

Managing Employment Relationships affected by COVID-19 in the Kingdom of Saudi Arabia

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Employers in the Kingdom of Saudi Arabia ('KSA'), as around the globe, have been affected by the impact of the COVID-19 pandemic across most sectors. In large part, this has been due to measures adopted by the Saudi government to curb the spread of the COVID-19 virus. This has resulted in a number of businesses having to close temporarily, reduce their working hours or change their normal business practices in order to comply with government instructions. In response, the government has introduced a number of measures with the aim of supporting employers during the pandemic whilst also giving some protection to employees. In this article, we set out an overview of the most significant employment related measures implemented by the Saudi government to assist employers in managing employment relationships through the COVID-19 pandemic.

Royal Order introducing Saned Wage Subsidy Scheme

On 3 April 2020, a Royal Order was issued to grant a wage subsidy to Saudis employed in the private sector ('Royal Order'). The subsidy is available for all Saudis working for employers with five or less Saudi employees. It also covers up to 70 per cent of Saudis working for employers with more than five Saudi employees. The employer will be able to select which employees to apply to put onto the subsidy scheme. Assuming that the employees are eligible to receive the Saned wage subsidy, the employer is then not required to cover the balance of wage difference for the duration of the subsidy scheme.

The subsidy is managed by the General Organisation for Social Insurance ('GOSI') through the Saned unemployment insurance fund. Employees who are selected and are eligible to receive the subsidy will get 60 per cent of their wages or up to SAR 9,000 (US\$ 2,400) per month (whichever is less). The Saned wage subsidy scheme covered wages for the months of April, May and June, with the subsidy payments for those months being made in May, June and July respectively. The scheme may be extended should the government deem appropriate. Employers must resume the payment of wages after the GOSI wage

subsidy programme ends (at time of writing June 2020).

To be eligible for the subsidy, the following conditions must be satisfied:

- the employer must be registered with GOSI and a subscriber to GOSI's unemployment insurance branch before 1 January 2020 and have continued its subscription;
- the beneficiary employee must be a Saudi national and under 60 years of age;
- the beneficiary employee should not have any income from work or another activity; and
- the employer must have paid the wages of its employees during the first quarter of 2020.

Applications were required to be received by 26 April 2020 in order for salary payments to be disbursed from 1 May 2020. Applications made in May were due to be paid out in June 2020. Employers in the financial services, insurance and banking sectors, communications sector and the food manufacturing sector are excluded from the Saned wage subsidy scheme.

There is some uncertainty with regard to the position of the Saudi and expatriate employees who are not covered by the Saned wage subsidy scheme. According to GOSI, employers must continue to pay the full wages of any Saudi employees who are not entitled to the subsidy as well as all expatriate employees. However, separate measures introduced by the Ministry of Human Resources and Social Development ('MHRSD') suggest that it is possible to apply a wage reduction to all employees where the employer is impacted by a force majeure event such as COVID-19 (subject to certain conditions as set out below).

Ministerial Decision Introducing a New Article 41 to the Executive Regulations of the Labour Law

On 6 April 2020, the MHRSD issued Ministerial Decision No. (142906) introducing a new Article 41 to the Executive Regulations of the Labour Law with the aim of regulating the employment relationship in cases of exceptional circumstances and force majeure events ('Article 41').

Pursuant to paragraph 1 of Article 41, in the event the KSA government implements measures concerning a situation or condition that requires a reduction of working hours or precautionary measures to be taken, including situations of force majeure provided for in Paragraph 5 of Article 74 of the Labour Law, an employer shall, within six months following the commencement of the implementation of such measures, agree with its employees to implement any of the following:

1. reduce an employee's wage on a pro-rata basis proportionate to their actual working hours;
2. grant an employee a period of leave to be deducted from their payable annual leave; and/or
3. grant an employee exceptional leave in accordance with Article 116 of the Labour Law (i.e. unpaid leave).

Paragraph 2 of Article 41 further provides that the termination of an employment contract shall be unlawful should it be proven that the employer benefited from any state subsidy to deal with the situation or condition (i.e. the force majeure event). The MHRSD has since clarified that it will be unlawful for an employer that benefits from a COVID-19 related state subsidy to terminate the employment of any Saudi nationals on the grounds of force majeure.

Paragraph 3 of Article 41 states that the employee's right to terminate employment is not prejudiced.

The MHRSD subsequently confirmed that it would ultimately be for a Labour Court to determine whether any termination of employment (of either Saudis or non-Saudis) was lawful based on the circumstances of the case. Given that these are unprecedented times, and the application of the new government measures are untested in the Labour Courts, it remains to be seen how a Labour Court will consider and determine

terminations on the grounds of force majeure in light of COVID-19.

Pursuant to Ministerial Decision No. (146377) issued on 30 April 2020, a failure to comply with the requirements of Article 41 will expose employers to a fine of SAR 10,000 (approximately US\$2,666) per violation and subject to the number of employees affected, and risks claims being brought in the Labour Court.

Although the Ministerial Decision introduced into law certain measures which undoubtedly assisted employers in managing the response to COVID-19, there was uncertainty as to how the measures could properly be implemented within the scope of Article 41 of the Executive Regulations and, thus, an explanatory note was issued (see further below).

Ministerial Decision Issuing an Explanatory Note to Article 41

On 3 May 2020, Ministerial Decision No. (14662) was issued which provided an Explanatory Note clarifying the application of Article 41 ('Explanatory Note'). The Explanatory Note explains the circumstances in which Article 41 is intended to apply and the measures that employers can take when the state adopts any actions, including any preventative steps or precautionary actions, to mitigate against the effects of a force majeure event.

When will Article 41 apply?

Although Article 41 was introduced with the intention of dealing with the impact of the current COVID-19 pandemic, its application is much wider in scope and can be invoked whenever there are exceptional circumstances that may be described as a 'force majeure' event. The Explanatory Note defines a 'force majeure' event as any event that can neither be predictable or escapable in response to which the state adopts procedures that requires minimising working hours or where it takes precautionary measures to limit the exacerbation of the force majeure event. Article 41 will apply and be effective for as long as the force majeure event exists. Employers will, therefore, be able to apply the measures set out in Article 41 (as explained further below) within a six-month period following the measures taken by the State to deal with the force majeure event. When it ceases to exist then Article 41 and any measures taken in reliance upon it will also cease and employees must be restored to the positions that they were in prior to the force majeure event in respect of their terms and conditions of employment.

Measures available to employers:

1. **Wage reduction:** Paragraph 1 A of Article 41 stipulates that employers can reduce the wages of employees commensurate with a reduction in their working hours. The Explanatory Note clarifies that employers can unilaterally impose a wage reduction without an employee's consent provided that such wage reduction does not exceed 40 per cent (and any reduction must be in line with a corresponding reduction in working hours);
2. **Setting annual leave:** Paragraph 1 B of Article 41 stipulates that employers have the right to dictate annual leave dates to employees. The Explanatory Note clarifies that employees cannot refuse to take leave once leave dates are set by the employer. Further, annual leave must be paid at the rate of the employee's actual wage before any reductions were applied in response to the force majeure event; and

3. **Granting unpaid leave:** Paragraph 1 C of Article 41 stipulates that an employer may agree a period of unpaid leave with the employee. The Explanatory Note describes this as exceptional leave and, unlike the previous two measures, it requires the agreement of the employee in accordance with Article 116 of the Labour Law.

Terminating Employment for a Force Majeure Reason

Paragraph 2 of Article 41 stipulates that it will be unlawful to terminate employment where it is evidenced that the employer has benefited from a state subsidy. The Explanatory Note now clarifies that the employer has a right to terminate employment in a force majeure case provided that it satisfies the following three conditions:

1. a period of six months should have lapsed following the actions taken to counter the force majeure event that resulted in a reduction in working hours or a cessation of work for a period;
2. the employer should have applied one or more of the measures available under Article 41 such as reducing wages, imposing annual leave or granting unpaid leave; and
3. the employer should not benefit from any state subsidy provided to counter the force majeure event.

Paragraph 3 of Article 41 states that an employee's right to terminate employment is not prejudiced. The Explanatory Note prohibits the employee from resigning for a force majeure reason unless the employee can show that a period of six months has lapsed following the actions taken to counter the force majeure event that resulted in a reduction in working hours or a cessation of work for a period and the employee has taken up or complied with all or some of the measures available to the employer under Article 41.

Conclusion

The wage subsidy scheme and the measures made available to employers under Article 41 of the Executive Regulations are much needed but there remains some uncertainty as to the rights of employers and employees despite the issuance of the Explanatory Note to Article 41. For example, it is still not clear whether employers can terminate employment during the six month period referred to in Article 41 for a reason other than force majeure or at all. Also, there is uncertainty about the measures which can be applied to employees who are not benefitting from the wage subsidy scheme or indeed any COVID-19 related state subsidy. There is also confusion as to whether employees who are receiving the wage subsidy can be paid a top up wage if they return to work after receiving the wage subsidy. That said, Article 41 (when read in conjunction with the Explanatory Note) has somewhat strengthened the position of employers to manage employees whilst the effects of the pandemic are being keenly felt and to prepare the way for the end of the government's restrictions and measures to curb its spread.

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