



Time to pay one's DEWS

DIFC replaces end-of-service gratuity payment regime with mandatory savings plan

End-of-Service Gratuity ("ESG") is a statutory severance payment which features in the labour laws of most Middle Eastern jurisdictions including the United Arab Emirates and its various free zones. It is commonly accepted that the ESG payment is intended to be akin to, or make up for the lack of state or mandatory pensions for most expatriate employees.

The Dubai International Finance Centre ("DIFC"), a leading free zone and financial hub in the UAE with its own independent employment laws, as of 1 February 2020 brought the ESG regime to an end, by requiring employers to enrol employees and make mandatory contributions into a defined contribution/money purchase plan which complies with the Regulations (as defined below) such as the DIFC approved DEWS Plan (see below for further detail).

DIFC employers must comply and the new regime cannot be opted out of.

Background

In October 2019, the DIFC published Consultation Paper No.7 of 2019 which sets out the DIFC's proposals for the replacement of ESG and invited comments on the draft legislation.

The Consultation Paper explained that the move away from the ESG regime was prompted by the DIFC's concerns over whether the ESG regime was fit for purpose given that employees face the risk of non-payment on termination and that the monies paid out (i.e. a cash lump sum) did not encourage employees to save and plan for future retirement.

The Consultation Paper attracted a vast number of comments and the original implementation date was pushed back slightly as a result. However, the below legislation was finalised and came into force on 1 February 2020:

1. Employment Law Amendment Law No. 4 of 2020 which amended DIFC Employment Law No. 2 of 2019; and
2. Employment Regulations (Qualifying Scheme requirements under Article 66 of the (above) Law) (the "Regulations").

The above laws meant that, from 1 February 2020, employees ceased to accrue ESG and were entitled instead to receive payments into a Qualifying Scheme (i.e. a money purchase scheme which complies with the Regulations).

In addition to the legislative changes, the DIFC in partnership with Equiom, Zurich and Mercer has introduced the DIFC Employee Workplace Scheme ("DEWS"). The DEWS Plan has been introduced to offer DIFC employers a readily accessible scheme that fulfils the criteria of being a Qualifying Scheme.

While most DIFC employees must be enrolled and will be entitled to receive monthly contributions, there are some exemptions. Furthermore, employers who wish to adopt their own savings scheme can do so provided it is a Qualifying Scheme. Alternatively some employers may be exempted by reason of offering employees an existing/alternative scheme.

Key changes

The legislative changes are complex and detailed. However, the below table provides a summary of the key changes:

<p>ESG payments replaced with an obligation on employers to:</p> <ol style="list-style-type: none"> 1. enrol employees into a Qualifying Scheme; and 2. to make mandatory monthly contributions. 	<p>All DIFC based employees (unless exempted) ceased to accrue or be entitled to ESG payments from 1 February 2020. Initially employers had until 31 March 2020 to enrol employees and to pay mandatory contributions into the scheme; however, due to COVID-19 this deadline was postponed to 30 April 2020 (but may be extended again). Payments will need to include any back payments to 1 February 2020.</p> <p>Accrued ESG and what happens to it?</p> <p>Employees' accrued ESG up to 31 January 2020 are preserved and employees who had less than a year's service had their entitlement calculated on a pro-rata basis. Accrued ESG can either be calculated and paid out on termination of the employee's employment (applying their (usually higher) salary as at the termination date) or it can be paid into the Qualifying Scheme either with or without employee consent. If the ESG is paid into the Qualifying Scheme with the employee's consent, then the employer's obligations in respect of such accrued ESG will have been satisfied. However, if the employer transfers accrued ESG into the Qualifying Scheme without the employee's consent, the employer will be obliged to make up any difference on termination of employment between the amount transferred and the amount the employee would have been entitled to (i.e. the investment risk would remain with the employer).</p> <p>Exemptions</p> <p>The obligation to enrol and make contributions do not apply to the following exempted employees:-</p> <ol style="list-style-type: none"> 1. Employees registered with the General Pension and Social Security Authority (i.e. UAE Nationals and GCC Nationals). 2. Employees on secondment (i.e. issued with a DIFC Seconded card not simply an employee referred to as a secondee). 3. Employees serving notice as of 1 February 2020. 4. Employees on a fixed term contract which is due to expire on or before 30 April 2020. 5. Equity partners (provided they meet the definition of Equity Partner). 6. Employees employed in the DIFC by a governmental entity. <p>Employees on probation are not exempted but their enrolment and payments into the scheme can be deferred until such time as they pass their probation. Once their employment is confirmed any contributions are backdated to the date their employment commenced.</p>
<p>Minimum Contributions</p>	<p>From 1 February 2020 or the date on which an employee's employment commenced if after 1 February 2020, employers must make mandatory contributions equal to:-</p> <ol style="list-style-type: none"> 1. 5.83% of an employee's basic monthly salary for the first five years of their employment (including period of service prior to 1 February 2020); and 2. 8.33% of their basic monthly salary for each additional year thereafter.
<p>Qualifying Scheme – what is a Qualifying Scheme?</p>	<p>The Regulations set out what constitutes a Qualifying Scheme under Article 66 of the DIFC Employment Law and contain complex legal requirements which need to be met in order for a scheme to be considered a Qualifying Scheme. The DEWS Plan is a Qualifying Scheme.</p> <p>For employers who choose not to enrol in the DEWS Plan and wish to either use an alternative scheme or rely on an existing scheme, a Qualifying Scheme would be a scheme which (i) meets the criteria as set out in the Regulations (which includes the requirement to have a Supervisory Body which oversees the Operator of the scheme); and (ii) has been issued with a Certificate of Compliance (in advance of the 30 April 2020 deadline); such certificate would need to be renewed annually.</p> <p>What about employers who already make contributions on behalf of employees?</p> <p>Many employers will already make pension payments or similar payments to employees either because they are legally required to do so by reason of the employee's nationality or home country.</p> <p>The Regulations provide that where an employer is under a statutory duty in another country to make pension, retirement, saving or any substantially similar contributions into a scheme in another country, the DIFC Authority ("DIFCA") may exempt such employers from being required to make contributions into a Qualifying Scheme.</p> <p>In addition, employers who, with the written consent of the employee, contribute to a defined benefit scheme for an employee at a level which <u>exceeds</u> the contributions required to be made into a Qualifying Scheme, may also be exempted by the DIFCA from making contributions into a Qualifying Scheme.</p>
<p>Penalties for non-compliance</p>	<p>A fine of USD 2,000 can be imposed in the event an employer contravenes the new provisions (it is unclear the number of times this penalty would be imposed). In addition, employers would likely face claims by employees.</p>

Next steps

1. **Know the law** - Employers in the DIFC should familiarise themselves with the proposed changes to the DIFC Employment Law.
2. **Inform employees** - In so far as employers have not informed employees of these changes (the changes have generally been well publicised and attracted lively debate), best practice is for employers to keep employees updated on these changes and what it will mean for them.
3. **Use a Qualifying Scheme** - Employers need to ensure that they have in place a Qualifying Scheme no later than 30 April 2020. Employers could either choose to opt into the DEWS Plan or to use an alternative Qualifying Scheme provided they have satisfied themselves that it complies with the Regulations and a Certificate of Compliance is obtained. This can be applied for by completing the relevant form issued by the DIFC. If an employer considers they are exempt, they will need to satisfy themselves and the DIFCA that that is the case.
4. **Decide how to treat accrued ESG** - Employers should decide how to treat accrued ESG. If it is to be paid into a Qualifying Scheme, it is advisable to obtain the employee's prior written consent.
5. **Update employment documentation** - Employers will almost certainly need to revise or update existing employment contracts (and any relevant accompanying policies and procedures) or issue documents confirming the changes and seeking any acknowledgments required from employees. In addition, if employees wish to make contributions, such contributions and how these will be paid should be agreed in writing.
6. **Payroll and scheme provider** - Employers should ensure they liaise with payroll providers and scheme providers to ensure the necessary changes are implemented.

How can we help?

Eversheds Sutherland Human Resource Practice Group and its International Benefits team has extensive experience advising clients on a wide range of employment and pensions related matters in the UAE and globally. We are assisting clients in respect of the above changes including the review of existing savings schemes and assisting with the process of having such schemes verified as Qualifying Schemes.



Key contacts



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Eversheds Sutherland Human Resource Practice – UAE

The practice is run by partner, Geraldine Ahern and principal associate, Sarah Anderson (both of whom are recognized by Chambers Global and Legal 500 EMEA for UAE employment).

Combined, they have over 15 years' experience advising on employment-related matters in the UAE and Sarah is one of the few lawyers in the region experienced in DIFC employment law including having acted for various clients in the DIFC Courts. Geraldine and Sarah are supported by a dedicated team of experienced lawyers across our network of regional offices in the UAE, Jordan, Qatar, Iraq, and Saudi Arabia, many of whom are fluent in Arabic and English. We have excellent contacts with the local relevant authorities, which ensures our advice is always in line with current custom and practice.

For further information, please contact Geraldine Ahern or Sarah Anderson.

Eversheds Sutherland International Benefits Team

Eversheds Sutherland International Benefits Team, made up of lawyers from around the globe (including tax, immigration, employee incentives, financial services, employment, pensions and benefits lawyers), provides pensions and benefits legal advice in our domestic markets and coordinated advice across multiple jurisdictions.

For further information, please contact François Barker or Charmian Johnson.

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