

Secondments in the UAE Hotel Industry

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Unusual working arrangements are not as common in the UAE as elsewhere. However, in some sectors, such arrangements are more usual simply because of issues particular to that sector. In the hotel sector, businesses which use the separate owner/operator model have little choice but to utilise secondments for a variety of reasons which will be considered below. This article explores the practical issues surrounding secondments used by hotels in the UAE together with the associated benefits of utilising that approach.

Background

In order to work in the UAE, all employees must have a residence visa (with the exception of UAE and other GCC nationals) and a work permit. As a result of UAE immigration laws, an employee may only lawfully work in the UAE for the employer listed on the employee's visa and work permit and only from the employer's registered premises. Furthermore, an employee may not lawfully work for more than one employer simultaneously except in very limited circumstances.

Where an employee is found to be carrying out work for an organisation other than their employer without the approval of the applicable authorities, fines of up to AED 51,000 (USD 14,000) per employee in breach may be issued by the General Directorate of Residency and Foreigners Affairs up to a maximum of AED 5 million (USD 1.4 million). Such fines may be issued against both the employer and any entity which allows employees who are not sponsored by it to carry out work.

As set out above, all employees in the UAE must carry out work for their sponsor and at their sponsor's registered place of business only. In the hotel industry, this inevitably results in the hotel owner employing all hotel staff, including senior management, as it is the hotel owner that holds the hotel licence and provides the licensed place of business at which the staff will be employed. This arrangement creates a scenario where the legal responsibility for the staff remains with the owner, whilst the selection, hiring, management and direction of the staff is undertaken by the hotel operator - although, practically, through the hotel executive personnel such as the general manager, head of HR, etc. These executives will also be employees of the owner. As a result, the issue of liability for the conduct of the hotel staff, including the executive personnel, can become blurred, and may, in the event of breach of the operator's obligations to the owner under the hotel management agreement ("HMA"), create an obstacle to successfully proving breach by the operator, where the event giving rise to the breach has been undertaken by a member of the hotel staff. To address this, secondment of executive staff is commonly used to provide for the continued employment of hotel executive personnel (general manager, financial controller and, in some cases, department heads) by the hotel operator, with a secondment to the hotel owner for the purposes of sponsorship and visa only.

Secondments in practice

In recognition of the fact that some roles or business dynamics require a degree of flexibility in relation to working arrangements, it is possible in some circumstances for employees to obtain consent to carry out work for another employer or from another location than set out in the employee's residence visa and

work permit.

More usually, a secondment will be used for commercial considerations (as identified above) or because the ultimate employer (in this case, the operator) does not have a presence in the UAE or is otherwise unable to obtain residence visas or work permits for employees. Where this is the case, the owner will sponsor the employee but an employment relationship will remain in place between the employee and the operator.

Documenting arrangements

Where key employees are concerned, it is very common for the employees to continue to be employed directly by the operator (often via its parent company abroad) whilst also entering into a direct employment relationship with the owner (which will ultimately be responsible for obtaining a residence visa for the employee) which naturally results in a number of issues. Perhaps the most important consideration for all parties is whether the employment with the operator will continue throughout any secondment arrangement. In most cases, employment will continue not least to ensure that the owner is best placed to prove any breach of contract by the operator. This potentially results in the employee being able to assert employment rights against both the owner and the operator. One possible way to resolve this difficulty is to suspend the employment terms with the operator whilst employment with the owner is ongoing.

Once a decision has been made in relation to employment of key staff with the operator, the primary concern between the parties would generally be how to document the arrangement, with the most commonly used arrangement being:

1. HMA

This would generally set out the commercial arrangements between the parties. Ideally, the owner would negotiate the terms of the HMA such that the operator retains responsibility for a number of specific key personnel. On occasion, and again depending on the negotiations between the parties, the HMA may contain a right of veto in favour of the owner which enables the owner to have some involvement in the identity of key personnel.

2. Employment contract between the operator and the employee

In order to preserve the relationship between the operator and employee during the secondment, and assuming that the parties would like this to be the case, the employee would ordinarily remain employed by the operator.

3. Secondment agreement between the owner and operator

Ideally, the agreement would detail, amongst other things, the mechanism for the secondment and management of the employees by the owner. This would include any amounts payable to the employee, responsibility for disciplinary matters, which party can approve leave etc. The most common approach would be for the operator to retain control of the employee with the owner effectively acting as the operator's proxy, carrying out instructions issued by the operator (where necessary). In some cases, the parties do not enter into such an agreement.

4. Agreement or letter between the operator and the employee

Where a secondment arrangement will be in place, the operator would generally communicate the proposed secondment to the employee in writing. The document would set out that the employment relationship between the parties will continue (if that is intended to be the case) and would identify which provisions of the employment contract will continue during the secondment and which would not. The agreement would also provide details and conditions in respect of the employment. By way of example,

the agreement would identify the proposed country and location of work, reporting lines and other matters which are likely to change during the secondment period.

5. Employment contract between the owner and the employee

Broadly, in order to obtain a residence visa and work permit for an individual in the UAE, it is necessary to file a standard form contract with the relevant free zone authority or the Ministry of Labour (with some exceptions). Certain hotels are exempt from the remit of the Ministry of Labour and therefore a standard employment contract is not a pre-condition of the visa process for those exempted entities. However, it would be usual for individuals to be provided with an employment contract from the owner. Despite that, the contractual documentation between the owner and the employee will generally be kept to a minimum in order to avoid repeating the content of the contract between the operator and employee or, potentially, creating conflict between those terms.

Considerations

There are many considerations for all parties involved in a secondment arrangement and most will be particular to the circumstances. However, there are a number of points which should be considered throughout the process in all cases and particularly whilst drafting the required documents. Examples of points to consider are set out below:

- How long will the secondment arrangement be in effect?
- Which party will be responsible for the employee, both day to day and in respect of material matters?
- Can any of the parties bring the arrangement to an immediate end and, if so, how will doing so impact upon the overarching employment relationship?
- What arrangements will be put into place during the secondment to ensure that the parties communicate effectively? Will there be regular updates issued by the owner?

The considerations set out above are of particular importance in respect of key employees who may well have worked with an operator for many years and who intend to remain employees of the operator for the foreseeable future.

Moreover, in addition to the pure employment considerations which all parties should be mindful of, it is of particular importance for the owner to consider the question of liability in the event of any major difficulties arising from the HMA. In the event of a breach of the terms of the HMA by the operator, the owner may well be in a stronger position to successfully prove the operator's breach, if the owner has ensured a direct link between the operator and the hotel key personnel, by utilising a well structured secondment arrangement.