



Dubai International Financial Centre

CONSULTATION PAPER NO. 1

February 2021

AMENDMENTS TO THE EMPLOYMENT LAW AND REGULATIONS

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Why are we issuing this paper?

1. The Dubai International Financial Centre Authority (“DIFCA”) proposes to enact additional amendments to the Employment Law, DIFC Law No. 2 of 2019, as amended by Employment Law Amendment Law, DIFC Law No. 4 of 2020 (the “**Current Law**”) and the current Employment Regulations dated 1 February 2020 (the “**Current Regulations**”) to further refine the Qualifying Scheme regime introduced into the DIFC in February 2020.
2. This Consultation Paper No. 1 of 2021 (“Consultation Paper”) seeks public comments on proposed amendments to the Current Law (the “**Amendment Law**”) and the Current Regulations (the “**Proposed Regulations**”).

Who should read this paper?

3. This Consultation Paper would be of interest to persons conducting or proposing to conduct business in the DIFC. In particular:
 - (a) Employers and Employees;
 - (b) the finance, human resources and legal functions of Employers; and
 - (c) the representatives and advisors to any of the above.

How to provide comments

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

Jacques Visser
Chief Legal Officer
DIFC Authority
Level 14, The Gate, P. O. Box 74777
Dubai, United Arab Emirates
or e-mailed to: consultation@difc.ae
5. You may choose to identify the organisation you represent in your comments.
6. 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?

7. The deadline for providing comments on the proposals in this Consultation Paper is **28 March 2021**.
8. Once we receive your comments, we will consider if any further refinements are required to the Amendment Law annexed to this Consultation Paper at Annex A or the Proposed Regulations at Annex B. Once DIFCA considers the Amendment Law and Proposed Regulations to be in a suitable form, it will be enacted to come into force on a date specified and published.
9. The Amendment Law and Proposed Regulations are in draft form only. You should not act on them until they are formally enacted. We will issue a notice on our website when this happens.

Defined terms

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

Background

11. In February 2020 DIFCA introduced a Qualifying Scheme savings regime for end of service benefits in the DIFC, thereby paving the way for the replacement of the previous gratuity payment scheme that has become outdated and not fit for purpose in attracting global talent to the DIFC. The new regime was introduced by amendments to the Employment Law, DIFC Law No. 2 of 2019, by way of the Employment Law Amendment Law, DIFC Law No. 4 of 2020, and the issuing of the Current Regulations.
12. The DIFC Authority at the same time also launched a default Qualifying Scheme under the name of the DIFC Employee Workplace Savings Plan (the “DEWS Plan”) in the DIFC after the DFSA’s authorisation and licencing of the trustee/ operator and administrator of the DEWS Plan and it also receiving the DFSA’s approval pursuant to its Employee Money Purchase Scheme (“EMP Scheme”) requirements under the DFSA Rules.
13. The launch of the DEWS Plan is widely considered to be a resounding success and has since gone from strength to strength, despite the challenges faced by the COVID-19 pandemic that

coincided with its introduction, and there are also currently plans to consider its expansion to the rest of the Emirate of Dubai starting with other commercial free zones in the Emirate.

14. However, the launch of the Qualifying Scheme regime in the DIFC also brought with it a number of distinct challenges. The two primary ones being:
- (a) an overlap in some instances, and the potential for conflict, between the requirements of the Employment Regulations and the DFSA Rules relating to EMP Schemes;
 - (b) DIFCA and DFSA encountering difficulties in assessing applications by Employers for Certificates of Compliance operated by foreign service providers, especially insofar as it related to them being from a Recognised Jurisdiction and providing an equivalent level of regulation to that of the DFSA (as required by the current Employment Regulation 2.1.6) primarily because of:
 - (i) the substantial differences between the DIFC Qualifying Scheme regime and the applicable rules to such schemes in other jurisdictions;
 - (ii) the different regulators and their regulatory models of oversight and the definitions involved; and
 - (iii) the variety of the types of schemes and their respective models of operation.
15. The Proposed Regulations (together with the proposed changes to the DFSA Rules contained in the DFSA's Consultation Paper No. 137) are intended to resolve these challenges in a manner that is in line with policy decisions that were jointly made by DIFCA and DFSA going forward in respect of the Qualifying Scheme regime in the DIFC to the following effect:
- (a) Certificates of Compliance will only be issued to Qualifying Schemes established as an EMP Scheme in the DIFC with both its trustee/operator and administrator being established in the DIFC and regulated by the DFSA; and
 - (b) Certificates of Exemption will only be issued to an Employer in respect of specific Employee/s where:
 - (i) the Employer is under a clear statutory duty in another country to make pension, retirement, saving, gratuity or any substantially similar contributions into a Scheme in respect of the Employee/s applied for; or
 - (ii) the Employer is making payments into a bona fide Group Scheme with the prior written consent of the Employee/s concerned and where the value of such payments are in excess of the Core Benefits required to be made under Article 66(7) of the Law.

16. It is also implied in the DIFC's policy position stated in paragraph 15 that:
- (a) EMP Schemes established in the DIFC may be marketed to Employers as a Qualifying Scheme in the DIFC in accordance with the DFSA's marketing and promotion rules by a suitably authorised firm and may be chosen by Employers as an alternative Qualifying Scheme to the DEWS Plan for making Member Contributions, provided that each such Employer shall be obliged to apply for its own Certificate of Compliance in respect of such EMP Scheme when it opts for participation in it;
 - (b) bona fide Group Schemes will not include Schemes that have been devised only for a DIFC Employer and its subsidiaries with the sole purpose to be funnelled into an international savings plan domiciled elsewhere (i.e. it must have been put in place for the whole Group and be available to its employees in multiple jurisdictions, such as global company sponsored 401(k) plans for US employers); and
 - (c) any Scheme that has been issued an Exemption Certificate in respect of specific Employees will not be allowed to be marketed to other Employers in the DIFC.
17. The proposed amendments to the Current Law contained in the Amendment Law are primarily intended to provide further clarity to certain matters relevant to the Qualifying Scheme regime and other areas of uncertainty in the Law that DIFCA has been requested to deal with by employment law practitioners and the DIFC Courts as part of at its next iteration of the Current Law.

The Proposed Amendments

18. The changes in the amendments proposed to the Current Law in the Amendment Law are as follows:
- (a) *Article 10* – adding a qualifier in respect of the limitation period in relation to the newly added Article 20(2) and adding language to clarify that claims may also be brought during employment. The Current Law does not provide a separate limitation provision for any claims during employment (including deduction claims), other than discrimination claims. This is an unintended consequence of Article 10 in its current form. Please see the discussion under numbered paragraph 18(c) below for the detailed discussion in this regard in respect of the amendment to Article 20(2) in the Amendment Law.
 - (b) *Article 14(2)(l)* – adding that where the Employee is employed by way of a fixed term contract for six (6) months or less, the applicable probation period may not exceed more than half the period of the fixed term contract. This amendment was added to

deal with the anomalous position that where an Employee is employed on a fixed-term contract of 6 months, and those 6 months are also stipulated as a probationary period in the Employment Contract (as is permitted under this Article in the Current Law), payments in respect of Core Benefits may be deferred under Article 66(12) until the end of the fixed term contract, resulting in no Core Benefits potentially being payable to the Employee concerned. The proposed change is intended to rectify this anomaly.

- (c) *Article 20(2)* – adding the limitations as to when a Court may consider claims under Article 20(1). The intention of this addition is to limit how far back claims can be made and how far back the claims period can extend. For example, in relation to unlawful deductions, under English law, claims must be brought within 3 months of the date of the deduction (or last in a series of deductions) and there is a 2 year back-stop period. Without such limitation, Employees could claim deductions going back several years. The suggested wording in the Amendment Law aims to address this point and introducing but also addressing what DIFCA considers as worthy exceptions to these limitations, i.e. claims in respect to Maternity Pay under Article 38, Paternity Pay under Article 39, pay due under Article 42, Sick Pay under Article 35; or a Gratuity Payment or Core Benefits under Article 66. These exceptions are in line with similar exceptions in other jurisdictions (e.g. the United Kingdom).
- (d) *Article 27(3)* – clarifying that the amount of accrued but untaken Vacation Leave can be carried forward to the next Vacation Leave Year by agreement between the Employer and Employee but that the minimum number of untaken Vacation Leave cannot be agreed between the parties to be less than five days. Article 27(3) of the Current Law was incorrectly being interpreted by some Employers to mean that five (5) days was the maximum number of days that their Employees could carry forward to the next year. The drafting of this provision in the Amendment Law sets five (5) days as the statutory minimum number of Vacation Leave days that can be carried forward to the next Vacation Leave Year, but enables the maximum number of days that can be carried forward to be agreed between the Employer and the Employee, as long as it is no less than the statutory minimum.
- (e) *Article 39(5)* – confirming that Vacation Leave shall also continue to accrue for fathers taking Paternity Leave. This amendment is intended to bring the accrual of Vacation Leave during Paternity Leave in line with the accrual of Vacation Leave during Maternity Leave under Article 37.
- (f) *Article 43(4)* – carving out certain basic workplace related health and safety duties placed on Employers under Articles 43 – 52 of the Law where Employees are working from home. The Current Law envisages a situation where Employees primarily work

from a workplace located in the DIFC. Hence the Current Law places obligations on Employers to provide, as far as reasonably practicable, adequate systems to minimise risks in the workplace relating to fire hazards, and the use, handling and storage of dangerous articles and substances, as well as providing sufficient ventilation, temperature control, lighting, cleanliness, space, workstations and seating, sanitary conveniences and clean drinking water. These obligations are obviously not relevant to Employees in a work from home environment, which is now far more prevalent during the COVID-19 pandemic, and potentially also in a post-COVID work environment. The Proposed Amendment in this Article is intended to reflect this.

- (g) *Article 66(1)* – replacing the words “*who is not required to be registered*” with “*who is not registered*”. This is to address the difference in wording around the requirement to be registered with the GPSSA in Article 65(2) of the Current Law and the reference to “Employee who is not required to be registered” in Article 66(1). In order to ensure that a GCC Employee (who is required to be registered under GPSSA) but was not registered (for whatever cause or reason) with the GPSSA by their Employer, is still entitled to end-of-service benefits. The language has been amended to ensure that such Employees will be entitled to Core Benefits under the Law for as long as they are not registered with the GPSSA.
- (h) *Articles 66(3)(d) and 66(8)(d)* – adding that multiple fixed term contracts and multiple periods of Secondment will be aggregated when determining an Employee’s period of employment for purposes of Articles 66(2) and 66(7). Under the Current Law there is uncertainty in circumstances where an Employee works for an Employer under a fixed term contract that is renewed multiple times. The proposed amendment to these Articles in the Amendment Law are intended to bring the DIFC in line with the practice in onshore UAE. It ensures that fixed term contracts are counted in the aggregate, to determine an Employee’s period of service for purpose of calculating Gratuity Payments and Core Benefits under the Law. It has also been clarified that this is the situation where there is some form of continuity in respect of these periods (i.e. they must be in succession or an offer with respect to the new period must be issued prior to the expiry of the previous period).
- (i) *Article 66(13)* – adding that agreements or arrangements that reclassify recurring payments to an Employee to appear to be non-recurring payments, in order to reduce an Employee’s Basic Wage calculation for the purposes of Core Benefit contributions by an Employer, will be null and void and unenforceable and not capable of waiver under Article 11(2)(b). This amendment results from a number of complaints received at the Small Claims Tribunal of the DIFC Courts relating to Employers that used the

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definition of “Additional Payment” in the Law to reduce the Basic Wage of Employees to a very small amount or nothing at all, and therefore claiming that no Gratuity Payment or Core Benefits are payable to the Employees. This practice is unreasonable and potentially harmful in circumstances where Employees are in effect receiving a recurring salary payment with very little or no contingency involved. The amendment of this Article is intended to curb this practice.

- (j) *Article 66(16)* – removing the requirement of Employers to take reasonable steps to ensure that a Qualifying Scheme continues to satisfy the requirements for a Certificate of Compliance. Given that a Certificate of Compliance can now only be held by a DFSA regulated EMP Scheme with a DFSA regulated operator and administrator, it has been decided that there is no need to place any additional duties on Employers in this regard.
- (k) *Article 67(2)* – clarifying that financial penalties and compensation orders, not falling under the classification of fines under Schedule 2 of the Law (which are payable to DIFCA), may be ordered by a DIFC Court to be payable to affected Employee(s). The fact that a DIFC Court may order payments in favour of Employees pursuant to Article 67(1) has been assumed previously but it was thought prudent to state this expressly in this Article to avoid any confusion.
- (l) *Definition of Additional Payment* – removal of the words “*or expressly agreed not to form part of an Employee’s Wage or Allowance*”. This amendment should be read in conjunction with the comments made in paragraph 18(i) above regarding the complaints received by the Small Claims Tribunal of the DIFC Courts relating to Employers that used the definition of “Additional Payment” in the Law to reduce the Basic Wage of Employees to a very small amount or nothing at all, and therefore claiming that no Gratuity Payment or Core Benefits are payable to the Employees.
- (m) *Definition of Basic Wage* – adding reference to Article 66(8)(b) as a qualifier to what an Employee’s Basic Wage amounts to (i.e. Basic Wage cannot be less than 50% of an Employee’s Wage). This was an oversight in the Current Law and is a rectification of that mistake.
- (n) *Definition of Exempted Employee* – adding that an Equity Partner is also an Exempted Employee where they make drawings or receive profit distributions or dividends from an affiliate of the Employer. Previously this was limited to the Employer only but it has been brought to DIFCA’s attention that a number of professional firms receive these drawings and profit distributions from affiliated concerns that are not necessarily the Employer itself, hence the amendment. However, given that the reference to “affiliate”

itself can be open to interpretation, we have also thought it prudent to define “affiliate” in the definition to ensure clarity.

- (o) *Definition of Legal Practitioner* – changing the reference from DIFC Academy of Law to the DIFC Courts when referring to who keeps the Register of Practitioners in the DIFC. This is an administrative change following the transfer of the Register of Practitioners to the DIFC Courts when the DIFC Academy of Law was transferred to the DIFCA to form part of the DIFC Academy pursuant to Presidential Directive No. 1 of 2019.
- (p) *Definition of Secondment* – adding references to the definition to clarify what the reference to becoming an Employee subsequent to a Secondment means. The reference to “*subsequently becomes an Employee*” is not clear in the Current Law. The Amendment Law clarifies that it means both immediately subsequent, and where there is a break between the Secondment and employment as long as the offer of employment occurs before the end of the Secondment.
- (q) *Definition of Short Term Employee* – adding that the 30 day period referred to is in related to Work Days and that fractions of Work Days may be counted in respect of Employees that only work for a specific number of hours in a Work Day. Any such fractions shall be derived from dividing the actual number of working hours worked by the Employee divided by 8.

Q1. Do you have any comments or suggestions in respect of the Amendment Law?

Q2. Is there anything else in the Current Law that you think needs to be addressed in the Amendment Law?

Q.3 Do you have any views on any policy decisions made by the DIFCA in respect of any of the amendments proposed in the Amendment Law?

The Proposed Regulations

- 19. The Current Regulations were drafted with a focus on the requirements of a Qualifying Scheme and less focus on the duties and responsibilities of the functionaries to a Qualifying Scheme, considering that the latter will be regulated by the DFSA (or another Recognised Regulator).
- 20. The original design of the Qualifying Scheme regime in the DIFC was intended to be more of a statutory scheme with detailed requirements, in line with the recommendations of the

working group that the DIFCA constituted for this purpose.

21. Based on DIFCA's experience in implementing the Current Regulations over the the past year, DIFCA agrees with the DFSA that Qualifying Schemes should have a single layer of regulation as EMP Schemes pursuant to the principles and requirements of the relevant DFSA Rules, as opposed to a statutory scheme where only the service providers are regulated.
22. The Proposed Regulations, and specifically the deletions in Section 2, are reflective of this change. The remaining Qualifying Scheme requirements in Sections 3 to 7 of the Proposed Amended Regulations should be seen in the context of practical and consumer related protections for Qualifying Schemes that the DIFCA wishes to impose on Qualifying Schemes in the DIFC from a policy perspective as well as a practical fitness for purpose perspective. This is not intended as an additional layer of regulation or to prescribe the way that DFSA should regulate EMP Schemes in the DIFC.
23. The key changes in the Proposed Regulations can be summarised as follows:
 - (a) *Definitions of Exempt Scheme and Exemption Certificate* – adding these definitions primarily for ease of reference as the Current Regulations already contain the concept of exemptions and how they can be obtained from the Board of DIFCA.
 - (b) *Definitions of Group and Group Scheme* – by adding these definitions to the Proposed Regulations (in Regulation 2.1.3) where the Schemes that are qualified to be issued an Exemption Certificate are stipulated in line with the policy position explained in paragraphs 15 and 16 above. These definitions are intended to encapsulate the policy position of the DIFC that Group Schemes will not include Schemes that have been devised only for a DIFC Employer and its subsidiaries with the sole purpose to be funnelled into an international savings plan domiciled elsewhere.
 - (c) *Definition of Recognised Jurisdiction* – by deleting this definition signifying DIFCA's and DFSA's move away from the idea of having "Recognised Jurisdictions" for purposes of recognising Qualifying Schemes in other jurisdictions pursuant to Employment Regulations 2.1.2(d)(ii) and 2.1.5(a). Given that Certificates of Compliance will under the Proposed Regulations only be issued to Qualifying Schemes established in the DIFC, this definition is not required anymore.
 - (d) *Definition of a Scheme* – by updating this definition to come in line with the DFSA's definition in this regard (i.e. by adding reference to superannuation, gratuity or similar arrangement to the definition).
 - (e) *Regulation 2.1.2(c)* – deleting the part dealing with Member withdrawals. The Current

Regulations provide for Qualifying Schemes to permit withdrawals in certain circumstances, inclusive of Member withdrawals of Voluntary Contributions at their convenience. This has been deleted in favour of the DFSA Rules dealing with this issue, in the manner explained in numbered paragraphs 47 to 54 of its Consultation Paper 137.

- (f) *Regulation 2.1.2(d)(ii)* – deleting reference to a Qualifying Scheme having the option to have an Operator and Administrator regulated in a Recognised Jurisdiction for the reasons set out above.
- (g) *Regulations 2.1.3, 2.1.4, 2.1.5 and 2.1.6* – deleting the parts allowing for a Qualifying Scheme to be established in a jurisdiction other than the DIFC for the reasons explained above.
- (h) *Proposed new Regulation 2.1.3* – clarifying that an Exemption Certificate is applied for in respect of specific Employees (i.e. when an Employer applies for an Exemption Certificate the relevant Employees' names will be required, and also be updated from time-to-time). The newly added language also introduces the concept of a Group Scheme into the Proposed Amended Regulations in the manner explained above.
- (i) *Proposed new Regulation 2.1.6* – providing a grace period of twelve (12) months for Qualifying Schemes or Exempt Schemes, that received Certificates of Compliance or Exemption Certificate under the Current Regulations, but will not qualify for these Certificates under the Proposed Regulations, to come into line with the amendments or be replaced with a Scheme that does.
- (j) *Proposed new Regulation 2.1.7* – providing a grace period of twelve (12) months for Employers who under the previous version of the Employment Law (effective date August 2019) opted out of the gratuity payment scheme pursuant to Article 66(6) of that version of the Employment Law. The Current Law and Current Regulations do not make any provision for Employers who used this opt-out and left them in a situation of uncertainty. The proposed addition of this Regulation aims to clear up that uncertainty and also provides such Employers with a twelve month grace period to come into line with the Current Law and Proposed Regulations.
- (k) *Regulation 2.2.1(c)(iii)* – deleting the requirement that the Supervisory Body of a Qualifying Scheme must ensure that the Operator applies high standards of integrity and fair dealing, due skill, care and diligence, and high standards of corporate governance in respect of its duties to a Qualifying Scheme. This requirement has been deleted, as this is a duty that the Operator has to the DFSA pursuant to the DFSA

Rules and is therefore not necessary for the Supervisory Body of a Qualifying Scheme to ensure.

- (l) *Regulation 2.2.3* – deleting the provision that a Supervisory Body can also be a protector of a trust. This Regulation was initially inserted to cater for offshore schemes where a protector or a trust can fulfil a supervisory function to that trust. Given that Qualifying Schemes are now only permitted to be established and regulated in the DIFC, this provision has become superfluous.
- (m) *Regulations 2.3, 2.4, 2.5 and 2.6* – deleting Regulations that deal with the Operator, Administrator, Investment Adviser and Investment Platform requirements, in line with the reasons provided in paragraph 21 above, on the basis that DIFCA and the DFSA agree that these requirements are best dealt with by the DFSA Rules relating to EMP Schemes and the manner in which the DFSA regulates the service providers to EMP Schemes, inclusive of the Operator, Administrator and Investment Adviser.
- (n) *Regulation 3.1.4* – adding that the DFSA Rules have a role to play as to how withdrawals of Voluntary Contributions may be made from a Qualifying Scheme.
- (o) *Regulation 4.2(e)* – adding that Participating Employers also have a duty to notify the Operator of any change of circumstances (other than a change in Monthly Wage) that will affect the amount of a Member's Contributions to a Scheme. This change has been made to ensure that the Operator is up to date with all the information related to a change in circumstances that may affect payments into the Scheme.
- (p) *Regulation 5.2* – Expanding the requirements for transfer of benefits to also be applicable to Exempt Schemes if they lose their exempt status. This is a logical expansion that should have been required in the first instance.
- (q) *Regulation 8.1.1* – adding the requirement of fees being payable for the application of a Certificate of Compliance. Given the amount of time and resources spent by DIFCA in issuing and keeping track of Certificates of Compliance that have been issued, it has been decided to ask an administrative fee of US\$500 for this.
- (r) *Regulation 8.1.2* – deleting this Regulation dealing with an annual process of application for a Certificate of Compliance. This requirement was initially brought in to deal with the expected administrative load to vet Schemes from other jurisdictions (e.g. to see if they had an equivalent level of regulation to that of the DFSA). Now that a Certificate of Compliance can only be given to a DIFC based Scheme, this requirement becomes superfluous. The consequence of this deletion also means that Employers may apply for a Certificate of Compliance at any time subsequent to an

EMP Scheme having been granted an approval by the DFSA.

- (s) *Proposed new Regulations 8.1.4 and 8.1.5* – adding these Regulations to also deal with the process and fees related to applying for an Exemption Certificate. These have been lacking from the Employment Regulations and now allows for the DIFCA Board of Directors to prescribe the manner and form of these applications. Once again, given the amount of time and resources expended by the DIFCA it has been decided to charge an administrative fee of US\$300 for this action.
- (t) *Proposed new Regulation 8.3* – adding the obligation on DIFCA to keep a list of Qualifying Schemes. This requirement has been added to ensure that Employers are made aware of which Schemes have been approved as Qualifying Schemes in the DIFC.

- Q4. Do you have any comments or suggestions in respect of the approach taken by the DIFCA in the Proposed Amended Regulations as to how Qualifying Schemes should be regulated by the DFSA and the additional requirements remaining in Sections 3 – 7?**
- Q5. Do you have any comments or suggestions in respect of the Proposed Amended Regulations?**
- Q6. Do you have any comments or suggestions in respect of any other matter that needs to be amended, added or clarified in the Proposed Amended Regulations?**
- Q7. What is your view regarding the fees that are proposed to be charged for a Certificate of Compliance and an Exemption Certificate?**

Legislative Proposal

- 24. The legislative proposal contained in this Consultation Paper consists of the following:
 - (a) the Employment Law Amendment Law (showing the proposed amendments is at Annex A);
 - (b) the Proposed Regulations showing the amendments (showing the proposed amendments is at Annex B)
 - (c) a table of comments to provide your views and comments on the Consultation Paper (at Annex C).