation board including a representative of the Ministry of Labour, a representative of the employees and a representative of the employer must hear the dispute. On certain occasions, the decision of the conciliation board may be subject to recourse to a supreme arbitration board, which includes a representative of the Ministry of Labour, a judge from the Federal Supreme Court and an expert.

IX TRANSLATION

Employment contracts filed with the Ministry of Labour are required to be in a standard bilingual English and Arabic form. Employer's guidelines and circulars to employees must also be in Arabic in addition to any other language the employer wishes to use; however, the Arabic text always prevails. Any other agreement between the employer and employee does not need to be translated into Arabic as long as it is not required to be filed with the Ministry of Labour or any other local authority in the UAE.

The Labour Law does not make a requirement for certifying or notarising translation of any employment-related documents; however, if such documents will be submitted to the courts or labour tribunal in relation to a dispute, it is expected that such translation will be duly certified by a legal translator.

X DATA PROTECTION

Entering into an employment contract with an employer means sharing with the employer information that often relates to the privacy of the employee. The Labour Law does not regulate the way employers create, keep and transfer data related to their employees, however, it requires employers to maintain records and files related to each employee. This is in line with the absence in the Labour Law of provisions on the protection of privacy and personal rights of employees, and in general with the absence of a law devoted to data protection in the UAE. Apart from a DIFC law on data protection (which only applies within the DIFC) and some generic provisions in the Constitution and Penal Code, there are no legal provisions in the UAE determining how and when data is collected, stored, transferred, used or otherwise processed. There is no regulation on sensitive data and on the possibility of background checks. As a matter of best practice, employers are encouraged to obtain the consent of employees for handling their data or conducting any background checks. The Constitution and the laws of the UAE are generally compliant with the principles of shariah law, which also encourages the protection of people's privacy.

XI DISCONTINUING EMPLOYMENT

i Dismissal

In the UAE, an employer may dismiss employees without cause. However, the cause is relevant to the employee's right to receive an 'end of service gratuity', which is generally

due upon termination of an employment contract. A gratuity is not due if the employee's contract was terminated with cause or if the minimum period for continuous work stipulated in the Labour Law was not fulfilled. An employment contract is terminated with cause in the situations provided for in Article 120 of the Labour Law. The gratuity is also due when the employee terminates the contract, provided certain requirements (such as length of employment) are fulfilled. For example, employees with limited-term contracts are not entitled to a gratuity if they terminate the contract before it expires unless they have completed five years of continuous service.

Any of the parties to an employment contract may terminate the contract provided that the notice period (which varies depending on how long the employee has been employed and which may be replaced with payment in lieu of notice) is observed and the termination is not arbitrary.

Employee termination is arbitrary when the reason for termination is not related to the work, if the worker has submitted a complaint to the Ministry of Labour or other authorities or if the worker has submitted other valid judicial claims. In relation to UAE nationals, Ministerial Resolution No. 176 of 2009 provides for further situations that would make a termination arbitrary.

In practice it may be difficult to prove that a termination is arbitrary, in particular because the Labour Law does not require the employer to disclose the reasons for termination or notify any authorities of such reasons. In the case of foreign workers, employers must inform the immigration authorities of the termination, but not its reason, for the purposes of cancelling the residence visa.

When employers have put in place a savings fund or a retirement or insurance scheme for the benefit of employees, the employee is entitled to choose between the end-of-service gratuity and such schemes, whichever is more advantageous.

Upon termination, in addition to the end of service gratuity, employers are also responsible for the repatriation costs of any foreign employees.

ii Redundancies

As in many other countries, in light of the recent economic crisis many employers have been forced to terminate various employment contracts. The concept of redundancy is not recognised under the Labour Law and as such, each termination is looked at individually and has to observe the rules in relation to termination of employment contracts, namely the notice requirements and payment of the end-of-service gratuity. Redundancy programmes implemented by international companies in the UAE during the economic downturn are mostly based on best practices and on an individual, rather than collective, basis.

XII TRANSFER OF BUSINESS

There is no separate business transfer law in the UAE. The Labour Law provides protection for employees affected by mergers, acquisitions or outsourcing transactions under the provisions of Article 126, which provides that all valid employment contracts at the time of change of ownership of a business will remain in force between the new employer and the employees and their service will be deemed continuous. The new employer and the

old employer will also be jointly liable for a period of six months for the discharge of any obligations resulting from employment contracts during the period preceding the change and the new employer will thereafter bear the liability solely.

As redundancy is not recognised under the Labour Law, collective transfer of employees is not allowed under the Labour Law and each employee shall be dealt with individually on the basis of the provisions of his or her employment contract.

Although the transfer of business is significant to employees' status, the Labour Law does not require obtaining the consent of employees to the transfer but to any changes affecting their employment contracts. As such, employers should distinguish between the following two options for transferring a business according to the impact each would have on the employees' status:

i Transfer of business with acquisition of the commercial licence (no change in the name of employer)

Examples of such transfer are buying the shares of a limited liability company or acquiring the parent company of a branch. In such case, employment contracts of employees remain in force and no consent is required to be obtained from the employees on the transfer unless the new owner wishes to make changes to their contracts, in which case it is mandatory to obtain the employees' consent on an individual basis.

ii Transfer of business without acquisition of the commercial licence (name of employer is changed)

There are two possible options in such transfer: (1) the new employer may opt to hire the employees under new contracts after having their employment contracts with the old employer terminated and they have received all their end of service benefits; or (2) the new employer hires the employees on continuous employment and accepts the transfer of the old employer's obligations under the existing employment contracts. In this case, the new employer and the old employer will be jointly liable for the discharge of all obligations under the employees' employment contracts for a period of six months. Furthermore, it is also mandatory to transfer, on an individual basis, the work permit and employment visa of each employee after making the necessary changes to their employment contracts, a process that employers find onerous and time-consuming. It is also important to distinguish in this type of transfer between the procedural requirements pertaining to foreign workers and those pertaining to UAE workers and workers of other GCC countries, since the transfer of the latter should be in compliance with the provisions of the UAE Federal Law No. 7 of 1999 regarding the pensions and social security regulations and after obtaining the approval of the General Pension and Social Security Authority.

XIII OUTLOOK

Employers are regaining confidence in the local market and in their growth prospects and are therefore looking to hire new employees. This chapter has highlighted that the Labour Law is not sufficiently sophisticated and indeed is silent in some areas regarding certain employment issues. As such, employers and employees are encouraged to seek

legal advice when entering into employment contracts or when dealing with the issues discussed above.

There have been ongoing discussions about a new labour law and there are great hopes that one will be enacted to replace the Labour Law and cover areas of employment relationships that have not been addressed. It seems there is a general agreement in the marketplace that amendments to the Labour Law might not be enough to match the phenomenal growth in the economy of the UAE over the past few years and face the challenges of the years to come. A new labour law must include, *inter alia*, provisions on: data protection; international and local secondment of employees; the appointment of employees' representatives; a minimum wage; discrimination and harassment; pensions and health care; and redundancy. These areas are either not covered properly or not covered at all by the current Labour Law.

Appendix 1

ABOUT THE AUTHORS

IBRAHIM ELSADIG

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Ibrahim Elsadig is a senior partner in the corporate group of Dentons in Dubai. He joined the Dubai office of the firm in March 1996 as a corporate and commercial lawyer. He worked as an in-house counsel for Africa, India and the Middle East from August 2005 and rejoined the firm in January 2007. He has extensive experience in the UAE and the Middle East, and has participated in major transactions in the UAE and across the Gulf region, North Africa and India. His experience ranges from joint ventures, mergers and acquisitions, liquidations and bankruptcy and restructuring. He has reviewed major agreements for compliance and legal due diligence. He also advised on major projects in water, wastewater, electricity and oil and gas sectors with an excellent banking background. He has also been involved in drafting and negotiating power generation, EPC contracts for power plants, long-term service agreements and operation and maintenance agreements. He can also advise on employment law, corporate governance and compliance issues.

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