

THE EMPLOYMENT
LAW REVIEW

TENTH EDITION

Editor
Erika C Collins

THE LAWREVIEWS

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PUBLISHER

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PREFACE

For the past nine years, we have surveyed milestones and significant events in the international employment law space to update and publish *The Employment Law Review*. In updating the book this year, I reread the Preface that I wrote for the first edition in 2009. In that first edition, I noted that I believed that this type of book was long overdue because multinational corporations must understand and comply with the laws of the various jurisdictions in which they operate. I have been practising international employment law for more than 20 years, and I can say this holds especially true today, as the past 10 years have witnessed progressive shifts in the legal landscape in many jurisdictions. This tenth edition of *The Employment Law Review* is proof of the continuously growing importance of international employment law. It has given me great pride and pleasure to see this publication grow and develop to satisfy its initial purpose: to serve as a tool to help legal practitioners and human resources professionals identify issues that present challenges to their clients and companies. As the various editions of this book have highlighted, changes to the laws of many jurisdictions over the past several years emphasise why we continue to consolidate and review this text to provide readers with an up-to-date reference guide.

This year, we proudly introduce our newest general interest chapter, which focuses on the global implications of the #MeToo movement. The movement took a strong hold in the United States at the end of 2017, as it sought to empower victims of sexual harassment and assault to share their stories on social media in order to bring awareness to the prevalence of this issue in the workplace. In this new chapter, we look at the movement's success in other countries and analyse how different cultures and legal landscapes impact the success of the movement (or lack thereof) in a particular jurisdiction. To that end, this chapter analyses the responses to and effects of the #MeToo movement in several nations and concludes with advice to multinational employers.

Our chapter on cross-border M&A continues to track the variety of employment-related issues that arise during these transactions. After a brief decline following the global financial crisis, mergers and acquisitions remain active. This chapter, along with the relevant country-specific chapters, will aid practitioners and human resources professionals who conduct due diligence and provide other employment-related support in connection with cross-border corporate M&A deals.

Global diversity and inclusion initiatives remained a significant issue in 2018 in nations across the globe, and this is one of our general interest chapters. In 2018, many countries in Asia and Europe, as well as South America, enhanced their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation as well as gender quotas and pay equity regulations to ensure that all employees, regardless of gender, sexual orientation or gender identity, among other

factors, are empowered and protected in the workplace. Unfortunately, there are still many countries where certain classes of individuals remain under-protected and under-represented in the workforce, and multinational companies still have many challenges with tracking and promoting their diversity and inclusion initiatives and training programmes.

We continue to include a chapter focused on social media and mobile device management policies. Mobile devices and social media have a prominent role in, and impact on, both employee recruitment efforts and the interplay between an employer's interest in protecting its business and an employee's right to privacy. Because companies continue to implement 'bring-your-own-device' programmes, this chapter emphasises the issues that multinational employers must contemplate prior to unveiling such a policy. Bring-your-own-device issues remain at the forefront of employment law as more and more jurisdictions pass, or consider passing, privacy legislation that places significant restrictions on the processing of employees' personal data. This chapter both addresses practice pointers that employers must bear in mind when monitoring employees' use of social media at work and provides advance planning processes to consider prior to making an employment decision based on information found on social media.

Our final general interest chapter discusses the interplay between religion and employment law. Religion has a significant status in societies throughout the world, and this chapter not only underscores how the workplace is affected by religious beliefs, but also examines how the legal environment has adapted to such beliefs. The chapter explores how several nations manage and integrate religion in the workplace, in particular by examining headscarf bans and religious discrimination.

In addition to these five general interest chapters, this edition of *The Employment Law Review* includes 45 country-specific chapters that detail the legal environment and developments of certain international jurisdictions. This edition has once again been the product of excellent collaboration, and I wish to thank our publisher. I also wish to thank all our contributors and my associate, Vanessa P Avello, for her invaluable efforts to bring this tenth edition to fruition.

Erika C Collins

Proskauer Rose LLP

New York

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SAUDI ARABIA

John Balouziyeh and Jonathan Burns¹

I INTRODUCTION

Saudi Arabian law is based fundamentally on shariah (Islamic law) as taught by the *Hanbali* school of jurisprudence. Secondly, the Saudi Arabian authorities and governmental agencies issue, *inter alia*, royal decrees, resolutions and circulars that have the effect of creating binding law. Generally, the codified law in Saudi Arabia is limited mainly to matters of commercial law and public order.

The employment law framework in Saudi Arabia is based on the Labour and Workmen Law, enacted by Royal Decree No. M/51, dated 23/8/1426 H, corresponding to 27/9/2005 G (as amended) (the Labour Law) and its Implementing Regulations enacted by Ministerial Resolution No. 1982 dated 28/6/1437 H corresponding to 6/4/2016 G (the 2016 IRs), as well as by shariah, as interpreted and applied in Saudi Arabia.

In addition to the Labour Law, numerous subsequent circulars enacted by the Ministry of Labour (MOL) are applicable to any relationship pursuant to which a party agrees to work in Saudi Arabia for another party. The Labour Law applies to and governs the employment relationship between the two parties.

The Commission for the Settlement of Labour Disputes (the Commission) under the aegis of the Ministry of Justice is the Saudi Arabian entity that is currently primarily responsible for adjudicating labour disputes.² However, before a case reaches the Commission, it must first be heard by the Labour Office for mandatory mediation. Only if the employer or employee refuses to accept the non-binding decision of the mediator may the case advance to the Commission.

As a general rule, the Labour Law is drafted in favour of the employee, creating statutory rights that the employee may not waive (Article 6, Labour Law). Among other issues, it regulates the employment of non-Saudis, training and qualification of employees, labour relations, work conditions, part-time work, protection against occupational hazards and industrial accidents, and the employment of women and minors. The most common areas of dispute under the Labour Law between the employer and employee relate to the scope of wages, working hours, overtime pay, termination and severance pay.

1 John Balouziyeh is a senior legal consultant and Jonathan Burns is an associate at The Law Firm of Wael A Alissa in association with Dentons.

2 In 2015, the MOL and Ministry of Justice announced that jurisdiction over labour disputes would be transferred to the Ministry of Justice and a proper tribunal system implemented. In 2016, the Ministry of Justice announced that specialised labour courts would begin operating during the current Hijri year of 1438 (corresponding to 2 October 2016 to 21 September 2017) after designated assistant judges had completed specialised training on resolving labour disputes.

II YEAR IN REVIEW

i Saudisation

The national policy of encouraging employment of Saudi nationals in the private sector, known as Saudisation, has always been a major topic throughout the years. Saudisation was originally enacted as a result of pressure exerted by Saudi Arabian nationals complaining that the job market had been saturated by Saudi Arabia's significant expatriate population, leading to high unemployment rates among Saudi nationals. In response, the MOL in October 2011 stated that it would cut the number of foreign workers in Saudi Arabia from the current rate of 31 per cent of the population to 20 per cent over the next several years.

The difficulty for employers to comply with Saudisation policies fluctuates with the performance of the local economy. For example, where depressed oil prices affecting state spending results in company closures and large lay-offs across the country, the authorities tend to increase Saudisation obligations on all employers generally to make up for the loss in Saudi employment. Conversely, where state spending is robust, resulting in a more liquid local economy, Saudisation obligations tend to decrease and hiring of expatriate employees becomes easier.

In that regard, while past years saw higher oil prices and state spending, and thus a more relaxed approach towards Saudisation and a move towards revising certain elements of the Labour Law in favour of employers, the hot topic of 2017 was an intensified Saudisation campaign and a significant increase in pressure on employers, their non-Saudi employees and even their families to comply with the country's Saudisation policies. This remained the case in 2018.

The policy of Saudisation is implemented, enforced and regulated by several government programmes and policies, and is reflected in nearly every facet of the public and private sectors. For example, foreign companies wishing to establish a presence in Saudi Arabia must include in their application packet to the Saudi Arabian General Investment Authority a plan for hiring and training Saudi nationals as employees, while any company undertaking a government contract is required to adhere to certain Saudisation and localisation measures. As another example, companies are required to draft and adopt a detailed internal Saudisation plan whereby each position of employment within the company is described and a time frame for replacing non-Saudi employees with Saudi employees is specified. In addition to other Saudisation measures, legislation lists 18 specific jobs that have been 'Saudised' and may not be held by non-Saudis, in addition to employing a minimum and maximum age limit for expatriate employees.

Furthermore, the Nitaqat programme gives significant effect to the policy of Saudisation. It labels companies as platinum, green, yellow or red based on a formula involving two or more of the following variables: the number of employees; the size of the company;³ and, under certain circumstances, the activities of the company.⁴ Failure to hire

3 For instance, large companies are required to employ a greater number of Saudi nationals than small companies.

4 For instance, small laboratories with between 10 and 49 employees must employ 10 per cent to 14 per cent Saudi nationals in order to remain in the yellow category. In contrast, in the agricultural industry, only 2 per cent to 4 per cent of Saudi employees are required for a company of the same size.

the required percentages of Saudi employees under the Nitaqat programme may result in fines, non-renewal of residency permits, non-issuance of future employment visas and similar actions.

Previously, the MOL required employers to pay a Saudi employee a minimum monthly wage of 3,000 Saudi riyals in order to count him or her as a full Saudi employee under the Nitaqat programme. In 2018, the MOL announced that Saudi employees over the age of 60 will no longer be counted in the employer's Saudisation rate.

ii 2018 Saudisation issues

As mentioned in subsection i, 2018 saw a continuation of the previous year's intensified pro-Saudisation campaign and significantly increased pressure on employers and non-Saudi employees and families. This topic manifested itself in many ways.

For example, the Ministry of Finance exacts fees on the dependents of non-Saudi employees residing in the country. This has resulted in a significant departure of families from the country, although in some cases a single breadwinner may stay behind to continue working. Although many in the business community have decried this measure as harmful to the local economy, it has been deemed by government policy as a necessity to increase local employment and free up jobs for Saudis. Following an increase in fees in 2017, fees were increased again in 2018, resulting in a larger departure of expatriates.

Another application of Saudisation in 2018 came in the form of an *iqama* (work permit) rules. Non-Saudi employees are required to have an *iqama*, which states the individual's sponsor and job title. Working in a role other than as stated in the *iqama* is a violation of the Labour Law. In the past, *iqamas* could be reissued with amended job titles, if needed for work reasons; however, in an effort to spur local hiring and reduce the expatriate labour force, the MOL suspended this service in 2018.

Related to this point, a large part of the MOL's enforcement efforts are conducted via inspections on companies and employers. In the past, these inspections were carried out by MOL officials. However, in 2018 the MOL announced that inspections would be privatised and delegated to private sector inspection services, in order to increase efficiency and supervision.

iii Shifting public sector employment to the private sector

As described below, the working week in Saudi Arabia is 48 hours, with Friday as a paid day of rest (see Section VI.ii). Nevertheless, the public sector, which is the largest employer of Saudi nationals, operates from Sunday to Thursday with Friday and Saturday constituting a two-day weekend.

Due to fiscal burdens on the government and public sectors in maintaining a large local workforce, a significant part of Saudi policy in 2018 was aimed at encouraging Saudis to take jobs in the private sector. However, many government employees enjoying a two-day weekend and 40-hour working week tend to reject the private sector's 48-hour, six-day working week.

As mentioned above, there are currently 18 specific jobs that are Saudised and may not be held by non-Saudis. Thus, policymakers in Saudi Arabia have discussed and considered implementing a 40-hour working week only applicable to existing Saudised jobs, and to add more job titles to this list – in an effort to entice more Saudis away from public sector employment and into the private sector with a guaranteed two-day weekend.

iv New penalties and increasing female employment

Pursuant to Ministerial Resolution No. 4786 issued on 28/12/1436H (corresponding to 12 October 2015), the MOL adopted a regime of fines and penalties applicable to employers for certain specified violations. Pursuant to Ministerial Resolution dated 01/05/1439H (corresponding to 18 January 2018), the MOL adopted a number of new fines and penalties.

Most of the new fines and penalties adopted in 2018 reflect a clarification or confirmation of existing requirements in the Labour Law. However, a large part of the new fines and penalties are aimed at curbing employer abuses, and creating a work environment that is accessible and welcoming to female employees.

For example, reduced government spending has resulted in financial scandals involving poorly managed and poorly capitalised companies that became unable to pay employee salaries. The MOL has sought to combat this occurrence by adopting new fines and penalties for employers who fail to pay salaries on time.

In the latter case, reduced government spending and high unemployment has resulted in a new phenomenon in Saudi Arabia where families need extra income – accordingly, more female members of the family have decided to seek employment and income in the marketplace. In the past, families could afford to meet expenses on the salary of only male family members, and cultural and religious practices encouraged families to avoid sending female members of the family into the public workspace. However, the needs of families for more income in order to meet expenses is slowly changing this viewpoint. Nevertheless, cultural sensitivity still exists, and therefore the MOL has sought to enact measures that make females' attendance in the workplace a suitable and safe solution. For example, new provisions penalise the employer's failure to have a separate ladies section and nursery, if required.

v Anti-Harassment Law

Additionally, Saudi Arabia adopted the Anti-Harassment Law under Royal Decree No. 488 dated 14/9/1439H corresponding to 29 May 2018G. The Anti-Harassment Law is not aimed specifically at the employment relationship. However, certain provisions are made expressly applicable to employers and impose a duty on them to fulfil certain obligations. For example, employers are required to adopt an internal complaints mechanism and procedure, which must include confidential investigation requirements. Although the Anti-Harassment Law is framed in a gender-neutral manner, most in Saudi Arabia agree that it is aimed at reforming society in preparation for more female involvement in the workplace and in public life.

vi Occupational safety

Finally, Saudi Arabia implemented a series of changes to better promote occupational safety and prevent occupational hazards. Minister of Labour and Social Development Resolution No. 161238, dated 10/8/1439 H, corresponding to 26/4/2018 G, approved the Regulation of Occupational Safety and Health Management (the Occupational Safety Regulation), which requires businesses to develop written policies for occupational safety and health in the languages most commonly used by members of the respective companies. The policies are intended to protect the safety and health of all members of facilities, visitors and passers-by who may be affected by passing through the workplace, by preventing work-related injuries, illness, diseases and accidents (Section 1.1, Occupational Safety Regulation). In addition,

in June 2018, the Ministry of Labour and Social Development began inspecting companies that employ 50 or more workers to ensure their compliance with the National Strategic Programme for Occupational Safety and Health.

The Labour Law continues to require all companies to take adequate steps to protect the health and safety of their employees. This duty is deemed to be an extra-contractual in that it applies regardless of whether it is memorialised in the contract between the parties.

III SIGNIFICANT CASES

Saudi Arabia is not a jurisdiction where case law forms binding precedent or is a source of law. Further, case law is not even available to the public for review. Therefore, any review of the laws governing Saudi labour law should focus on laws, implementation rules, circulars and other regulations put forth by the MOL and other relevant government institutions, as well as the knowledge and experience of counsel.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

As defined by the Labour Law, employment relationships in Saudi Arabia are created by a 'contract concluded between an employer and the employee, whereby the latter undertakes to work under the management or supervision of the former for a wage' (Article 50).

The employment contract must be duplicated, with one copy to be retained by each of the two parties. However, the law provides for situations where an employment contract is not in writing (and thus not signed). In this case, the contract is deemed to exist, but the employee alone may establish its existence and his or her entitlements arising therefrom. To do so, he or she may introduce any evidence, including testimony as to oral agreements entered into, in order to prove the existence of the contract. When the contract is not written, either party may demand at any time that it be put in writing (Article 51, Labour Law). The 2016 IRs use a standard form of work contract as a template, presumably in an attempt to make contract drafting easier for employers and encourage them to have a written contract, since this is often overlooked, resulting in disputes.

Discussing specifically employment contracts for non-Saudi nationals, the Labour Law requires that they be in writing (Article 37). The Law does not state what would transpire if the contract was not in writing. Presumably, Article 51, which recognises employment contracts even if they are not written, would come to apply. Under Article 51, the employee is allowed to prove the existence of an unwritten employment contract by any means available.

For Saudi employees, both fixed-term and at-will⁵ employment contracts are permitted. Fixed-term contracts automatically terminate upon expiration of the duration term as specified in the contract, without giving rise to any claim against the employer should it opt against renewal.

For non-Saudi employees, only fixed-term employment contracts are available. The employment contract for non-Saudi employees must define with particularity the duration

5 As further discussed in Section XII.i, the term 'at will' does not strictly apply to indefinite term contracts, as 60 days' notice and a valid reason are still required to terminate the contract. That is, parties are not permitted to immediately terminate an indefinite contract without any reason as in most at-will jurisdictions.

of the contract. However, if the contract does not include a term specifying the duration, then the duration of the work permit shall serve as the term of the employment contract (Article 37, Labour Law).

It is recommended that an employment contract be made in writing and, even though not required under the Labour Law, signed by both parties in order to bind the parties to certain terms generally required under Saudi Arabian law and to avoid disputes. It is recommended that all employment contracts in Saudi Arabia include the following terms:

- a* a probation period (as discussed below);
- b* a stipulation of salary to be paid in Saudi riyals;
- c* a provision noting Article 98 of the Labour Law, which states that employees shall not work more than eight hours a day during non-holidays, and no more than six hours a day during the month of Ramadan;
- d* a provision providing at least 21 days of annual vacation, to be increased to at least 30 days if the employee spends five consecutive years working for the employer, as required by Article 109.1 of the Labour Law;⁶
- e* a provision providing the employee an entitlement to days off with full pay during national holidays as set forth by the MOL, and pursuant to Article 112 of the Labour Law and Article 25 of the 2016 IRs, including:
 - four days for Eid al-Fitr (marking the end of Ramadan);
 - four days for Eid al-Adha (Festival of Sacrifice); and
 - Saudi Arabian National Day;
- f* a provision providing for sick leave during a single year pursuant to Article 117 of the Labour Law, including:
 - sick leave for the first 30 days at full pay;
 - 60 days following the first 30-day period at 75 per cent pay; and
 - 30 days following the 60-day period without pay, provided that the employee can substantiate his or her sickness; and
- g* a provision providing for an 'end of service' reward pursuant to Articles 84 and 85 of the Labour Law. The employer must pay the employee a reward for his or her period of service, the calculation of which is dependent on whether the employment relationship has expired, was terminated by the employer or was terminated as a result of the employee's resignation from the employer. In each of these cases, the end of service reward shall be calculated as follows:
 - employee dismissal or expiration of employment relationship – half a month's wages⁷ for each of the first five years the employee has worked for the employer; and a full month's wage for each year following the first five years (collectively the EOS Reward); and
 - employee resignation – one-third of the EOS Reward for an employee whose period of service was not less than two consecutive years and not more than five years; two-thirds of the EOS Reward for an employee whose period of service was

6 Article 25 of the 2016 IRs clarified that national holidays and sick days falling within an employee's annual leave shall not count towards the 21 or 30 days of minimum annual leave.

7 The Labour Law defines 'wage' (or 'wages') as 'actual wage', which includes all amounts paid to the employee under an employment contract, including fixed and periodic allowances (e.g., transportation, accommodation) and any other accrued amounts owed to the employee (e.g., commission, profit).

greater than five years and not more than 10 years; and the entire EOS Reward if the employee's period of service is greater than 10 years.

Parties must conclude an employment contract before the start of the employment relationship. The process for amending or changing an employment contract or the terms of employment are the same as those that apply to contracts generally in Saudi Arabia: through mutual rescission, termination or completion of the term of an existing contract, followed by the execution of a new contract, or otherwise by executing a valid substitute agreement that, with the agreement of both parties, expressly or impliedly revokes a former contract and includes new terms.

ii Probationary periods

Article 53 of the Labour Law allows for a 90-day probationary period, which may be extended if the probationary period falls during either Eid al-Fitr or Eid al-Adha or both. During the probationary period, either party may terminate the employment contract for any reason whatsoever, unless the contract states that only one party is entitled to do so. The Labour Law does not impose any notice period requirement on a party seeking to terminate the employment relationship during the probation period.

According to the amendments to the Labour Law that took effect in 2015, the parties may agree to extend the probation period by an additional 90 days after the first period expires. Prior to implementation of the 2016 IRs, it was unclear if the extended probation period could be decided from the start by placing a 180-day probation period in the employment contract, or if the employer and employee were required to execute a separate agreement providing for an additional 90-day probation period after completion of the first 90-day period. Pursuant to Article 20 of the 2016 IRs, the latter view prevails – that is, an employee may be subject to a total 180-day probation period – but it must be separated into two 90-day periods. The first 90-day period must be included in the employment contract, and the second 90-day period must be mutually agreed in separate writing by the employer and employee.

Further, as per Article 54, an employer may place an employee on an additional probationary period as long as both parties agree and either (1) the scope of employment involves a different profession or work⁸ or (2) the employee has returned from a leave of absence of six months or more.

iii Establishing a presence

A foreign company may not hire employees without being officially registered to carry on business in Saudi Arabia. Moreover, a company may not hire employees through an agency or another third party without being registered in Saudi Arabia. This is because of the Labour Law's requirement that employees be under the sponsorship of their employers (Article 3, Labour Law).

According to Article 39 of the Labour Law, non-Saudis may not work for anyone other than the sponsor, except with authorisation through the MOL's Ajeer system pursuant to the

8 There is an exception for household (domestic) help employed in Saudi Arabia. In July 2013, the Council of Ministers passed a law that, among many other things, gave employers the right to place household help on probation for a maximum of three months.

2016 IRs, Article 14. Ajeer is an online portal whereby licensed and approved manpower providers and their clients must pay fees and electronically document the arrangement. When this has been satisfied, a notice is issued that serves as proof of the non-Saudi secondees' authorisation to work for the client. Notices are valid for only one labourer and for only one month ('free' account) or up to six months ('excellent' account, for 20 Saudi riyals per month per notice). Thus, in two years, four notices will need to be issued consecutively every six months for each seconded under the excellent account, or the notices must be issued monthly under the free account. Notices may only be issued for clients seeking manpower in the following activities: construction; operation and maintenance; cleaning and maintenance; consultancy and business services; institutes; and colleges. Only companies that are compliant with Saudisation policies may participate in the Ajeer system.

Companies not registered in Saudi Arabia may second employees to a locally registered company (subject to concerns about doing business without a licence or under concealment). During this period, the seconded will remain under the sponsorship of the local company, which will continue to pay the employee's salary and provide his or her benefits.

A foreign company that is not officially registered in Saudi Arabia may engage an independent contractor.

Saudi law defines a permanent establishment of a foreign company in Saudi Arabia as the permanent place of the foreign company's activity through which the company carries out business in Saudi Arabia. Under the Income Tax Law (ITL), the following are deemed to constitute permanent establishments:

- a* business carried out through the company's agents in Saudi Arabia (Article 4(a));
- b* construction sites, assembly facilities, sites used for surveying for natural resources, a fixed base where a non-resident natural person carries out business (Article 4(b)); and
- c* a branch of a non-resident company licensed to carry out business in Saudi Arabia (Article 4(b)).

Sites used for storage, displaying goods belonging to the non-resident, keeping stock belonging to the non-resident for the purpose of processing by another person or for the collection of information for the non-resident are not deemed to constitute a permanent establishment (Article 4(c), ITL).

Therefore, if the work of a contractor comes to create a relationship of agency with a foreign company through the formation of a relationship whereby the parties agree to the contractor's acting on behalf of the foreign company and subject to the foreign company's control, the contractor's business in Saudi Arabia on the foreign company's behalf can come to be deemed a permanent establishment of the foreign company, thus triggering certain tax and reporting duties. For example, any payments made from the contractor to any person or company that is not resident in Saudi Arabia must pay a withholding tax on behalf of the non-resident when the payment derived from any activity in Saudi Arabia (Article 68, ITL). This withholding tax may range from anywhere between 5 per cent and 20 per cent of the payments to be made.

The employer must provide employees with health care in accordance with the standards set forth by the MOL, taking into account the provisions of the Council of Cooperative Health Insurance (Article 144, Labour Law), whose directives require employers to provide

health insurance to all of their employees based in Saudi Arabia.⁹ In addition to the legally mandated minimum, some companies also provide other insurance, such as business travel and accident insurance, to their employees.

At the conclusion of an employment contract, the employer must provide the employee with a certificate of service and settle his or her entitlements, including the end of service reward (Article 88, Labour Law). If the employee is non-Saudi, the employer must also bear the costs of a ticket for a return flight to the employee's homeland (Article 40.1, Labour Law).

V RESTRICTIVE COVENANTS

Article 83.1 of the Labour Law permits non-competition clauses in the employment contracts of employees whose scope of employment necessarily entails that they shall become acquainted with the employer's customers. For non-competition clauses to be valid, they must be in writing and include the following terms and conditions, which must be narrowly tailored to protect the legitimate interests of the employer:

- a* the duration of the clause, which shall not exceed two years as of the date of termination of the employment contract;
- b* the venue by which the employee shall be prohibited from seeking employment with a competitor; and
- c* the type of work that the employee shall be prohibited from engaging in with a competitor.

In addition, Article 83.2 permits confidentiality clauses in the employment contracts of employees whose scope of employment necessarily entails that they shall become acquainted with the employer's business or trade secrets. For confidentiality clauses to be valid, they must be in writing and be specific in terms of time, place, and type of work.

According to Article 83.3, an employer may sue an existing or former employee for breach of non-competition or confidentiality undertakings within one year of discovering the violation.

VI WAGES

i Payment

According to the recent and ongoing implementation of the Wage Protection System in Saudi Arabia, Article 90.2 of the Labour Law provides that all employee wages shall be paid into each employee's account through an accredited bank within Saudi Arabia. As of the end of 2018, the Wage Protection System is now applicable to firms employing 11 or more employees.

ii Working time

Article 98 of the Labour Law provides that employees shall not work more than eight hours a day or 48 hours in a week during non-holidays (normal working hours), and no more than

⁹ The Saudi comprehensive healthcare insurance scheme covers family members and other dependants holding a residency permit in Saudi Arabia.

six hours a day or 36 hours during the month of Ramadan.¹⁰ Friday is a paid day of rest. Article 106 of the Labour Law provides an exception to the normal working hours period, and allows working hours to reach up to 10 hours a day or 60 hours per week (extended working hours) in the following circumstances:

- a* annual inventory activities, budgeting, liquidation, closing of accounts and preparations for discount and seasonal sales, as long as the extended working hours do not exceed 30 days a year;
- b* if the work is intended to prevent occurrence of a hazardous accident, mitigate its impact or avoid imminent losses in perishable materials;
- c* if the operation is intended to confront extraordinary work pressures; and
- d* holidays, other seasons, occasions and seasonal activities defined by a minister's decision.

Article 101 provides that no employee shall work more than five hours without a break of not less than 30 minutes for rest, prayer and meals, and that no employee shall be required to remain at the workplace for more than 12 hours in any one day.

Articles 150 and 163 of the Labour Law place limitations on the number of hours that women and minors can work during the night. Women may not work at night for a period of at least 11 consecutive hours except in certain enumerated instances, such as in the case of *force majeure* or emergency, or if the work takes place in a shop that sells women's supplies. Minors may not work for a period of at least 12 consecutive hours without receiving approval from the MOL.

iii Overtime

Article 107 of the Labour Law requires that employees be paid overtime compensation – calculated as the regular wage plus 50 per cent of the regular wage – for employees who work beyond the normal working hours or during national holidays. Pursuant to Article 23 of the 2016 IRs, an employee's yearly overtime shall not exceed 720 hours, unless by exception of the MOL.

VII FOREIGN WORKERS

Employers must compile and keep detailed paperwork regarding their employees for the purpose of obtaining employment visas, contributing to the Occupational Hazards Branch of the General Organisation for Social Insurance, and so forth. Article 16 of the 2016 IRs requires employers to draft, adopt and implement an internal Saudisation plan. The plan must include a description of each job position in the company describing its tasks and duties, a time frame for replacing non-Saudi employees with Saudi employees, and providing training to Saudi Arabian employees. Employers must also maintain a record of Saudi employees who have replaced non-Saudi employees. However, there is no central database or register in which companies must participate or contribute employee information.

10 Days, months and years mentioned in the Labour Law are references to the Hijri (Islamic) calendar, and not the Gregorian calendar, unless otherwise stated in the employment contract or agreed with the employee. The Hijri calendar year is approximately 11 days shorter than the Gregorian calendar year. In most cases, and as a matter of practice, employers and employees use the Gregorian calendar. This should be made clear in the employment contract.

There is no strict limit on the number of foreign workers a workplace or company may have. However, there are required minimums as to the number of Saudi employees that a company must have in relation to the number of foreign workers hired. Therefore, the more foreign employees that are hired, the more Saudis must also be hired. Failure to hire the required percentage of Saudi nationals under the Saudisation policy may result in fines, non-renewal of residency permits and non-issuance of future employment visas.

There is only one tax that companies must pay for foreign workers: the contribution to the Occupational Hazards Branch of the General Organisation for Social Insurance. The employer's payment of 2 per cent of the employees' total wages is out of its own pocket rather than deducted from the employee's salary. For Saudi Arabian employees, the employer must pay an additional 9 per cent of the employees' total wages out of pocket to the Annuities Branch of the General Organisation for Social Insurance, as well as 1 per cent of the employees' total wages out of pocket for Saned, the unemployment insurance scheme implemented by the General Organisation for Social Insurance.

Foreign workers are protected under the Labour Law, and are permitted to work in Saudi Arabia as long as they uphold the provisions of the Labour Law and secure valid work permits from the MOL. Article 33 of the Labour Law imposes the following conditions precedent to the issuance of work permits to foreigners:

- a* the employee has entered the country legally;
- b* the employee possesses educational qualifications and professional qualifications that the country needs and that the nationals do not possess; and
- c* the employee has entered into a valid employment contract with his or her employer, whereby the employer agrees to hold itself responsible for the employee.

VIII GLOBAL POLICIES

As a preliminary matter, both the employer and the employee must acquaint themselves with all contents and provisions of the Labour Law so that each party may be aware of its obligations. In addition, all employers are required to adopt internal work rules.

A standard form of internal work rules was provided in previous implementing regulations. However, pursuant to the 2016 IRs, a new standard form of internal work rules was adopted. Pursuant to Article 4 of the 2016 IRs, companies must log on to the MOL's E-Portal and either accept the MOL's standard form of internal work rules or, alternatively, insert additional terms, which will be reviewed electronically by the MOL for consistency against Saudi Arabian rules and regulations. However, existing companies that have already adopted internal work rules are exempt from this requirement so long as their current rules are not inconsistent with the Labour Law or its implementing regulations.

Once approved, the employer is required to post the rules in a conspicuous location within the employer's establishment, or use any other method of communication to make employees aware of the rules (Article 13, Labour Law).

The Labour Law sets forth a list of permissive internal work policies and disciplinary measures that an employer may invoke. Under the Labour Law, an employer has the power to impose the following penalties:

- a* a fine, in which the employer must specify in a written record the employee's name, wages, the amount of the fine, and the cause and date of the fine;
- b* deprivation or postponement of allowance, but only for one year and no longer;
- c* postponement of promotions, but only for one year and no longer;

- d* suspension from work and withholding of wages, the latter of which must be prospective and not retroactive for work already completed by the employee; and
- e* dismissal.

Each of these measures must be comprehensive in nature, and define the scope of the measures, with particular emphasis on the privileges and rules related to violations and disciplinary penalties (Article 66, Labour Law).

Further, the standard form of internal work rules under the 2016 IRs lays out a specific and detailed scheme for discipline carried out by employers specifying the type of penalty that may be applied for 49 specific acts depending on whether the act was committed for the first, second, third or fourth time.

Moreover, there are no mandatory global policies required under Saudi Arabian law. It is advisable, however, that all companies seeking to establish a uniform set of global policies declare adherence to Saudi Arabian laws and regulations when drafting, for example, the following common corporate global policies:

- a* Workplace standards: a workplace standards policy should be written such that it does not contravene shariah, including, but not limited to, the prohibition against the consumption of alcohol, pork and pork products on the employer's premises.
- b* Anti-bribery policy: an anti-bribery policy should adhere to the Combating Bribery Law, enacted by Royal Decree No. M/36, dated 29/12/1412 H, corresponding to 1/7/1992 G, which seeks to counter both the offer and receipt of bribes involving public officials in Saudi Arabia. Under the Combating Bribery Law, a public official¹¹ is deemed as having received a bribe if he or she has solicited for him or herself or a third party, or accepted or received, a promise or gift for the purpose of obtaining or retaining business or securing some other improper advantage.¹² Further, an anti-bribery policy should additionally require employees to comply with the US Foreign Corrupt Practices Act and, if a shareholder of the employer has a presence in the UK, the UK Bribery Act.
- c* Anti-money laundering policy: an anti-money laundering policy should comply with the relevant anti-money laundering legislation in Saudi Arabia, which is the Anti-Money Laundering Law enacted by Royal Decree No. M/20 dated 05/02/1439H (25/10/2017G).
- d* Corporate authority and executive committee policy: a corporate authority and executive committee policy may need to take into consideration the following Saudi Arabian laws and regulations:

11 A public official includes: (1) a person employed by any of the Saudi Arabian public administrative authorities, regardless of whether the employment is permanent or temporary; (2) an arbitrator or expert appointed by the Saudi Arabian government or any entity having judicial specialisation; (3) a person assigned by a government authority or any other administrative authority to perform a specific assignment; (4) a person employed by a joint-stock company or company in which the state has a holding, a company that carries out banking operations or a company that manages and runs or maintains a public facility or that is performing a public service; and (5) certain chairmen and directors of companies.

12 A public official is deemed as having received a bribe if he or she has solicited for him or herself or a third party, or accepted or received a promise or gift in exchange for: (1) abstaining from carrying out his or her duties; (2) violating the functions of his or her duties; (3) performing or abstaining from one's duties as a result of a request, recommendation or mediation; (4) exercising real or alleged influence in order to obtain or attempt to obtain from any public authority any act, decision, contract, licence, job, service or any other kind of a benefit or advantage; and (5) lobbying a government authority on the basis of his or her position.

- the Anti-Harassment Law enacted under Royal Decree No. 488 dated 14/9/1439H corresponding to 29 May 2018G.
 - the Capital Market Law, enacted by Royal Decree No. M/30 dated 2/6/1424 H, corresponding to 31/7/2003 G;
 - the Regulations for Companies promulgated under Royal Decree No. 3/1437, dated 28/1/1437H, corresponding to 10/11/2015G, as amended;
 - the Bankruptcy Law, enacted by Royal Decree No. M/05 dated 28/05/1439H (corresponding to 13/02/2018G);
 - the Banking Control Law, enacted by Royal Decree No. M/5, dated 22/2/1386, corresponding to 11/6/1966 G;
 - the 2017 Corporate Governance Regulations (as amended);
 - the 2006 Real Estate Investment Fund Regulations;
 - the 2007 Mergers and Acquisition Regulations (as amended); and
 - the Commercial Agencies Law, enacted by Royal Decree No. M/11 dated 20/2/1382 H, corresponding to 22/7/1962 G, as amended.
- e* Securities trading: a securities trading policy should adhere to the relevant legislation in Saudi Arabia, which includes the Capital Market Law.
- f* Records retention: a records retention policy should comply with the Law of Commercial Books (the CB Law) (discussed in more detail in Section XI).

In addition to the above, it is also advisable that companies operating in Saudi Arabia include a policy that the company and its employees are expected to conduct themselves in a manner that does not offend local laws, practices and customs in Saudi Arabia, or do anything that would bring prejudice to the company in Saudi Arabia.

IX TRANSLATION

Article 9 of the Labour Law mandates that all data, records, files, employment contracts and all other documents provided for in the Labour Law, including any other decision issued by the MOL, shall be written in Arabic. In this regard, between an employment document translated in Arabic and the same contract translated in a foreign language, the general rule is that the Arabic version shall prevail. In addition, it is recommended that employee handbooks and company policies be translated into Arabic in the event that the global policies become subject to litigation in the Saudi Arabian courts. It is common practice for most information to be in English, which is also the common commercial language.

X EMPLOYEE REPRESENTATION

In April 2013, the MOL announced that it would promulgate legislation for the establishment of the General Union of Saudi Workers (the Workers' Union), which will aim to represent Saudi employees in their efforts to improve salaries and working conditions, seek promotions, increase benefits and ensure vocational safety.¹³ The Workers' Union will only be available to businesses employing more than 100 employees. As of the end of 2018, the Workers' Union was still not operational.

¹³ See *Arab News*, 'Labour Unions to be a reality soon', (12 April 2013) available at: www.arabnews.com/news/447872.

XI DATA PROTECTION

i Requirements for registration

Article 1 of the CB Law requires that ‘every merchant shall keep the commercial books required by the nature and importance of his trade in a way that shows his exact financial status and the rights and obligations pertaining to the merchant’s trade.’ Moreover, Articles 6 and 8 of the CB Law, when read together, provide that all merchants must keep for 10 years ‘an exact copy of all correspondence and documents relating to his trade, issued or received by him’, which shall be ‘kept in a regular way that facilitates review of the accounting entries, and ensures, where necessary, ascertaining of profits and losses’.

Articles 3 to 6 of the CB Law suggest that a company must identify with particularity the information being processed, including, but not limited to, financial transactions, inventory and other company financially related information.

ii Background checks

Background checks and credit checks are permitted. In practice, there are no areas that are prohibited from investigation and review.

XII DISCONTINUING EMPLOYMENT

i Dismissal

Under the Labour Law, an employee may not, regardless of whether the contract is an indefinite or fixed-term contract, be dismissed without cause unless the dismissal occurred during and pursuant to the employee’s validly negotiated probationary period. Rather, dismissal must be supported by a valid reason specified in a written notice. There is no guidance as to the scope of a valid reason, and there is some evidence to suggest that courts are more willing to find a valid reason for dismissal when the employee is an expatriate, rather than a Saudi Arabian national.

An employer may dismiss an employee bound to a fixed-term contract in one of the following three ways: non-renewal of the employment contract at the end of the contract’s duration;¹⁴ an event that triggers any of the contract’s terms with respect to dismissal or termination, unless such terms are contrary to the Labour Law or to Saudi public policy; or a conversion of the fixed-term contract to an indefinite term employment contract, which permits termination with 60 days’ notice and a valid reason – however, the Labour Law provides that the expiration date of the work permit shall serve as the fixed term of the contract for expatriate employees if no fixed term is specified. Thus, in practice only Saudi nationals may have indefinite term contracts.

¹⁴ However, pursuant to Article 19 of the 2016 IRs, the MOL adopted a standard form of work contract that encompasses obligatory as well as optional terms. Employers are not required to use the standard form of work contract, but employment contracts may not have any terms that are inconsistent with the standard form. Pursuant to Article 2 of the standard contract, it is obligatory that all fixed-term contracts are automatically renewed unless either party notifies the other in writing otherwise at least 30 days prior to the expiration date of the contract. Thus, employers may not let an employee go simply by failing to renew the fixed-term contract at the expiration of its term. Rather, the employer now must affirmatively provide 30 days’ notice prior to the expiration date.

In the event that none of these options is applicable, the Labour Court may, nonetheless, be willing to approve the dismissal of the employee for other reasons that it may deem valid, provided that adequate compensation is paid to the employee (e.g., the equivalent of three months' salary).

As a last resort, an employer may terminate an employment agreement with cause if the employee engages in egregiously inappropriate behaviour (e.g., by assaulting the employer; see below for a more detailed discussion of for-cause termination). In these cases, the employer must give the employee a chance to object to the termination and state his or her reasons for the same (Article 80, Labour Law).

Dismissal of employees bound to indefinite term employment contracts, in addition to a valid reason, requires that the employee receive written notice describing the reason for the dismissal. Employees who are paid monthly must receive the notice at least 60 days prior to the termination, whereas all other employees must receive such notice at least 30 days in advance. The employer may, however, forgo the employee's respective statutory notice period in exchange for a payment to the employee equal to the employee's wage for the duration of the notice period.

As a general rule, an employer must provide a dismissed employee with a statutory end of service reward or indemnity. The Labour Law, however, does not require the employer to pay the reward or any other indemnity in the following cases of for-cause termination:

- a* the employee assaults the employer or any of his or her superiors;
- b* the employee fails to obey the orders of his or her superiors or does not meet the essential obligations under his or her employment contract;
- c* if there is proof to suggest that the employee has adopted bad conduct or behaviour, or has committed an act affecting honour or integrity;
- d* the employee commits an act with the intention to cause material loss to the employer;
- e* the employee resorts to forgery in order to obtain the job;
- f* the employee is dismissed during his or her contractual probationary period;
- g* the employee is absent without a valid reason for a period of time specified in the Labour Law, so long as a warning is first served;
- h* the employee unlawfully takes advantage of his or her position with the employer in order to receive personal gains; or
- i* the employee discloses work-related confidential information or trade secrets (Article 80, Labour Law).

Irrespective of the way in which the employee's contract is terminated, the employer is required to pay the employee's wages and settle all of the employee's entitlements within one week of the dismissal or termination date. If the employee is an expatriate worker, then the employer must also bear the costs of a return ticket to the employee's homeland, unless the employee resigns in the absence of a legitimate reason (Article 40.2, Labour Law).

In cases in which an employer wishes to terminate the contract of an employee for cause, but the employee disputes the basis of the termination, the parties may enter into a settlement agreement in order to avoid protracted litigation before the Commission for the Settlement of Labour Disputes, which has jurisdiction to adjudicate disputes between employers and employees. Usually, agreements to settle are entered into between the parties after an employee has already filed a complaint.

ii Redundancies, conclusion of certain activities and closure

Redundancies are deemed to be valid reasons for terminating employment contracts. If company restructuring or some other business decisions lead to redundancies in personnel, a company may terminate the contracts of certain redundant employees, provided that it fulfils the statutorily mandated notice period or makes payment in lieu thereof.

In addition, where a company ceases operations in a certain activity, or ceases operations altogether, the amendments to the Labour Law that went into effect in 2015 provide, as a matter of statute, that the contracts of the relevant employees working in such operations may be terminated (Article 74).

XIII TRANSFER OF BUSINESS

The Labour Law offers protection to employees affected by a merger, acquisition or other business transfer recognised under Saudi Arabian law. Article 18 provides that all employment contracts affected by a valid business transfer shall be deemed as continuous, regardless of whether the contract is with the predecessor company or the successor company.

Both the predecessor and the successor shall be held jointly liable for all of the employee's entitlements for the period preceding the business transfer, including severance awards and wages. However, with respect to individual establishments involved in a transfer of ownership, the successor and predecessor may, but are not required to, agree on the transfer of all previous entitlements of the employees to the new owner subject to the employees' written approval. If an employee does not approve of the agreement, then he or she may demand termination of his or her employment contract and delivery of all of his or her entitlements from the predecessor (Article 18).

Notwithstanding Article 18 of the Labour Law, Article 11, which provided that both parties are jointly responsible to provide employees with all rights and privileges granted by the original employer where the employer sells all or part of its business to another, was amended as part of the 2015 amendments to remove such joint responsibility and place sole responsibility on the successor.

It would therefore appear that there is a conflict between Articles 11 and 18 of the Labour Law.

XIV OUTLOOK

Saudi Arabia is still experiencing growing pains as state spending is curtailed as a result of volatile oil prices, and this is reflected in the labour market and the pressure on companies to comply with Saudisation policies by focusing on the hiring, training and promotion of Saudi employees. There is hope that a renaissance of diversification will bring a renewed sense of optimism to the economy, but for the time being, companies doing business in Saudi Arabia should anticipate a continuation of 2017's intensified pro-Saudisation campaign and anti-expatriate sentiment. Long-standing policies of restricting expatriate employment and conditioning the issuance of employment visas to foreign workers on satisfactory levels of employment of Saudi nationals will remain and Saudi policy is likely to require ever-increasing percentages of Saudi nationals among workforces, even in fields where there is a shortage of skills among Saudi nationals, as well as higher levels of protection for Saudi employees generally.

ABOUT THE AUTHORS

JOHN BALOUZIYEH

Dentons in Association with The Law Firm of Wael A Alissa

John's practice focuses on commercial law as it relates to company formation, corporate restructuring, and compliance with Saudi labour and business law. Prior to joining Dentons, John worked on international arbitration and investment disputes as a legal fellow in the US Department of State. He also clerked at various international law firms and courts, including the Court of Justice of the Andean Community (international trade law). He is the author, editor and translator of various books and articles dealing with international and comparative law, including *A Legal Guide to Doing Business in Saudi Arabia* (Thomson Reuters, 2013) (co-authored with Amgad Husein).

JONATHAN BURNS

Dentons in Association with The Law Firm of Wael A Alissa

Jonathan is a US-trained and qualified associate at Dentons, resident full time in Jeddah after first joining Dentons in Riyadh in 2012. As part of the Dentons corporate and commercial team, Jonathan advises foreign, Saudi and GCC global market leaders and key players in the region on the full range of investing and doing business in Saudi Arabia and the GCC region. Jonathan is author of the book *Introduction to Islamic Law: Principles of Civil, Criminal and International Law under the Shari'a*, and previously served as an editor on the *Indiana International & Comparative Law Review*.

DENTONS

Dentons in Association with The Law Firm of Wael A Alissa
Khalidiya Business Center
Third floor, Suite 301
Prince Sultan Street
Jeddah
Saudi Arabia
Tel: +966 12 606 9777
Fax: +966 11 200 8679
jonathan.burns@dentons.com

Tatweer Towers, Tower 1, Level 8
King Fahad Road
PO Box 59490
Riyadh 11525
Saudi Arabia
Tel: +966 11 200 8678
Fax: +966 11 200 8679
john.balouziyeh@dentons.com

www.dentons.com



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