



Dubai
International
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Centre

CONSULTATION PAPER NO. 1

FEBRUARY 2018

**PROPOSED EMPLOYMENT LAW
DIFC LAW NO 6. OF 2018**

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PROPOSALS RELATING TO A NEW EMPLOYMENT LAW

Why are we issuing this paper?

1. The Dubai International Financial Centre Authority (“DIFCA”) proposes to replace its current Employment Law, DIFC Law No. 4 of 2005 (the “Current Law”) with a new law to update employment relationships in the DIFC. This Consultation Paper No. 1 of 2018 (“Consultation Paper”) seeks public comments on the proposed new Employment Law (the “Proposed Law”)¹.
2. In doing so, much of the structure and contents of the Current Law is retained but in a number of instances existing principles were expanded or refined in the Proposed Law.
3. The Proposed Law also proposes to make provision for Employment Regulations to be issued pursuant to the Proposed Law. DIFCA proposes to seek public comment on the proposed Employment Regulations separately following consideration of public comments on the Proposed Law.

Who should read this paper?

4. This Consultation Paper would be of interest to persons conducting or proposing to conduct business in the DIFC. In particular:
 - (a) officers and employees of establishments or bodies having a place of business in the DIFC;
 - (b) individuals employed by such an establishments or entities, who is either based within, or ordinarily works in or from the DIFC;
 - (c) shareholders and members such establishments or bodies;
 - (d) legal advisors; and
 - (e) service providers and advisers to the employment industry in the DIFC.

How to provide comments

5. All comments should be provided to the person specified below:

¹ Please refer to Annex A for the Proposed Law and to Annex B for the Current Law.

Jacques Visser
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DIFC Authority
Level 14, The Gate, P. O. Box 74777
Dubai, United Arab Emirates
or e-mailed to: consultation@difc.ae

6. You may choose to identify the organisation you represent in your comments.
7. DIFCA reserves the right to publish, on its website or elsewhere, any comments you provide, unless you expressly request otherwise at the time the comments are made.

What happens next?

8. The deadline for providing comments on the proposals in this Consultation Paper is 22 March 2018.
9. Once we receive your comments, we will consider if any further refinements are required to the Proposed Law. Once DIFCA considers the Proposed Law to be in a suitable form, it will be enacted as a new DIFC law to come in to force on a date specified and published.
10. The Proposed Law is in draft form only. You should not act on it until the Proposed Law is formally enacted. We will issue a notice on our website when this happens.

Defined terms

11. Defined terms are identified throughout this paper by the capitalisation of the initial letter of a word or of each word in a phrase and are defined in the Proposed Law. Unless the context otherwise requires, where capitalisation of the initial letter is not used, the expression has its natural meaning.

Background

12. The proposal to replace the Current Law with the Proposed Law stems from a comprehensive review of the Current Law. In undertaking that review, we considered international best practice and comparable models in other jurisdictions, focusing specifically on:
 - (a) specific developments in employment law under English law;
 - (b) how those developments would fit into the overall context of employment relations in the UAE and what example the DIFC should set in this regard; and

- (c) catering for practical developments in the DIFC relating to employment and working relationships in the DIFC since the enactment and amendment of the Current Law.
13. The Proposed Law attempts to balance the needs of Employers and Employees in the DIFC with the emphasis being on providing a framework of minimum employment standards and fair treatment of Employees in the DIFC to enable businesses in the DIFC to thrive, while also ensuring the attraction of human capital to the DIFC.

Key changes proposed

14. The Proposed Law contains refinements to the current regime which include the following:
- (a) clarifying the application of the DIFC's employment regime in respect of what Employers and Employees qualify, as well as in respect of Part-Time Employees and Short Term Employees, and excluding the application of the DIFC employment law regime to certain categories of Employees – see numbered paragraphs 15 to 30;
 - (b) introducing a fines and penalties regime to ensure adherence to basic conditions of employment and the visa and residency sponsorship requirements of Employees and inspection powers in respect thereof – see numbered paragraphs 31 to 34;
 - (c) allowing for the waiver of rights under the Proposed Law in certain circumstances – see numbered paragraphs 35 to 38;
 - (d) removing the mandatory nature of penalties on Employers for late payment of amounts due to Employees at Termination – see numbered paragraphs 39 to 41;
 - (e) removing the restriction placed in respect of maximum weekly working time – see numbered paragraphs 42 to 46;
 - (f) reducing the amount of Sick Leave pay – see numbered paragraphs 47 to 51;
 - (g) introducing Paternity Leave for male Employees – see numbered paragraphs 52 to 55;
 - (h) clarifying an Employer's vicarious liability in respect of acts, attempted acts or omissions of Employees acting in the course of employment – see numbered paragraphs 56 to 62;

- (i) introducing requirements for visas and permits – see numbered paragraphs 63 and 64;
- (j) introducing the principle of contributory negligence in compensation claims arising out of injury or death arising out of or in the course of employment – see numbered paragraphs 65 and 66;
- (k) expanding the definitions relating to discrimination and the grounds for discrimination to include pregnancy and age – see numbered paragraphs 67 to 71;
- (l) introducing remedies for discrimination claims – see numbered paragraphs 72 to 74;
- (m) removing the forfeiture of Gratuity Payments in cases of termination for cause – see numbered paragraphs 75 to 77;
- (n) clarifying the rights of Employees and Employers where they terminate employment for cause – see numbered paragraphs 78 to 85;
- (o) adding whistle-blower protection in line with what is provided for in the newly proposed DIFC Companies Law – see numbered paragraphs 86 to 89; and
- (p) other miscellaneous changes – see paragraphs 90 and 91.

Clarifying the application of the DIFC Employment Law regime

15. The introductory paragraph of Article 4(1) of the Current Law is drafted to be applicable only to Employees.
16. Article 4(1) of the Current Law also limits the application of the Law to Employees of establishments having a place of business in the DIFC and the centre bodies constituting the DIFC as Employers and who were based within or ordinarily works within or from the DIFC. This created a number of uncertainties in respect of the application of the Current Law to certain types of Employees and Employers, inclusive of:
 - (a) whether Part-Time Employees and Short Term Employees are included;
 - (b) whether the Current Law applies to Employees working in the DIFC pursuant to a secondment;
 - (c) whether the Current Law applies to Employees of DIFC establishments who rendered most of their duties outside DIFC;

- (d) whether the Current Law applies to Employees working for federal or local government bodies situated in the DIFC; and
 - (e) whether Employers are permitted to conclude employment contracts subject to any other applicable laws.
17. Under the Proposed Law, the new Article 4(1) is drafted to be applicable to both Employers and Employees and attempts to deal with each of the issues listed above. It also allows for the possibility in certain cases for Employers to contract out of the Law being applicable, provided that some basic conditions of employment under the Law remain applicable to such Employers. We discuss these issues in more detail below.

Dealing with Part-Time Employees and Short Term Employees

18. The definition of Employee, Employment Contract and the provisions of Article 16 of the Proposed Law bring Part-Time Employees and Short Term Employees within the scope of application of the Proposed Law. In this context we considered the employment status definitions in the applicable statutes under English law.
19. For Part-Time Employees the Proposed Law only distinguishes between this category of Employee and full-time Employees by pro rating their leave entitlements under the Proposed Law (see Articles 16(1) to (4)).
20. Insofar as Short Term Employees (i.e. Employees providing work or service to an Employer in aggregate for thirty days or less over a twelve month period) are concerned, a number of provisions of the Proposed Law are excluded from this category of Employees (see Article 16(5) of the Proposed Law). These exclusions are largely in line with those found within the context of statutory rights for short term employees in the United Kingdom under the Employment Rights Act 1996, the National Minimum Wage Act 1998, the Social Security and Benefits Act 1992, the Equality Act 2010 and related regulations.

Expanding the application of the Employment Law to Employees that have agreed to be subject to the Employment Law and those having a sufficiently close connection to the DIFC

21. Article 4(1)(b)(i) and (ii) of the Proposed Law adds additional categories of Employee to whom the Law will apply. These are:
- (a) any individual who agreed in an Employment Contract to be subject to the Proposed Law; and

- (b) any individual who “*has been determined by the Court to have a sufficiently close connection to the DIFC for it to be appropriate to deal with any right, remedy, privilege, debt or obligation of that individual pursuant to this Law*”.
22. These additions came about as a consequence of a number of issues identified in this regard, primarily because:
- (a) the DIFC often serves as a nexus point for expatriate workers whose work requirements are peripatetic in nature that can make the usual qualification for Employees to be those “*ordinarily working in or from the DIFC*” difficult to apply;
- (b) the test for application in Article 4(1) of the Current Law to Employees is drafted in such a manner that the requirement to be “*ordinarily working in or from*” had to be satisfied in addition to an Employer being situated in the DIFC.
23. The first addition in Article 4(1)(b)(i) of the Proposed Law is quite straightforward in that it serves to bring Employees who work for DIFC-based Employers outside the DIFC within the ambit of the Proposed Law, where the parties involved choose to do so.
24. The second addition of Employees who satisfy the “*sufficiently close connection*” test in Article 4(1)(b)(ii) of the Proposed Law is intended to deal with individuals who may from time to time be working in or from the DIFC under applicable law other than the Proposed Law (as provided for under Article 4(2) of the Proposed Law). However, these individuals may still have rights pursuant to the provisions of Article 4(3) of the Proposed Law and it is with these rights in mind that the scope of the Proposed Law’s operation is expanded.
25. The “*sufficiently close connection*” test stems from the decision of the House of Lords in the matter of *Serco Ltd v Lawson and other cases [2006] IRLR 289 (HL)* and subsequent case law in the United Kingdom dealing with the territorial scope of UK statutory employment rights, especially insofar as it relates to unfair dismissal cases.
26. Although the DIFC does not yet have a fully developed employment regime in respect of unfair dismissal claims the “*sufficiently close connection*” test was considered suitable for introduction into the Proposed Law as a means of dealing with the issues pointed out in numbered paragraph 24 above.

Introducing carve-outs where the Proposed Law will not apply to Employers or Employees

27. A number of instances have been identified as problematic in the Current Law where the provisions of Article 4(2) stipulating that the Law shall apply (on a mandatory basis without exception) to contracts of employment relating to Employees that were ordinarily working in or from the DIFC.

28. A few practical examples where this requirement were regarded as problematic relates to:
- (a) federal or local government Employees, such as those providing immigration, visa and residency services in the DIFC employed by the Dubai General Directorate of Residency and Foreigners Affairs of the Government of Dubai;
 - (b) shift workers working in retail outlets in the DIFC but who may at times also do shift work for their Employers outside the DIFC;
 - (c) Employees that are employed by their head-office elsewhere in the world but get seconded to the firm's branch or entity in the DIFC under the same contract; and
 - (d) Employees employed and sponsored by an Employer's Dubai-based affiliate but working in the DIFC pursuant to the dual licensing memorandum of understanding agreed to between DIFCA and the Dubai Economic Department.
29. Article 4(2) in the Proposed Law has been introduced to deal with the issues pointed out above. However, it should be noted that this Article is made subject to Article 4(3) which imposes certain minimum conditions of employment on the relevant Employers, irrespective of which law is applicable to an Employer/ Employee relationship.
30. Also, to ensure that the Secondment exemption in the Proposed Law is not abused, DIFCA's current intention is to restrict what will be permitted under the exemption of "Secondment" in this context to a number of strictly defined categories in the Regulations.

- Q1. Do you have any concerns about the clarifications in the Proposed Law in Article 4 dealing with the application of the Proposed Law? If so, what are they, and how should they be addressed?**
- Q2. Do you have any concerns regarding the application of the Proposed Law in respect of dealing with Part-Time Employees and Short Term Employees, their definitions and the Articles of the Proposed Law that have been made not applicable to Part-Time Employees Short-Term Employees. If so, what are they, and how should they be addressed?**
- Q3. Do you have any concerns regarding exempting some of the provisions of the Proposed Law in respect of Employees working in the DIFC on the basis of a Secondment?**

- Q4. Do you have any concerns about the introduction of the “*sufficiently close connection*” test in Article 4(1)(b)(iii) of the Proposed Law? If so, what are they, and how should they be addressed?**
- Q5. Are there any issues or concerns to be addressed relating to the application of the Law not dealt with in the Proposed Law? If so, what are they, and how should they be addressed?**

Introducing a fines and penalties regime with inspection powers

31. Article 9 of the Proposed Law introduces a new fines and penalties regime for any contraventions of the Proposed Law. Article 9(2) expressly states that, by allowing DIFCA to impose fines and penalties in the above regard, it does not limit the rights of Employers or Employees to enforce any rights, remedies, privileges, claims or actions under the Proposed Law or any other relevant law. Accordingly, circumstances may occur where, for example a fine is levied on an Employer by DIFCA, as well as that Employer being sued for compensation under the same or other provisions of the Proposed Law.
32. The new fines and penalties regime should also be read in the context of the newly introduced Article 65 of the Proposed Law that allows for general contravention provisions, the Board of Directors of the DIFCA having the right to expand the fines and penalties regime and the appointment of Inspectors to ensure compliance with the Proposed Law or any other applicable law.
33. Schedule 3 to the Proposed Law indicates the suggested fines for the contraventions listed therein. Note also that the Board of Directors of the DIFC may impose additional fines and penalties other than those indicated in Schedule 3.
34. The proposed approach in the above regard stems from the fact that the Current Law has a number of requirements and restrictions on Employers but has no corresponding fine, penalty or other remedy in the Current Law to ensure compliance. The introduction of the abovementioned provisions in the Proposed Law intends to address this shortcoming.

- Q6. Are there any concerns in relation to the proposed fines and penalties regime? If so, what are they, and how should they be addressed?**
- Q7. Do you have any views regarding the fact that the Board of the DIFCA has the authority to impose fines and penalties under the Proposed Law, in addition to those stipulated in Schedule 3 to the Proposed Law?**

- Q8. Do you have any concerns about the proposed inspection regime and the investigative powers of Inspectors under Article 68 of the Proposed Law? If so, what are they, and how should they be addressed?**
- Q9. Do you have any views on the infringements and the amounts of the proposed fines suggested in Schedule 3?**

Allowing for the waiver of rights under the Proposed Law

35. Article 10(1) of the Current Law prohibits the waiver of the provisions of the Current Law and renders any such waiver of rights as having no effect. This was considered as problematic for parties settling their disputes, as the Current Law makes no express provision elsewhere for the waiver of the requirements under the Current Law. Also, any disputes between Employers and Employees could potentially render parts of settlement agreements void as a consequence of this Article.
36. Consequently, a carve-out to the above principle is introduced in Article 10(2)(b) of the Proposed Law whereby parties will be permitted to waive any right, remedy, privilege, claim or action pursuant to the provisions of the Proposed Law in an agreement but only where it involves the resolution of a dispute (i.e. the proposed carve-out is not intended for parties to generally enter into agreements waiving their rights under the Proposed Law if there is not a dispute pending between them).
37. However, to avoid a situation where Employers may place undue pressure on Employees to waive their rights and remedies under the Proposed Law, Article 10(3) in the Proposed Law has been added to provide the Court with a discretion to set aside agreements waiving any right, remedy, privilege, claim or action where it is found to have been unreasonable in the circumstances.

38. To avoid the uncertainty that Article 10(3) itself may then bring about (i.e. where settling a matter involving the waiver of rights, remedies, privileges, claims or actions can always be challenged again in the Court, irrespective of what the parties agreed to) Article 10(4) provides that Article 10(3) does not apply to such settlements in certain instances (i.e. where an Employee received independent legal advice prior to entering into the settlement agreement, where an Employer can show that an Employee was offered the opportunity to obtain independent legal advice or in circumstances where mediation efforts preceded the agreement).

Q10. Are there any concerns in relation to the proposed carve-out for the waiver of rights, remedies, privileges, claims or actions under the Proposed Law in relation to agreements? If so, what are they, and how should they be addressed?

Q11. Are there any concerns relating to limiting this carve-out to the settlement of disputes? If so, what are they, and how should they be addressed?

Q12. Are there any concerns relating to allowing the Court to set aside any agreement waiving rights, remedies, privileges, claims or actions under the Proposed Law if they are found to be unreasonable in the circumstances? What are they and how should they be addressed?

Q13. Do you have any concerns in respect of Article 10(4) the Proposed Law exempting agreements from the provisions of Article 10(3) of the Proposed Law in certain circumstances?

Allowing the Court a discretion in the imposition of financial penalties on late payment

39. One of the more contentious provisions of the Current Law is the imposition of a financial penalty on an Employer equal to the last daily Wage of an Employee for each day the Employer was in arrears with payment of an Employee's dues at termination of employment under Article 18(2) of the Current Law.

40. The mandatory nature of this penalty was criticized in Court decisions, as well as in submissions made to DIFCA by establishments in the DIFC, especially in instances where the imposition of such a penalty was clearly unreasonable.

41. Consequently, Article 18(3) of the Proposed Law was added to:

- (a) exclude de minimis claims from penalty claims (i.e. if the full amount due to an Employee is below 5% of the full amount due to an Employee on a Termination Date no penalty under Article 18(2) of the Proposed Law);

- (b) cap the Article 18(2) penalty at six months' Wages; and
- (c) provide the Court with a discretion to waive or reduce the Article 18(2) penalty in circumstances where imposing such penalty is unreasonable in the circumstances.

Q14. Do you have any concerns about the addition of Article 18(3) to the Proposed Law? If so what are they, and how should they be addressed?

Q15. Do you have any comments in respect of (i) the 5% de minimis exemption, (ii) the capping of the Article 18(2) penalty, or (iii) providing the Court with a discretion to reduce such penalty in certain circumstances in Article 18(3)? If so, how should this be done?

Removing maximum weekly working time

- 42. Article 21 of the Current Law restricts and Employee's working time to an average of forty eight hours for each seven day period, unless the Employer has first obtained the Employee's consent in writing.
- 43. This Article presented a number of difficulties in that there is no period stated over which the average working hours for each seven day period is to be calculated (e.g. in the UK it is seventeen weeks).
- 44. It was also pointed out to DIFCA in its consultations in preparing the Proposed Law that it is a provision of the Current Law that is largely being ignored on account of the DIFC being primarily a financial services centre and professional services hub, where the large majority of Employees are professionals that are often expected to work longer hours than the permitted limit in Article 21 of the Current Law.
- 45. It was also submitted that non-professional workers have sufficient protection in the Current Law in that Article 22 (Excessive hours), Article 24 (Daily rest), Article 25 (Weekly rest period) and Article 26 (Rest breaks) allow for sufficient protection and, consequently, these were repeated in the Proposed Law under Articles 21, 23, 24 and 25.
- 46. In light of the above it is proposed that Article 21 in the Current Law is removed.

Q16. Do you have any concerns about the removal of Article 21 of the Current Law? If so what are they, and how should they be addressed?

Reducing Sick Leave pay

47. Article 34 of the Current Law provides that all sixty Work Days allowed to an Employee to be taken by an Employee during a twelve month period are paid for in full by an Employer. This is not in line with practice under the Federal Law (which only allows for fifteen calendar days as fully payable Sick Leave and another thirty calendar days at half pay)².
48. DIFCA also conducted an extensive benchmarking exercise in a number of other jurisdictions and found that the requirements for paid Sick Leave in such jurisdictions were in many cases substantially less than those provided for in the Current Law³.
49. In addition, DIFCA received complaints from centre establishments that the paid Sick Leave provisions of the Current Law are open to abuse.
50. Consequently, Article 34 of the Proposed Law has introduced the following limitations in respect of Sick Leave pay:
- (a) the first ten Work Days of Sick Leave taken in a twelve month period will be fully paid;
 - (b) the next twenty Work Days of Sick Leave taken in the same twelve month period will be subject to payment of half of an Employee's Wages; and
 - (c) any additional Sick Leave taken by an Employee in the same twelve month period will be unpaid.
51. It should be noted that these limitations are minimum standards and Employers may contract in more favourable terms with Employees, especially where it concerns serious or chronic health conditions.

Q17. Do you have concerns regarding the proposed reduction of Sick Leave pay? If so, what are they, and how should they be addressed?

Q18. Are there any other considerations you wish to suggest that should be taken into account in respect of Sick Leave? If yes, please provide these.

² See Article 83 of the UAE Labour Law, Federal Law No. 8 of 1980.

³ The jurisdictions included in the benchmark analysis included the UAE, the United Kingdom, the United States, Hong Kong, Singapore, Australia and India.

Introducing Paternity Leave and time off for ante-natal care

52. DIFCA conducted a benchmark analysis regarding the issue of Paternity Leave⁴.
53. The conclusion reached was that Paternity Leave is widely accepted and implemented in other jurisdictions. There are also considerations of a potential discrimination claim under the expanded grounds for discrimination under Article 59 if expectant fathers were not afforded Paternity Leave.
54. Consequently, Article 38 of the Proposed Law introduces Paternity Leave of five Work days to male Employees to whom a child is born or who adopts a child under the age of five years.
55. Similarly, Article 56 of the Proposed Law also extends the right to attend medical appointments for ante-natal care or adoption proceedings to male Employees.

Q19. Do you have concerns regarding the proposed introduction of Paternity Leave? If so, what are they, and how should they be addressed?

Q20. Are five days Paternity Leave considered sufficient? If not, what do you propose and on what grounds?

Q21. Do you have concerns regarding the proposed introduction of time off for male Employees for ante natal care and adoption proceedings? If so, what are they, and how should they be addressed?

Providing defences to an Employer's vicarious liability

56. Article 51 of the Current Law extends vicarious liability to Employers to any act of an Employee done in the course of employment.
57. DIFCA is of the opinion that this general extension of liability does not reflect Common Law on the position and the Proposed Law suggests to introduce defences by Employees in the above regard in the manner as set out in numbered paragraphs 58 to 62 below.
58. Article 51(2)(a) of the Proposed Law stipulates that Employer can only be held liable for claims for loss, damages or compensation for any act, attempted act or omission on the part of an Employee if the act, attempted act, or omission to which such claim relates is

⁴The same jurisdictions as those referred to in footnote 2 were consulted.

sufficiently connected with what was authorised or expected of the Employee in the course of employment whether directly or indirectly.

59. Under Common Law vicarious liability gives rise to a two stage test:
- (a) firstly, one has to establish a relationship between the primary wrongdoer and the person alleged to be liable which is capable of giving rise to vicarious liability; and
 - (b) secondly, there is what is called the "*sufficient connection*" test (i.e. whether act, attempted act or omission was "*so closely connected with [the] employment that it would be fair and just to hold the employers vicariously liable*").
60. Stage one of the test is typically assumed where there is an employment relationship, provided there was control over the Employee⁵. In these circumstances, the principal focus is on stage two of the test. Article 51(2)(a) in the Proposed Law attempts to reflect the test enunciated by the House of Lords in *Lister v Hesley Hall*⁶.
61. Similarly, Article 109 of the UK's Equality Act 2012 affords statutory vicarious liability to Employers in respect of discrimination claims. The test for statutory discrimination is to be regarded as at least as wide as, if not broader than, the *Lister* test referred to above⁷.
62. The provisions of Article 51(2)(b) of the Proposed Law attempts to capture the principles of the statutory defence provided for against statutory vicarious liability for Employers in the UK under Article 109 of the Equality Act 2012 in relation to instances where a person seeks to hold an Employer liable for discrimination, harassment or victimisation offences committed in the course of employment.

Q22. Do you have concerns regarding the proposed defences to vicarious liability for Employers in Article 51(2)(a) and (b) of the Proposed Law? If so, can you please provide details?

Q23. Are the specific defences to vicarious liability for Employers in Article 51(2)(a) and (b) regarded as sufficient or should there be a broader approach to this issue of vicarious liability? If yes, can you please indicate how this should be addressed?

Q24. Do you agree with DIFCA following UK law examples in the above regard? Should other jurisdictions/ examples also be considered?

⁵ Control is satisfied by the requirement that the act, attempted act or omission took place in the course of employment

⁶ See the House of Lords decision in *Lister v Hesley Hall Ltd* [2001] UKHL 22

⁷ See *Livesey v Parker Merchants Ltd* [2004] UKEAT/0755/03).

Introducing visa and permit requirements

63. Article 54 of the Proposed Law introduces visa and permit requirements into the DIFC employment regime. These requirements are intended to reflect what is already part of doing business in the DIFC and what Employers are already required to adhere to pursuant to the Personnel Sponsorship Agreement.
64. However, the primary reasons for introducing these requirements into the Proposed Law are as follows:
- (a) Employees required protection in prohibiting Employers (i) to pass on the costs of hiring and sponsoring and obtaining all the requisite visas, authorisations, licenses, permits, and approvals onto Employees; and (ii) retaining passports and other original personal documents, as some of the Federal Laws and Dubai Laws in this regard may not be applicable in the DIFC; and
 - (b) to link these requirements to a fines and penalties regime to ensure compliance.

Q25. Do you have concerns regarding the proposed requirements relating to visas and permits in the DIFC as stated in Article 54 of the Proposed Law? If so, can you please provide details?

Q26. Do you have concerns regarding the linking of the requirements in Article 54 of the Proposed Law to imposition of fines and penalties? If yes, can you please indicate how this should be addressed?

Q27. Do agree with allowing Inspectors to have access to Employers' premises and Employee records to verify compliance with the provisions of the Proposed Law and Regulations published pursuant thereto? If not, what alternatives would you suggest?

Introducing principles relating to contributory negligence to Employee compensation claims for injury or death arising out of or in the course of employment

65. Article 52 of the Current Law imposes strict liability on Employers in respect of the injury of an Employee arising out of or in the course of Employment and as a result of injury or illness arising out of or in the course of employment.
66. Article 52(3) of the Proposed Law seeks to introduce the principle of apportioning damages as a consequence of contributory negligence on the part of an Employee in line with the principle enunciated in the UK's Contributory Negligence Act 1945, which provides

that: "*Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in responsibility for the damage ...*".

Q28. Do you agree with introducing contributory negligence as a means of apportioning damages in claims resulting from injury or death arising out of or in the course of employment where the Employee was negligent? If not, what are your reasons?

Q29. Do you have any concerns relating to the reasons provided above? If yes, can you please provide these?

Adding pregnancy and age as grounds for discrimination

67. Article 58 of the Current Law, limits the grounds for discrimination to:

- (a) sex;
- (b) marital status;
- (c) race;
- (d) nationality;
- (e) religion; and/or
- (f) mental or physical disability.

68. If one follows examples elsewhere in the developed world certain additional characteristics are also protected under employment equity laws⁸.

69. Not all of such additional characteristics enjoy universal protection, especially in countries where religious and cultural sensitivities play an all important role in society. Notwithstanding these sensitivities, Article 59 of the Proposed Law suggests that the DIFC expands the grounds for discrimination to also include pregnancy and age, in addition to the ones referred to in the Current Law.

70. In the case of pregnancy this is an extension of what has already been provided for in Part 5 of the Proposed Law and ties in with Article 39(3) of the Proposed Law that stipulates

⁸ See the UK's Equality Act 2010 for examples in this regard.

that “[a]ny breach of an Employer’s obligations under this Article 39, shall constitute discrimination under the provisions of Article 59”.

71. Insofar as adding age is concerned, it is proposed that this are also worthy of protection in a jurisdiction such as the DIFC, where the attraction of talent is a primary motivation, irrespective of the Employee’s age.

Q30. Do you agree with the proposed extension of grounds for discrimination under Article 59 to include pregnancy and age? If not, what are your reasons? Should any other grounds for discrimination also be added? If so, please provide your reasons for suggesting further additions.

Q31. Do you have any concerns relating to the reasons provided above for the proposed amendment to Article 59? If yes, can you please provide these?

Introducing remedies for discrimination

72. Article 58 of the Current Law prohibits discrimination on the grounds referred to in numbered paragraph 67 above. However, there are no remedies provided in the Current Law to deal with any complaints in this regard, thus rendering the Article largely meaningless.
73. In order to rectify this shortcoming, the following was included in the Proposed Law:
- (a) sub-sections 59(2), (3) and (5) of Article 59 of the Proposed Law expands on what constitutes discrimination in relation to the characteristics referred to in Article 59(1) to the extent that indirect discrimination and discrimination to Employees that assist others in good faith to raise a discrimination complaint are also included⁹;
 - (b) sub-section (4) allows for Employers to apply “*genuine occupational qualifications*” to positions in the workplace which is further clarified in sub-section (5)(c) as “*a requirement reasonably necessary for the normal performance of a particular role of occupation*”.
 - (c) sub-section (7) provides for Employees gaining access to information relating to potential grounds for discrimination, as this is usually not readily available to Employees;

⁹ The example provided by the UK’s Equality Act 2010 was largely followed in this regard.

- (d) gaining access to information relating to potential grounds for discrimination under sub-section (7), however, will be limited to what is to be prescribed in the Regulations to avoid unduly onerous disclosure requirements for Employers, such as was previously the case for businesses in the UK under section 138 of the Equality Act of 2010 (now repealed);
- (e) DIFCA's current thinking is to put in place an informal, non-legislative approach in place in the Regulations to questions and answers to gain access to information relating to potential grounds for discrimination very much in line with the UK's Advisory, Conciliation and Arbitration Service guidance ("Acas Guidance") in this regard; and
- (f) provision is also made in sub-sections (9) to (16) of Article 59 in the Proposed Law regarding certain procedural requirements in bringing a complaint before the Court and what orders the Court can make in this regard.

74. It is important to also note that it was decided to cap the compensation that can be paid to an Employee in respect of a discrimination complaint to one year's Wages (see Article 59(15)) and two years' Wages for a repeat offender (see Article 59(16) in this regard). The decision to limit compensation claims was largely based on the policy considerations explained in numbered paragraphs 92 and 93 below.

- Q32. Do you agree with the introduction of remedies for discrimination complaints? If not, can you please provide reasons?**
- Q33. Do you agree with the expanded definitions on what amounts to discriminatory conduct under Article 59 of the Proposed Law? If not, please provide reasons.**
- Q34. Do you agree with the inclusion of indirect discrimination as grounds for a complaint? Please provide reasons if not.**
- Q35. Do you agree with the suggested mechanisms for Employee's to obtain information relating to potential discrimination, inclusive of the suggestion that the Regulations will introduce procedures similar to the Acas Guidance in the UK? If not, please state why.**
- Q36. Do you agree with the proposed role of the Court in adjudicating discrimination complaints and the orders that it may give in this regard? If not, please provide reasons.**

Q37. Do you agree with the capping of the amount of compensation that may be awarded by the Court in respect of discrimination claims? If not, please provide reasons.

Removing the forfeiture of Gratuity Payments in cases of termination for cause

75. Article 62(4) of the Current Law provides for the forfeiture of an Employee's Gratuity Payment where there was termination of employment for cause. This is not in line with the provisions of the Federal Law.
76. Also, Gratuity Payments in the UAE serve as an Employers contribution to an Employee's retirement savings and withholding an Employee's Gratuity Payment for a single event that may constitute grounds for immediate dismissal holds the potential for gross unfairness in cases of long-serving Employees, especially considering the open-ended nature of what may constitute grounds for termination for cause under Article 59(4) of the Current Law.
77. Consequently, it was decided to remove this clause altogether in Article 64 of the Proposed Law, which serves as the replacement of Article 62 under the Current Law.

Q38. Do you agree with the removal of the forfeiture clause for Gratuity Payments in cases of termination for cause? If not, can you please provide reasons?

Clarifying the rights of Employees in cases where they terminate employment for cause

78. Article 59A of the Current Law allows both an Employer and Employee to terminate employment for cause if it is reasonable in the circumstances to do so.
79. However, the Current Law is silent on what should be considered within the context of reasonability and an Employee rights when it is the Employee terminating for cause under this Article and relevant Court decisions have been regarded by some practitioners to be conflicting in this regard.
80. Consequently, Article 61(2) of the Proposed Law introduces an expanded test for determining whether a termination for cause is reasonable (in line with the DIFC Court of Appeal decision in McDuff v KBH Kaanuun), which includes:
- (a) considering the circumstances the Employer or Employee in treating the reason for termination as sufficient; and
 - (b) requiring that the question in (a) to be considered in accordance the principles of equity and the substantial merits of the case.

81. In addition, Article 61(3) of the Proposed Law stipulates the entitlements of an Employee if it is the Employee terminating their employment for cause which allows for:
- (a) payment of Wages in lieu of the full notice period that normally would have applied for termination of employment;
 - (b) the applicable Gratuity Payment inclusive of the applicable notice period;
 - (c) payment of all outstanding Vacation Leave inclusive of the applicable notice period; and
 - (d) such other compensation deemed reasonable by the Court in the circumstances.
82. The entitlements referred to in numbered paragraphs 81(a), (b) and (c) can be considered as merely enunciating what should have been the reasonable position under the Current Law. However, the added entitlement to compensation to an Employee (referred to in paragraph 81(d) above) if a Court deems it reasonable is a substantial addition to this Article.
83. The primary motivation for this addition lies in the fact that neither the Current Law, nor the Proposed Law allows for constructive dismissal in the manner seen in other developed labour markets. It is intended for Article 61(3)(d) in the Proposed Law to also serve a purpose in this regard from a fairness perspective to Employees that are forced to terminate employment for cause.
84. It should also be noted that any compensation awarded to an Employee pursuant to Article 61(3)(d) of the Proposed Law is limited to an Employee's Annual Wage and shall, if applicable, reduce the amount of compensation awarded to an Employee under Article 59(13)(b) of the Proposed Law and vice versa (see Article 61(5)). Once again, these limitations stem from the policy considerations stated in numbered paragraphs 92 and 93 below.
85. Article 61(4) has also been added to clarify an Employee's entitlements in circumstances where an Employer terminates an Employee's employment for cause.

Q39. Do you agree with the expanded test for determining whether a termination for cause is reasonable as enunciated in Article 61(2) of the Proposed Law, especially also in the context Court decisions already having established some precedent in this regard? If not, can you please provide reasons?

- Q40. Do you agree with the entitlements afforded to an Employee, in cases where it is the Employee who terminates employment for cause, as set out in Article 62(3) of the Proposed Law? If not, can you please provide reasons?**
- Q41. Do you have any objections to compensation being awarded to an Employee if it is the Employee who terminates for cause in an amount deemed fit by the Court? If so, please provide details.**
- Q42. Should any guidelines be imposed in the manner in which compensation may be awarded to Employees in the above regard? Please provide details.**
- Q43. Do you have any comments in respect of the compensation being capped and that any compensation awards under Article 61(3) reduces the amount of compensation awards for discrimination claims under Article 59 of the Proposed Law and vice versa? If so, please provide details.**
- Q.44. Do you have any views on the entitlements an Employee will receive under Article 61(4) in instances where it is the Employer who terminates the employment for cause?**

Whistle-blower protection

86. Article 69 of the Proposed Law incorporates by reference the whistle-blower protection provisions included in the new DIFC Companies Law (the “Companies Law”) and reflect the OECD initiatives in this regard.¹⁰
87. These provisions are designed to protect any person who discloses to the DIFC Registrar of Companies or a company’s auditor or director, any information relating to a reasonable suspicion that the person has, or may have, of any contraventions of applicable law from being exposed to civil or contractual liability, unfair dismissal and other actions which are prejudicial to the interests of that person. However, it should be noted that in order to be protected, such disclosures must be made in good faith to mitigate against vexatious claims.
88. Consideration was given whether these provisions should rather be contained in full in the Proposed Law, rather than the Companies Law. However, we have considered it more appropriate to include them in the Companies Law, rather than in the Proposed Law, because the protection provided is wider than employment related, and the persons who may provide such information could be someone other than an Employee of a company.
89. DIFCA is aware that whistle-blower provisions may conflict with Federal Law prohibitions on disclosure of confidential information. These laws criminalise unlawful disclosure of specified types of confidential information. However, the Penal Code (which applies in the DIFC) provides an exception if the disclosure is “allowed by law”. To meet the “allowed by law” test, a provision in a DIFC law which permits or requires disclosure suffices.

Q45. Do you have concerns regarding the proposed approach to provide protection to whistle-blowers? If so, what are they and how should they be addressed?

Q46. Do you agree with our proposal to place these provisions in the Companies Law, instead of in the Proposed Law? If not, what are your reasons?

¹⁰ See Article 200 of the Companies Law.

Miscellaneous changes

90. We have also made a significant number of other changes in the Proposed Law. These include:
- (a) Article 11(b) of the Proposed Law – including “*job description and title*” in respect of which false representations cannot be made;
 - (b) Article 12 of the Proposed Law – increasing the age of hiring children from 15 to 16 years to be in line with the requirements of Federal Law;
 - (c) Article 13(2)(l) of the Proposed Law – adding “*any probation period*” in dealing with the minimum requirements of what should be stated in an Employment Contract;
 - (d) Article 13(2)(m) of the Proposed Law – adding “*any applicable policies and procedures, including any code of conduct and where these can be accessed*” dealing with the minimum requirements of what should be stated in an Employment Contract;
 - (e) Article 13(4) of the Proposed Law – making provision for administrative amendments (i.e. those amendments that are administrative in nature and do not place any additional obligations or reduce the rights and entitlements of Employees) to Employment Contracts that do not require signature by both parties in writing, provided that prior written notice is still given before such amendments take effect;
 - (f) Article 15(2) of the Proposed Law – adding that Employee information need not necessarily be kept at the Employer’s place of business in the DIFC, provided that it is accessible from there;
 - (g) Article 15(2) of the Proposed Law – increasing the retention period for Employee records to be kept from two to six years in line with the time periods required for record keeping by the DFSA and the limitation period for claims applicable at the Courts.
 - (h) Article 17(1) of the Proposed Law – extending the protection of Wages under the Current Law to the protection of an Employee’s Remuneration, which also includes Additional Payments (e.g. bonuses and commissions);
 - (i) Article 17(2) of the Proposed Law – adding a provision allowing for an Employer and Employee to agree to defer payment of Additional Payments (e.g. bonuses),

which is often common practice in financial services firms as a retention mechanism;

- (j) Article 19(1)(c) of the Proposed Law – making provision for also recouping benefits utilised by an Employee in excess of what is permitted in an Employment Contract;
- (k) Article 26(5) of the Proposed Law – adding that payments in lieu of Vacation Leave is only permitted at termination of employment or where the Employer agrees otherwise;
- (l) Article 26(6) of the Proposed Law – adding that Vacation Leave is not capable of being converted to Sick Leave if an Employee falls ill during Vacation Leave;
- (m) Article 31(3) of the Proposed Law – removing the requirement for consent in relation to replacing Public Holidays with Vacation Leave or payments of Daily Wages (or a pro-rated part thereof) in cases where an Employee works on a Public Holiday;
- (n) Article 33(1) of the Proposed Law – clarifying that the 12 month period referred to in this Article in terms of excessive Sick Leave is the same 12 month period when references thereto are made in Articles 34 and 35 of the Proposed Law;
- (o) Article 36(2)(b) of the Proposed Law – removing the requirement that a pregnant Employee is required to notify her Employer at least 8 weeks before taking Maternity Leave, only if so requested by her Employee (i.e. the effect being that she needs to provide 8 weeks' notice prior to taking Maternity Leave, irrespective of whether she was requested to do so or not by her Employer);
- (p) Article 39(2) of the Proposed Law – changing the language in Article 39 of the Current Law which reads “*and with same seniority rights she would have had, had she not taken maternity leave*” to “*with the same level of seniority the Employee had immediately prior to taking Parental Leave*” in the Proposed Law (the difference being that under the Current Law a technical reading of this Article implies that an Employee could also have been entitled to promotions during Parental Leave, whereas the new wording in Article 39(2) in the Proposed Law only requires of an Employer to employ an Employee after returning from Parental Leave to the same level of seniority he/she had before taking Parental Leave);
- (q) Article 55 of the Proposed Law – removing the requirement under Article 54(2) of the Current Law that an Employee is only entitled to take time off from work had the Employee been employed for a continuous period of two years, as well as

removing the requirement that an Employer could curtail what was reasonable in the circumstances according to its own business needs;

- (r) Article 56(1) of the Proposed Law – extending the right to time off for ante natal care also to male Employees whose wife is pregnant;
- (s) Article 56(3) of the Proposed Law – extending the time off benefit for ante natal care (up to eight Work Hours) also to Employees attending to adoption proceedings;
- (t) Article 58(1) of the Proposed Law – increasing the duties of Employees by also requiring that an Employee shall serve an Employer faithfully, comply with reasonable and lawful instructions, exercise reasonable skill and care in performing duties, not to disclose confidential information, personal data of other Employees or trade secrets and not to disrupt an Employer’s business;
- (u) Article 60(5)(a) of the Proposed Law – adding that the provisions of Article 61(2), dealing with termination notice requirements, do not apply during a probation period agreed to in an Employment Contract;
- (v) Article 62(1) of the Proposed Law – removing the requirement under Article 60 of the Current Law that only Employees that have been employed in excess of one year are entitled to ask for a written statement indicating the reasons for dismissal, clarifying the term “dismissal” in the Current Law with “termination for cause under Article 61” in the Proposed Law, as well as adding a fine that can be levied against Employers who fail to do so;
- (w) Article 62(2) of the Proposed Law – adding that the reasons provided under Article 63(1) must have sufficient detail in them for a reasonable person to understand the reasons for the termination for cause in the circumstances;
- (x) Article 63(1) of the Proposed Law – adding GCC country individuals in respect of Employees that are subject to pension schemes and adding the obligation on Employers to make contributions to the pension schemes referred to in this Article and to keep them up to date at all times;
- (y) Article 64(3) of the Proposed Law – limiting the minimum percentage at 50% of what an Employee’s Basic Wage may be as a proportion of their Wage for purposes of calculating a Gratuity Payment;
- (z) Article 64(5)) of the Proposed Law – expressly permitting an Employer to make certain deductions from an Employee’s Gratuity Payment; and

(aa) Article 64(6) – allowing Employers and Employees to opt out of Gratuity Payments in cases where the parties have agreed for the Employer to make contributions to a pensions scheme, retirement savings scheme or a substantially similar scheme on behalf of Employees.

91. In addition to the above changes, the Proposed Law also includes a number of new definitions and substantial changes to some definitions in the Current Law. The overriding objective in this regard is to ensure more clarity in the interpretation and understanding of the Proposed Law.

Q47. Do you have concerns regarding any one or more of the proposed changes set out above? If so, what are they and how should they be addressed?

Q48. Do you agree that the new or amended definitions in the Proposed Law assist in the interpretation and understanding of the Proposed Law? If not, can you please provide details?

Matters not addressed in the Proposed Law

92. From an employment law perspective, a number of issues still remain unaddressed in the Proposed Law, largely for policy reasons. These policy reasons are primarily driven by considering the DIFC's employment law regime within the context of other employment regimes in the UAE and to ensure that (i) there is not room for legislative arbitrage between the different regimes; or (ii) that Employers and Employees in the DIFC are not at a distinct advantage or disadvantage from others in the UAE.

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94. The DIFC is committed to fair and reasonable employment practices in accordance with international standards and principles and wishes to serve as an example to others in the region to ensure that firms in the DIFC can attract top talent, but it also has to give consideration to the overall context that it finds itself in within the UAE.
95. Consequently, some of the issues not addressed in the Proposed Law include the following:
- (a) unfair, wrongful or constructive dismissal;
 - (b) procedural and substantive fairness;
 - (c) redundancy protections;
 - (d) disciplinary proceedings and hearings;
 - (e) rights of surrogate parents;
 - (f) other discrimination grounds (such as sexual orientation, beliefs and gender reassignment);
 - (g) rights of appeal;
 - (h) the rights of workers who may not qualify as Employees (such as workers on zero hour contracts); and
 - (i) the establishment of an employment tribunal.
96. In some cases the Proposed Law has introduced some form of additional protections to Employees, such as compensation for discrimination and termination for cause by an Employee (serving as a means of dealing with constructive dismissal), but included maximum limits in respect thereof, once again largely for the reasons set out in numbered paragraphs 92 and 93.
97. Some members of the legal profession practising employment law in the DIFC also raised the question whether the wage protection system ("WPS") implemented by the UAE

Ministry of Human Resources and Emiratisation should also be expanded to the DIFC, especially to protect Employees in the retail, hospitality and food & beverage sectors in the DIFC. WPS was primarily designed to protect blue collar workers against unscrupulous payment practices by employers. DIFCA ultimately decided against this, primarily due to the fact that the cost and administrative burden that would be imposed on it and Employers by implementing WPS were considered as too onerous when viewed within the context of the relatively small number of Employees that would have benefitted from such a system in the DIFC.

Q49. Do you have concerns regarding the policy reasons stated above or the approach of DIFCA in dealing with them? If so, what are they and how should they be addressed?

Q50. Are there any issues or matters not addressed in the Proposed Law that in your view should be addressed? If so, please provide details.

Legislative Proposal

98. This legislative proposal contains the following:

- (a) the Proposed Law (at Annex A);
- (b) the Current Law (at Annex B);
- (c) a comparison of the Current Law and the Proposed Law (at Annex C);
- (d) a roadmap of the proposed changes (at Annex D); and
- (e) a table of comments to provide your views and comments on the Consultation Paper (at Annex E).