

Extraterritorial Application of US Labour Laws in the UAE

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US Laws with Extraterritorial Application

As in other jurisdictions, laws in the US presume no extraterritorial effect unless expressly identified otherwise. There are three key federal laws (amongst others) which have expressly been given extraterritorial effect as follows:

- Title VII of Civil Rights Act of 1964;
- Americans with Disabilities Act; and
- Age Discrimination in Employment Act (collectively, the “Laws”).

The Laws prohibit discrimination in a number of cases such as on the basis of age, race, national origin, colour or gender.

Scope

The Laws seek to protect American citizens working as employees of US companies, whether inside the US or abroad, including within the UAE. The Laws would not afford protection to consultants or other workers. Since American nationals working in the UAE must obtain a residence visa and work permit in order to work lawfully in the UAE, they will generally be considered to be ‘employees’ and thus, assuming all other conditions are satisfied, they will fall under the protection of the Laws.

The scope of the Laws would not extend to UAE companies with no links to the US or which do not employ American citizens. However, it should be noted that the definition of a ‘US company’ for the purpose of the Laws is fairly broad. In the event of a dispute, a number of factors may be considered to determine whether an entity is sufficiently connected to an US company, including (but not limited to):

- whether the UAE entity has a US parent;
- the location of the company’s principal place of business;
- the nationality of the company’s shareholders, officers and directors;
- whether the company is controlled by an US entity when considering matters such as:
 - degree of interrelated operations;
 - extent of common management;
 - application of common policies;
 - extent of common ownership or financial control;
 - and shared cost-centres.

Defences

The extraterritorial effect of the Laws is potentially onerous and gives rise to a range of legal implications that the UAE entity may not have envisaged. However, in deference to the sovereignty of UAE law within the UAE’s borders, there are two primary defences available to UAE companies seeking to avoid the

application of the Laws as follows:

1. Foreign Law Defence

In certain circumstances, complying with the Laws would mean breaching other applicable laws in the jurisdiction within which an entity is based. To give an example, Federal Law No. 8 of 1980 (the “Labour Law”) provides that women shall not be required to work at night. When applying the Laws, that provision would likely be considered to be discriminatory on the basis of gender. However, complying with the Laws and allowing both male and female employees to work night shifts would be a breach of the Labour Law. In those circumstances, employers to whom the Laws may potentially otherwise apply could rely on the existence of an obligation in the Labour Law as a valid reason for failing to comply with the Laws.

In order to successfully rely on this defence, the employing entity must be able to prove that a specific legal provision exists and that complying with the Laws would be a breach of that provision. In the UAE, this may prove to be a difficult hurdle since there are very few legal provisions which actively require discrimination. Therefore, as a general rule, where employers fall under the scope of the Laws, the relevant provisions should be complied with.

2. Foreign Sovereign Compulsion Defence

It is also possible for a company to defend actions which would otherwise amount to a breach of the Laws if the company can demonstrate that a foreign sovereign compelled the employer to engage in a practice which would otherwise be unlawful.

Potential Difficulties (UAE vs. US employment laws)

There are a number of common practices in the UAE which may give rise to breaches of the Laws for companies falling within the remit of the Laws and therefore require additional thought to be given to potential risks in the US. For example, the following actions could create a risk:

- choosing men over women for manual roles;
- employing individuals with a particular gender or religion as a result of client preference; or
- refusing to consider hiring certain nationalities due to likely difficulties with obtaining a residence visa. (It is worth noting however that an assumption that a visa will not be granted will likely be treated differently to circumstances in which an application for a visa is submitted and is then rejected by the UAE authorities.)

Conclusion

On balance, an employer’s focus in the UAE should be on compliance with UAE laws. However, care should be taken where UAE entities have an US nexus and may be the subject of extraterritorial application of the Laws. It is therefore imperative for organisations to be alert to foreign laws which may apply to them and to recognise that being based in the UAE does not necessarily mean that their obligations begin and end with UAE laws.

As the largest dedicated specialised employment law team in the Middle East, Al Tamimi & Company’s Employment team regularly advises employers on contentious and non-contentious employment law issues. For further information please contact Gordon Barr (G.Barr@tamimi.com) or Natalie Jones (N.Jones@tamimi.com).