

Abu Dhabi Global Market - The new employment horizon

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The Regulations have now been finalised and came into effect as of 14 June 2015.

As with the Dubai International Financial Centre (“**DIFC**”) ADGM will be a special free zone and will operating as a new jurisdiction carved out of the UAE and will not be subject to UAE civil and commercial law. English common law shall apply in and form part of the law of ADGM, with appropriate safeguards in order to ensure that any undesirable evolution of the common law may be overridden by ADGM. This was not unexpected as it was commonly felt that ADGM would create a familiar legal environment for international banks and financial institutions.

From an employment perspective the Regulations closely follow those of the DIFC and as such differ in a number of significant areas from the UAE position (which we refer to as ‘onshore’ in this article).

The Key Points

Part-Time Working Arrangements. For the first time in the UAE, the Regulations provide for part-time working arrangements. In particular, the Regulations state that employee leave entitlements, as well as an employer’s right to terminate for excessive sick leave, shall apply but shall be calculated on a pro-rata basis for part-time employees. In our view this development will be beneficial for both employers and employees, and is in line with the UAE’s stated ambition to achieve greater female participation in the workforce.

Overtime. The Regulations stipulate that the maximum working week is 48 hours “*unless the Employer has first obtained the Employee’s freely-given and informed consent in writing*”. One would anticipate that employers would obtain this consent via the employment contract signed at the commencement of the relationship when the employee is unlikely to challenge it. There is no provision for overtime payment for hours worked in excess of 48 hours.

Annual leave. Employees are entitled to 20 working days annual leave (as opposed to 22 working days onshore) and are allowed to carry forward up to five (5) working days into the next calendar year.

Maternity Leave. Employees are entitled to a minimum maternity leave of 65 working days of which the first 33 days are fully paid and the balance is paid at 50% normal rate. This contrasts with the onshore provision which is 45 calendar days paid maternity leave (which equates to 32 working days for those on a 5 day week).

Sick Leave. The very generous DIFC sick leave provisions are replicated in ADGM. An employee is entitled to 60 working days paid sick leave in any 12 month period. This contrasts with the onshore position where an employee is entitled to 90 calendar days sick leave (equating to 66 working days on a 5 day week basis) of which only one third is paid.

Discrimination. The Regulations prohibit an employer from discriminating against an employee on the grounds of sex, marital status, race, nationality, religion, age and disability.

Compensation Limits and Applicable Fines. The Regulations provide that the Board of Directors of the ADGM may make rules setting out applicable fines and/or appropriate limits of compensation for non-compliance with the obligations under the Regulations. However, until such time that any such rules are made, there are no applicable limits on the compensation due for non-compliance with the Regulations.

Data Protection. The Regulations impose a number of obligations and restrictions with regard to personal data, including the specific purposes for which personal data can be processed, and the circumstances in which an employer is permitted to transfer personal data outside of the ADGM. The Regulations also provide that appropriate measures must be taken by employers to prevent unauthorised or unlawful processing of personal data as well as accidental loss or destruction of personal data.

Probation period. An employer may place an employee on a probation period of up to six months. This reflects the onshore position but differs from the DIFC (which is silent on the issue of probationary periods albeit that they are routinely used).

Paternity Leave. For the first time in the UAE private sector, paternity leave of 5 working days is provided to employees in ADGM.

Right to a written contract. Employees may only be employed pursuant to a written contract which must be in English and signed by both parties. The contract must contain certain fundamental pieces of information such as salary, term, notice period, job title and so on.

End of service gratuity is calculated the same way as onshore however there is no reduction in gratuity where an employee with less than 5 years service resigns. Gratuity is not payable in cases of gross misconduct or where the employee elects to take a company pension instead.

Termination

The Regulations state that, other than rights under the Regulations, applicable common law and the employment contract, an employee shall have no other rights to compensation or payments from the employer on termination of the employment.

While there is no express provision for compensation for unfair dismissal nor is there a requirement for an employer to follow established procedures for implementing dismissals, the explicit recognition of common law principles could potentially open the door to employee claims for damages under the common law concept of implied duty of trust and confidence. It is yet to be seen how this may be interpreted and applied in practice.

Perhaps in an effort to provide a counter-balance for employees the minimum notice periods in ADGM are more generous for longer serving employees than onshore. For employees with 3 months to 5 years service the minimum notice is 30 days and for those with over 5 years service it is 90 days. The onshore equivalent is 30 days.

The employer may terminate for cause (without notice and without end of service gratuity) if the employee's conduct is such that "*a reasonable employer would consider immediate termination to be warranted*".

Post Termination Restrictions

The effectiveness of post termination restrictions in the UAE has been debated for some time. Non-compete and non-solicitation clauses will potentially have more bite within ADGM in that the equitable remedy of injunctive relief should be available in the ADGM courts. This will have the effect of potentially blocking a departing employee from securing employment with a competitor within ADGM until such time as the non-compete is no longer applicable. It would also be open to an employer to claim damages for breach of these clauses. It will be interesting to see the interplay between the DIFC and ADGM jurisdictions

on this front and whether either jurisdiction would enforce the restrictive covenant emanating from the other.

Employment Disputes

It is proposed that a dedicated employment tribunal system will be established to deal with all employment cases arising in ADGM with its own discrete procedural rules. This should ensure that those adjudicating on employment disputes are specialised and experienced in that field, resulting in just outcomes and efficient case management which can only benefit employers and employees. The draft procedural rules will be submitted for public consultation in a similar manner to the Regulations. Prior to the establishment of that system the ADGM courts will handle any employment disputes.

Regulatory Transition

One aspect of ADGM is the creation of a new jurisdiction but another aspect is the formation of a new regulatory body. Most employers currently based in the geographical area that will become ADGM are subject to the remit of the Ministry of Labour (“**MOL**”). Their employees have labour cards (work permits) and the employer is subject to MOL inspection and oversight. There are some government owned entities in the area that are not under the remit of the MOL.

When the free zone is operational a transition process will occur whereby employers will get licensed by the ADGM free zone authority (“**FZA**”) and the employees will shift from onshore visas to free zone visas. From an employment law perspective this is a termination of one employment and commencement of another. Employers will need to consider how to deal with accrued benefits like end of service gratuity and annual leave. It is expected that most employers will seek to ‘roll over’ these accrued benefits to the new employment, which may be done subject to the correct agreements being in place.

Dependent visas will also have to be cancelled and reissued. Currently it is necessary to produce an Abu Dhabi tenancy contract to obtain a dependent visa in Abu Dhabi (but not for the employee’s visa) and it is not clear yet whether this will change under the new regime.

From an employer’s perspective the FZA will replace the MOL as the regulatory and oversight body. Generally speaking free zones are considered to be more relaxed about providing permission for hybrid working arrangements and short term working arrangements.

Most free zones have a mediation process (with differing levels of formality) that must be exhausted by the parties to an employment dispute before a party can file a case in court and it remains to be seen whether this is followed in ADGM.

UAE nationals

There are explicit onshore requirements regarding the termination of UAE national employees – specifically, the MOL must be consulted at least 30 days prior to the proposed dismissal of a UAE national and its approval for the dismissal must be obtained. These requirements will not apply in ADGM. The same considerations will apply in respect of nationals and non-nationals.

Emiratisation

Certain onshore Ministerial Resolutions stipulate that a percentage (which varies between certain sectors) of a company’s workforce should be UAE nationals. There is presently no such requirement in ADGM.

Conclusion

The Regulations are very employer friendly in that the prospect of obtaining injunctive relief to enforce post termination restrictions is likely to be attractive to employers. The working hour arrangements, which oftentimes can represent a challenge for onshore employers, are also quite flexible.

While there is no express provision for unfair dismissal compensation and employers are not required to follow established procedures for implementing dismissals, the explicit recognition of common law principles could potentially open the door to employee claims for damages under the common law concept of implied duty of trust and confidence. It is yet to be seen how this may be interpreted and applied in practice.

From the employee perspective there are anti-discrimination and data protection provisions as well as more generous sick leave, maternity leave and also, for the first time in the UAE private sector, paternity leave. Furthermore there is no reduced gratuity where the employee resigns.

Overall the Regulations are likely to be welcomed by employers and without doubt they send out a powerful message that ADGM is open for business.

Al Tamimi & Company will shortly be holding a client workshop to discuss the final draft of the Regulations.