

Workforce flexibility within the UAE Healthcare sector

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We consider how far the UAE employment system not only protects but also advances the interests of employers within the Healthcare sector, whilst also recognising some limitations inherent in the current sponsorship system. The intention to develop the UAE as a hub of medical tourism adds an extra dimension to this complex area.

Restriction of activities during employment

An employer within the Healthcare sector can comfortably rely upon the UAE employment and immigration framework to guarantee that its staff will be dedicated to providing their services to that single employer. Unlike other legal systems which may recognise an individual's freedom to contract with more than one "employer", the employment framework within the UAE requires that an employee shall work only for the sponsoring entity.

The nature of the employment relationship in the UAE is essentially "static". As addressed in a previous edition (Law Update February 2014), the UAE immigration process strictly controls the manner in which individuals can perform their "work" on a daily basis.

An individual must be directly engaged (i.e. "employed") by a locally licensed and registered employing entity in order to work lawfully in the UAE. There is no recognised concept of self-employment or other atypical working status, which may be commonplace in other jurisdictions. As a general principle, a non-national seeking to live and work in the UAE must either enter into a Ministry of Labour ("MOL") standard form contract (where employment is onshore) or a similar standard contract provided by the applicable free zone. This applies equally to those employed in the Healthcare sector.

For example, as a general principle, a Hospital-Based Specialist working for hospital X in the Dubai Healthcare City ("DHCC") free zone may not work for other entities. There may be a possibility for permission to be granted to work for another entity within that free zone and we are aware of such practices within DHCC. However, this would be subject to various conditions, not least the existing sponsor confirming that it did not object to such a situation and the arrangement would have to be carefully managed in order to preserve the employer's business interests (i.e. its ability to provide specialist services to its patients).

The limitation on mobility of employees has some undoubted advantages for private sector hospitals/clinics in terms of ensuring that their Hospital-Based Specialists are restricted to only providing services to them and not to other employers. That preservation of a stable trained workforce within the single licensed entity is a key factor for any business, but particularly one which relies upon the consumer perception of high quality patient care.

Restricting activities post-employment via restrictive covenants

An employer's ability to protect its business interests during employment is largely uncomplicated. However, the position is less straightforward after termination of employment.

In addition to the restrictions which arise during employment in the UAE, an employer may also choose to impose contractual restraints upon its employees as a means of regulating their activities following termination of employment. Given the basic nature of both the MOL contract and standard form free zone contracts, most employers will include post termination restrictions within separate supplementary employment contracts or on a stand alone basis. Typical covenants include restrictions against competition, solicitation and dealing with customers/clients and the solicitation and employment of staff of the former employer.

Legal Position

Article 127 of Federal Law No. 8 of 1980 (as amended) (the “Labour Law”) expressly states that where an employee performs a role which allows him to become acquainted with confidential information, the employer may require the employee to agree to a contractual provision preventing him from working with a competing business after termination.

Whilst the Labour Law is silent as to the circumstances in which a restriction will be regarded as valid, guidance is provided in Articles 909 and 910 of the Civil Code. A non-competition provision must be reasonable. It must therefore be limited in its scope; specifically its duration, area/geographical scope and relevance to the ex-employer’s business interests. The former employer relying upon the covenant must demonstrate that any restrictions are reasonably necessary to protect a legitimate business interest (for example, a client connection or confidential information) and that the restrictions are not being used simply to prevent legitimate competition.

Whilst a covenant may be regarded as “reasonable” when applying the standards referred to in the Civil Code (above), that only takes matters so far. That alone does not necessarily provide an employer with a meaningful remedy in the absence of clear consequential financial harm arising from the breach of the covenant.

Effective enforcement of a restrictive covenant

By contrast with a number of other jurisdictions, the UAE (with the exception of the Dubai International Financial Centre) does not recognise the concept of an injunction to actually prevent the financial harm, but insists upon clear evidence of such harm which may then lead to an award of damages (provided that the other tests as to reasonableness etc have been satisfied). This alone does not provide a significant deterrent to a former employee intent on breaching his covenants and (for example) seeking to divert customers (or clinic patients) from the previous employer.

To mitigate the unavailability of injunctive relief, the commonly adopted approach is to bolster the restrictive covenants by including a “liquidated damages” clause in the supplemental contract of employment. This is a separate contractual undertaking between the employer and employee and the onus is on the former employee to demonstrate that the sums sought are not a genuine pre-estimate of loss suffered by the employer. This is important because it runs contrary to the more usual scenario where a party claiming damages has to prove actual loss.

Relevance to the Healthcare sector

Given that post-termination restrictions must be focused on the protection of a legitimate business interest, it follows that non-competition covenants must be used carefully and target only those employees who are genuinely a potential risk to the business. A Hospital-Based Specialist in a patient-facing role who has a developed relationship with patients (including knowledge of sensitive patient information) is a key “asset” of the business. Providing at least some degree of deterrent against competition is likely to be an important consideration for the employing hospital.

It should be noted that the misuse of confidential information (such as patient records) to compete at a different establishment would potentially be susceptible to criminal sanction.

However, the positive assistance in restricting employees' activities to their immediate sponsoring entity also imposes certain practical restraints on the employer which may be more than a mere operational inconvenience. For an employer operating more than one site, potentially in different Emirates, the current constraint upon employee mobility does not readily facilitate free movement of employees between sites. The new unified approach to licensing (below) may be the first step towards recognising the practical benefits of greater mobility within the Healthcare sector.

Unified Licensing

In line with its intention to become a hub of high quality medical care and a centre of medical tourism, on 12 October 2014, a new licensing regime for Healthcare professionals came into effect in the UAE.

This has introduced a pragmatic approach to licensing of healthcare professionals within the UAE. The agreement between respective licensing bodies, the Ministry of Health (covering the northern Emirates), Dubai Health Authority (DHA) and the Health Authority of Abu Dhabi (HAAD) introduces a consistent approach to licensing. The new arrangement provides a single recognised licensing process as opposed to a process applied on an Emirate specific basis.

DHA Director-General Essa Al Maidoor stated recently that, "The agreement paves way for medical professionals to work across the UAE and is important as it unifies as well as streamlines the professional medical licensure process."

At first sight that might seem to open the door to a relaxation of the process for working between Emirates and also between facilities. However, at this stage, the unified approach to licensing appears to be more focused on streamlining the recognition of qualifications within the UAE rather than wholesale relaxation of employment and immigration framework within the Healthcare Sector.

The cooperation between Emirates to recognise respective licensing does not alter the fundamentally static nature of the employment relationship. Licensing (for example, via DHA or HAAD) is entirely separate from immigration and/or Labour Law requirements. The employee can still only work for the employer who provides sponsorship at the stated place of business subject to the exceptions mentioned above. As such, an employee who is licensed in Dubai may indeed have his registration recognised in Abu Dhabi or elsewhere; however, that does not thereby permit him to actively work for an entity other than his immediate sponsor.

Conclusion

It remains to be seen how far the aim to development the UAE as a centre for medical tourism ultimately also leads to a greater freedom for medical professionals to be transferred more readily between facilities, whilst preserving the employer's commercial interests. At this stage, the employer continues to benefit from certain restrictions upon the activities of its workforce, but is constrained by established sponsoring formalities from fully exploiting the rapidly developing marketplace.

A Senior Associate in the Employment Department, John has experience of advising healthcare providers in the UK and UAE on all aspects of the employment relationship. His experience includes dealing with cases before professional conduct bodies in the medical and other regulated sectors. John is also a Judicial Officer for the UAE Rugby Federation.