The New DIFC Employee Workplace Savings Scheme: replacement of end of service gratuity

Anna Marshall - Senior Associate - Employment and Incentives
- Dubai Maze Tower

Following a number of recent legislative developments, end of service gratuity ('ESG') was replaced with a new DIFC employee workplace savings scheme with effect from 1 February 2020.

The legislative changes have now been finalised and enacted by way of the Employment Law Amendment Law (DIFC Law No. 4 of 2020) which amends certain provisions of DIFC Law No. 2 of 2019, as amended (the 'DIFC Employment Law'). The DIFC has also introduced new Employment Regulations which set out additional details in relation to the new savings scheme requirements.

What is changing?

Previously, employees in the DIFC, with at least one year of employment, have been entitled to ESG. ESG accrued at the rate of 21 calendar days' basic salary for each of an employee's first five years of service, and at the higher rate of 30 calendar days' basic salary for each additional year of employment. An employee's accrued ESG entitlement is then payable to them as one lump sum when their employment terminates.

The new DIFC employee workplace savings scheme is more akin to pension arrangements which are typically found in the UK and elsewhere globally. In particular, DIFC employers are now required to pay a monthly contribution into a third-party savings scheme for each employee (subject to certain exceptions which are discussed further below).

The minimum contributions which DIFC employers are now required to pay into each eligible employee's savings fund are as follows:

1. a monthly contribution of 5.83 per cent of monthly basic salary during the first five years of employment (which largely mirrors the rate of ESG accrual under the current DIFC Employment Law during an employee's first five years of employment); and
2. a monthly contribution of 8.33 per cent of monthly basic salary after the first five years of employment (which largely mirrors the rate of ESG accrual under the current DIFC Employment Law, once an employee has at least five years of continuous employment).

Unless a statutory exemption applies (as discussed further below), any agreement between a DIFC company and an employee to circumvent the company's payment of the above minimum contributions into a savings scheme for the employee would be null and void.

Employees themselves are not legally required to make any contributions into their own savings scheme however, they are able to do so on a voluntary basis.

Why have these changes been introduced?

The new requirements are intended to provide security for employees' end of service benefits, as the benefits which an employee accrues during their employment will now be professionally managed and invested by a third party (with the savings scheme being underpinned by a fiduciary trust arrangement). This is in line with international best practice and the DIFC's aspirations to be a leading international financial centre.

The new requirements will also provide an opportunity for an employee's accrued benefits to increase in value over time. As the contributions made to each employee's savings scheme will be invested in funds it will therefore have the opportunity to grow in value during the period of employment.

Can DIFC companies decide which savings scheme to use?

Following a competitive tender process last year, the DIFC Authority has established a framework savings scheme which will be administered by Zurich and have asset management oversight from Mercer (the 'DEWS Plan'). The DEWS Plan will have fiduciary backing by DIFC-licensed trustee, Equiom.

Alternatively, if a DIFC employer does not wish to enrol its employees in the DEWS Plan, the employer can apply to the DIFC Authority for a 'Certificate of Compliance' for a different savings scheme. In order to obtain a Certificate of Compliance, the savings scheme will need to satisfy the requirements set out in the new Employment Regulations (enacted in January 2020) which accompany the DIFC Employment Law.

What will happen to an existing employee's accrued ESG?

As the new savings scheme requirements were effective from 1 February 2020, any ESG which an employee has accrued up to and including 31 January 2020 will not be affected. This amount can either be paid directly to the employee when their employment terminates, or alternatively it can be paid into the employee's savings fund by their employer. While the latter can be done without the employee's consent, the employer's potential financial liability will be lower if the employee's prior written consent is obtained.

Otherwise, the company will be required to make up any shortfall between:

1. the ESG accrued up to 31 January 2020 (based on the employee's basic salary at that time) and what the employee's ESG would have been, had it been paid to the employee on termination of their employment (based on their final basic salary) rather than being paid into their savings scheme; and
2. the cumulative value of the savings in the employee's savings scheme when their employment terminates, and the ESG they accrued up to 31 January 2020.

What will happen to an employee's savings when their employment terminates?

On termination of their employment with their DIFC employer, the employee can choose whether to receive a pay-out of the accrued benefits from their savings scheme or alternatively, leave the relevant amount in their savings scheme for continued investment. This choice can be made by each employee on an individual basis.

If the employee had accrued ESG prior to the new savings scheme requirements that came into effect on 1 February 2020, and unless their employer had paid their accrued ESG into their savings scheme during their employment, then the employee would also be entitled to their accrued ESG within 14 days of their employment terminating.

Are there any exceptions or exemptions available?

Yes, there are certain exemptions from the new DIFC savings scheme requirements, in particular:

1. where an employee is under probation, the employer may defer the payment of savings contributions to that employee for the duration of their probation period. If the employee successfully passes their probation period and their employment is confirmed, the employer would then need to make backdated contributions into a savings fund for the employee from the commencement of their employment (including their probation period). However, if the employee does not pass their probation period and their employment is terminated (either during or at the end of the probation period), then the employee would not be entitled to any savings scheme contributions. If the employer decides not to defer savings contributions during the employee's probation period, the employee would remain entitled to any contributions which the employer had paid into their savings fund during the probation period, regardless of whether or not they successfully pass probation and have their employment confirmed;
2. where an employee owns a partnership interest, membership interest or shares in the company, no savings contributions would be required in respect of that employee's drawings from a partnership, equity, capital or profit account of the company or any profit distributions or dividends they receive from the company;
3. where an employee is under notice of termination of their employment as of 1 February 2020, or is employed under a fixed term employment contract which will expire within three months of 1 February 2020, they do not need to be enrolled in a savings scheme and would instead continue to accrue ESG until their employment terminates; and
4. where the employer is under a statutory duty in another country to make pension, retirement or savings contributions into a scheme in any other country in respect of an employee, or where the employer is paying defined benefits to an employee under a pension or savings scheme where the defined benefits are in excess of the value of the minimum employer contributions under the DIFC savings scheme, the DIFC employer can apply to the DIFC Authority for an exemption in relation to that employee.

The following employees are also exempt from the new DIFC savings scheme requirements:

1. eligible UAE and other Gulf Cooperation Council nationals who are required to be registered for the state government pension;
2. employees who are employed in the DIFC pursuant to a Secondment Card issued by the DIFC Authority; and
3. employees who are employed in the DIFC by a local or federal government entity (except for those established pursuant to the DIFC Founding Law) or where the President of the DIFC has exempted their employer from being subject to the DIFC Employment Law.

What are the next steps for DIFC companies?

At the outset DIFC employers need to decide whether to adopt the DEWS Plan or alternatively seek a Certificate of Compliance from the DIFC Authority to enrol their employees in a different savings scheme. DIFC employers have until 31 March 2020 to obtain a Certificate of Compliance from the DIFC Authority if they wish to use a different scheme, otherwise they will be required to enrol their employees in the DEWS Plan.

While there is a grace period (until 31 March 2020) for DIFC employers to make the necessary administrative arrangements to enrol all eligible employees in an appropriate savings scheme, the mandatory employer contributions will need to be backdated to 1 February 2020.

If a DIFC company fails to adhere to the new savings scheme requirements, it could be subject to a fine of USD 2,000 per contravention.

In addition to making the necessary administrative arrangements, DIFC companies should take this opportunity to review their employment contracts, HR policies and employee handbooks to ensure they are up to date and compliant with the new legislative requirements. It may also be helpful for companies to arrange employee meetings and/or circulate internal communications to help explain the changes to employees.

Al Tamimi & Company's Employment & Incentives team regularly advises on all aspects of the employment relationship. For further information please contact Anna Marshall (a.marshall@tamimi.com) or Gordon Barr (g.barr@tamimi.com).