UAE employment disputes amidst COVID-19: force majeure, class actions, unionization, and procedures

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As the Coronavirus pandemic takes its toll on businesses, many employment relationships are facing disruption, and employers are taking action on a mass-scale, with issues relating to unpaid leave, undue termination, or other actions that may be seen as a breach of contractual or lawful employment rights.

Comparatively, employees who deem themselves victimized in the current circumstances look to avenues to protect their interests individually or collectively.

In this article, we look at updates to unionization and class action lawsuits in the United Arab Emirates, the risks of employers arguing force majeure circumstances, and procedures for a collective claim by employees.

Example of past cases on collective employment disputes

In 1991, the Federal Supreme Court ruled in favor of the employees in a collective employment claim lodged by three employees (and referred to the Federal courts by the deputy minister at the time).

In 2002, the Federal Supreme Court rejected a claim by 18 employees on the basis that it was a joindering of 18 independent claims and did not fulfill the requirements under Article 154 of the UAE Labor Law (Employment Law) governing collective employment disputes.

In 2006, the Federal Supreme Court rejected defense by an employer that the claim should have been lodged as a collective employment dispute and ruled in favor of the employee.

2018 updates; thresholds, class actions, and unionization

In 2018, the regulatory procedures for collective employment disputes were amended by the Minister of Human Resources and Emiratization. Amongst which three crucial amendments were introduced.

The first of the crucial amendments made in 2018 was establishing a minimum threshold of one-hundred employees to fulfill the conditions of a collective employment dispute.

Secondly, the employees making the claim do not necessarily have to be employed by the same employing entity. Even if the employees are employed by different entities, but share a common denominator, they may form a class on the condition that all their employers share the same owner.

Finally, the employees must be represented by three to five employees designated by the collective employees; essentially a mechanism akin to unionization in other jurisdictions.

Force majeure and the dangers of making the argument

Employers looking to legitimize actions against employees based on an argument of a force majeure event occurring may face inquiry (by the conciliation committee, the supreme arbitration committee for employment disputes, a court, or opposing counsel) as to whether the employer’s financial condition justified such action against the employees.

A critical example would be large enterprises (such as banks, airlines, or real estate developers) who publicly announce annual revenues in billions of Dirhams, in which case an overseeing conciliator, arbitrator or judge would question

whether adequate human resource provisions were made against potential business disruption in light of the magnitude of revenues generated.

Provisioning for human resource liabilities is of particular importance as Emirati law requires that employment debts are prioritized in the payment of debts during liquidation or bankruptcy, and are also prioritized over government or third-party debts, which essentially reflects the significance the Emirati legislator has given in terms of preferring employment debts against any others.

Moreover, limited liability companies (and other forms of commercial companies) must maintain a certain cash reserve. Administration and liabilities of corporate cash reserves are complex and vary, but as a general matter, the reserve must amount to half of the paid-up share capital amount. For example, a corporate with a paid-up share capital of AED 100,000,000 must maintain a statutory reserve of AED 50,000,000.

Read collectively, companies must provision funds out of annual profits into cash reserves and employment debts arguably have priority over government or third-party debts. The formulation of these two elements dilutes an argument of force majeure as the employer is – by law – required to establish a cash reserve to cover unexpected expenses of which employees are prioritized over third parties (such as suppliers, landlords, etc.).

Even in the odd circumstance that an employer has an insignificant shareholding capital, such as AED 10,000 for example which would require a reserve of only AED 5,000 – but the employer operates with annual figures amounting to millions or more, an employee may argue factual contradiction to the requirements of the commercial companies law which necessitates that a company must have sufficient capital to achieve the purpose of its incorporation.

Importantly; employers face creating a liability over the personal assets of the shareholders and managers if arguing that the Coronavirus is a force majeure event that hindered the employer from paying salaries (or any other employee debt).

The risks arise if the employer is found to have not maintain the required cash reserves (which are meant to cover unexpected circumstances) due to excess distribution of profits to shareholders, in which case the owners and managers of the employer may become liable in their personal capacity (i.e. with their personal assets) for breach of the commercial companies law.

Procedure for collective employment disputes

Commencing collective employment dispute procedures (whether as employees of the same employer, or a class of employees of different employers who share the same owner) requires the employees to notify the employer in writing of any collective dispute to commence a preconditional amicable settlement period.

The employees and the employer must also notify the Customer Happiness Center of Ministry of Human Resources and Emiratization located in the Emirate that has jurisdiction over the dispute, on the day the dispute occurs, or directly on the following business day, that a collective employment dispute has commenced.

The employees must continue to adhere to their employment obligations, and the employer must keep the entity valid and operational until the dispute has been resolved.

If direct negotiations do not resolve the dispute within seven business days, either of the employer or employees may request the Center to mediate the dispute.

If mediation efforts by the Center are not accepted by the

parties within ten days from the date the Center is notified of the request to mediate, the Center must then refer the dispute to the respective conciliation committee.

The conciliation committee has the authority to set hearings and obtain evidence to adjudicate the dispute, and question any of the employees or persons concerned with the dispute, as it deems fit.

The conciliation committee must issue its ruling within two weeks of the dispute being referred to it or otherwise refer the matter to the supreme arbitration committee for employment disputes.

If the conciliation committee issues its ruling, and either of the parties disagrees with the ruling, they may object before the supreme arbitration committee for employment disputes.

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