



Dubai
International
Financial
Centre

CONSULTATION PAPER NO. 7

October 2019

**EMPLOYMENT LAW AMENDMENT LAW
& NEW EMPLOYMENT REGULATIONS**

**CONSULTATION PAPER NO. 7 OF 2019
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REGULATIONS**

Why are we issuing this paper?

1. The Dubai International Financial Centre Authority (“DIFCA”) proposes to enact amendments (the “Proposed Amendments”) to the Employment Law, DIFC Law No. 2 of 2019 (the “Current Law”) and to issue new Regulations under the Current Law (the “Proposed Regulations”) to replace the end-of-service gratuity payment regime in Article 66 of the Current Law (which is a defined benefit scheme) with a funded defined contribution regime.
2. This Consultation Paper No. 7 of 2019 (“Consultation Paper”) seeks public comments on the Proposed Amendments and the Proposed Regulations.

Who should read this paper?

3. This Consultation Paper would be of interest to persons conducting or proposing to conduct business in the DIFC. In particular:
 - (a) Employers and Employees;
 - (b) the finance, human resources and legal functions of Employers; and
 - (c) the representatives and advisors to any of the above.

How to provide comments

4. All comments should be provided to the person specified below:

Jacques Visser
Chief Legal Officer
DIFC Authority
Level 14, The Gate, P. O. Box 74777
Dubai, United Arab Emirates
or e-mailed to: consultation@difc.ae

5. You may choose to identify the organisation you represent in your comments.
6. DIFCA reserves the right to publish, on its website or elsewhere, any comments you provide, unless you expressly request otherwise at the time the comments are made.

What happens next?

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7. The deadline for providing comments on the proposals in this Consultation Paper is **18 November 2019**.
8. Once we receive your comments, we will consider if any further refinements are required to the Proposed Amendments or the Proposed Regulations. Once DIFCA considers the Proposed Amendments and Proposed Regulations to be in a suitable form, it will be enacted to come into force on a date specified and published.
9. The Proposed Amendments and Proposed Regulations are in draft form only. You should not act on them until they are formally enacted. We will issue a notice on our website when this happens.

Defined terms

10. Defined terms are identified throughout this paper by the capitalisation of the initial letter of a word or of each word in a phrase. Those terms that are not expressly defined herein are defined in the Proposed Amendments and/or the Proposed Regulations. Unless the context otherwise requires, where capitalisation of the initial letter is not used, the expression has its natural meaning.

Background

11. In 2016 His Excellency Essa Kazim, the Governor of the DIFC (the “Governor”), formed a working group (the “Working Group”) pursuant to the provisions of Article 5 bis (3)(b) of Dubai Law No. 9 regarding the Dubai International Financial Centre (the “Founding Law”) to consider the benefits of an end-of-service savings scheme for non-GCC Employees as a potential alternative to the end of service benefit gratuity payment scheme that is currently in place in the DIFC.
12. The Working Group fulfilled its mandate to the Governor in three (3) phases:
 - (a) Phase 1 produced a white paper in December 2016 setting out the key considerations, advantages and risks of the introduction of a funded expatriate savings scheme and addressed its relevance to the DIFC’s objectives. The recommendations set out in that paper were adopted by the DIFC Higher Board in December 2016 in accordance with the provisions of the Founding Law, thereby initiating Phase 2.
 - (b) Phase 2 addressed the global context for retirement and workplace savings schemes and the implications thereof to recommend an optimal structure. The deliverables of phase 2 were divided into two stages:

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- (i) stage 1 – assessed the key strategic building blocks of such schemes from a global benchmarking and comparative analysis perspective; and
- (ii) stage 2 – set out specific recommendations and design requirements for the establishment of what was then already envisaged as a defined contribution employment workplace savings plan within the DIFC.

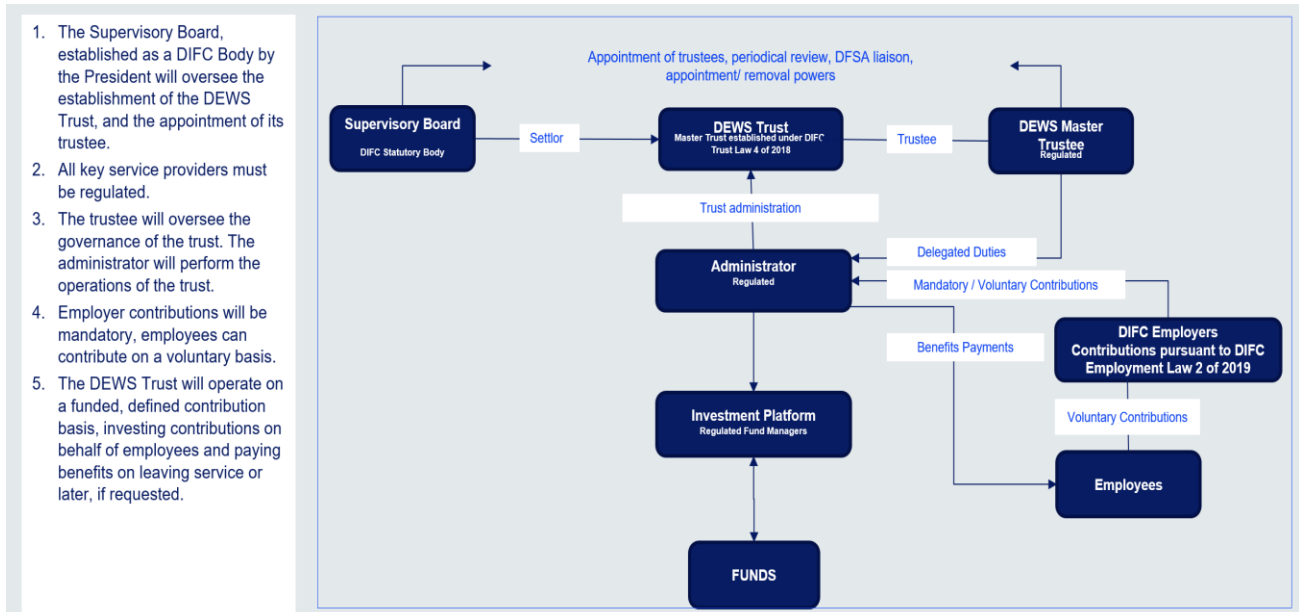
The Working Group’s recommendations in respect of Phase 2 were approved by the DIFC Higher Board in December 2018.

- (c) Phase 3 concerned itself with the specific design components of a defined contribution workplace savings plan in the DIFC, its implementation requirements and to recommend a timeline in respect thereof. The specific design components and timelines for implementation proposed by the Working Group (suggesting a 1 January 2020 one-off implementation date) were approved by the DIFC Higher Board in June 2019.

13. The key design components of the plan (by then known as the DIFC Employee Workplace Savings Plan (the “DEWS Plan”) as approved by the DIFC Higher Board can be summarised by the following slides:

	High level recommendations	Defined contribution design	Centralised administration	Mandatory contributions
Feature	Detailed recommendations			
Legal structure	<ul style="list-style-type: none"> ▪ Global best practice for preserving benefit security means the DIFC Employees Workplace Savings (DEWS) should be established using a master trust structure, governed by an independent trustee, domiciled in the DIFC and regulated by the DFSA. 			
Benefits & contributions	<ul style="list-style-type: none"> ▪ For simplicity, the existing end of service gratuity structure for eligibility, Basic Wage definition, and timing of payments should be retained under the DEWS. ▪ For cost neutrality and simplicity purposes, minimum employer contribution rates under DEWS should broadly match minimum accrual rates under the existing end of service gratuity system. 			
Transition	<ul style="list-style-type: none"> ▪ There should be no change to benefits accrued under the existing end of service gratuity structure such that they remain linked to Basic Wage at eventual termination date. ▪ All DIFC-based companies and employees should be subject to the changeover from the existing regime to the DEWS. ▪ Employers that have an end of service arrangement that provides benefits no less than DEWS and that is funded via a third party fiduciary should be exempt from joining DEWS. 			
Administration	<ul style="list-style-type: none"> ▪ There is a range of third party service providers who would be able to administer the DEWS for all DIFC-based companies and their employees. These would be solicited by RFP to select a suitable service provider. ▪ They would be able to provide the range of services that employees, employers and the DIFC could reasonably expect. 			
Investment	<ul style="list-style-type: none"> ▪ To minimise plan charges, contributions should be invested (where reasonably possible) in passive, index-tracking funds. ▪ Employees should be able to select from a range of pre-selected managed funds, based on the employee’s risk appetite. ▪ A default investment option should apply where employees do not make a selection. ▪ Consultation may be required to gain views on the acceptability for a proportion of contributions to be invested in UAE-based assets. 			
Charges	<ul style="list-style-type: none"> ▪ The operating costs of the DEWS should be recovered, where possible, through an annual management charge (AMC) that would apply to employees’ investment accounts. ▪ Subject to economies of scale and market rates, it is expected the AMC for the DEWS would not be dissimilar to charges applied to best practice occupational savings regimes around the world. 			

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14. The Proposed Amendments and Proposed Regulations have been drafted to give effect to the specific design components and requirements as approved by the DIFC Higher Board. It should be noted, however, that these have been drafted by DIFCA in a generic manner that refers to a “*Qualifying Scheme*” (as opposed to specifically referring to the DEWS Plan) in order to also allow for other plans and schemes to qualify for mandatory contributions to be made by Employers and any voluntary saving contributions made by Employees. This has been done by DIFCA for policy reasons, especially to cater for Employers that have been contributing to a Qualifying Plan on behalf of their employees on a contractual basis prior to the Qualifying Scheme Commencement Date, or who have specific requirements in respect of their Employees, not catered for by the DEWS Plan, that can be more specifically dealt with by another Qualifying Scheme. However, the requirements set out in the Proposed Regulations for what qualifies as a Qualifying Scheme have been drafted specifically with the proper protection of Employee’s interests in mind, and also to avoid regulatory arbitrage in respect of any alternative to the DEWS Plan that is not established in the DIFC, or where the key functionaries are not regulated by the DFSA.

The Proposed Amendments

15. The key changes in the Proposed Amendments are all in relation to Article 66 of the Current Law:
- (a) *Articles 66(1) to (4)* – the changes in respect of these Articles are proposed to ensure that Employees continue to have a right to accrued Gratuity Payments prior to what is termed as the “*Qualifying Scheme Commencement Date*”. The effect being that Employees’ rights in respect of accrued Gratuity Payments prior to the Qualifying

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Scheme Commencement Date will remain untouched in the manner provided for under the Current Law. The reference to “*Employee’s Termination Date*” in Article 66(3)(c), when dealing with references to “*Basic Wage*” and “*Annual Wage*”, also means that the eventual Gratuity Payment due to an Employee will be subject to adjustment (i.e. to what they are at the Employee’s Termination Date) subsequent to the Qualifying Scheme Commencement Date.

- (b) *Article 66(5)* – this Article is intended to provide Employers with the option to transfer any accrued Gratuity Payment in favour of an Employee into a Qualifying Scheme at any point subsequent to the Qualifying Scheme Commencement Date. This may be done by Employers without the consent of Employees. However, an Employer will only be relieved of the residual responsibilities to make up any negative difference between (i) what the value of the Gratuity Payment would have been under Article 66(1) of the Current Law at the Termination Date had it not been transferred to a Qualifying Scheme; and (ii) the value of the Money Purchase Benefits held for the benefit of the Employee in the Qualifying Scheme that is representative of the Gratuity Payment at the Termination Date – if the Employee provided their prior written consent to the transfer.
- (c) *Article 66(6)* – this Article introduces Employers’ obligations from the Qualifying Scheme Commencement Date onwards. This is either (i) a specific date (currently suggested to be 1 January 2020) for current Employees at that date; or (ii) a date not later than the fifteenth (15th) day of the month following the month of an Employee’s employment after the Qualifying Scheme Commencement Date, the latter providing Employers with a grace period to get new Employees enrolled as members of a Qualifying Scheme subsequent to them joining the Employer. In short, instead of accruing a Gratuity Payment, and not necessarily being required to fund it in a separate ring-fenced account, Employers are now obliged to fund this contribution to a Qualifying Scheme monthly on a mandatory basis. The references here to the percentages (5.83% and 8.33% of an Employee’s Monthly Basic Wage) are intended to replicate the same financial obligation that Employers have to Employees under the Current Law (i.e. 21 days of an Employee’s Basic Wage for each year of the first 5 years of service = 5.83% of an Employee’s Monthly Basic Wage; and 30 days of an Employee’s Basic Wage for each additional year of service = 8.33% of an Employee’s Monthly Basic Wage). As is the case with the Current Law, provision is also made for pro-rating Employer contributions where a Termination Date is part-way through a month. The Working Group gave extensive consideration as to the impact on Employers of such a requirement. In the end it made this recommendation (also subsequently endorsed by the DIFC Higher Board (in fulfilling the objectives of the

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DIFC) and the DIFCA (in giving effect thereto by the Proposed Amendments), inter alia, for the following reasons:

- (i) the benefits to be derived by Employees from (1) the security of their end-of-service contributions being ring-fenced with a regulated third party, (2) their end-of-service contributions being professionally managed in accordance with investment choices made by the Employees themselves, (3) the ability to save on a voluntary basis towards certain goals (such as their retirement) in the DEWS Plan at low cost; and (4) being able to leave such savings in the DEWS Plan even after termination of their service with an Employer;
 - (ii) Employers being required to make potentially lower contributions to the DEWS Plan as would be the case with Gratuity Payments (i.e. they pay at an Employee's current Basic Wage and not what that Employee's Basic Wage would be at an Employee's Termination Date);
 - (iii) the turnover rate of Employees in the DIFC (as surveyed by the Working Group) indicating that the Gratuity Payments that Employers would make on average during a typical employment cycle of 5 – 7 years in the DIFC closely matching what Employers would pay as mandatory contributions to a Qualifying Scheme during the same period (i.e. the effect on cash-flow and rate of return on profitability are on average very similar but with contributions to a Qualifying Scheme the contributions are fixed and foreseeable); and
 - (iv) best practice examples in other jurisdictions suggesting that doing so would serve the DIFC's objectives as set out in the Founding Law, its aspirations to be a leading global international financial centre, and also to assist it to attract top talent.
- (d) *Article 66(7)* – the requirement that an Employee's Monthly Basic Wage shall not be less than 50% of an Employee's Monthly Wage in this Article is a continuation of the basic protection provided for in respect of Gratuity Payments in Article 66(3) in the Current Law. Ultimately, the DIFCA is still of the view (from a policy perspective) that Employees' monthly Remuneration in the DIFC should not be manipulated to the extent that their Basic Wage, and the end-of-service benefits derived therefrom, are reduced by Employers to amounts that are not reasonable from a best practice perspective.

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- (e) *Article 66(8)* – this Article establishes the principle in primary law that the Proposed Regulations will from time-to-time determine what the requirements are of a Qualifying Scheme.
 - (f) *Articles 66(9) to (14)* – the contents of these Articles are self-explanatory and deal with a number of secondary issues relating to a Qualifying Scheme, such as:
 - (i) each Qualifying Scheme requiring a Certificate of Compliance, which shall be issued in accordance with Part 8 of the Regulations;
 - (ii) Employees being permitted to save into a Qualifying Scheme by making voluntary contributions in addition to the Core Benefit contributions made by their Employers;
 - (iii) the rights to Core Benefits that must be paid into a Qualifying Scheme not being capable of waiver;
 - (iv) the risk in and to Qualifying Scheme investments residing with Employees, subject to Article 66(5);
 - (v) introducing a fine for non-compliance with the provisions of Article 66(6); and
 - (vi) clarifying that the provisions of Article 66 not derogating from an Employee’s right to obtain relief from a Court in respect of any Gratuity Payment or Core Benefits (i.e. if an Employer does not pay, it can be sued for it in the Court).
16. To compliment the changes in respect of Article 66 alluded to above, certain definitional amendments were also required. These include:
- (a) Certificate of Compliance;
 - (b) Core Benefits;
 - (c) Employee Money Purchase Scheme;
 - (d) Money Purchase Benefits;
 - (e) Monthly Basic Wage;
 - (f) Qualifying Scheme; and

(g) Qualifying Scheme Commencement Date,

which are all self-explanatory as set out in the Proposed Amendments or discussed further below under the heading “*The Proposed Regulations*”.

17. In addition, there are also a few other miscellaneous proposed amendments to rectify referencing errors in Articles 17 and 61 of the Current Law and to deal with Part-Time Employees that work for more or less than 5 days per Work Week in the definition of “*Daily Wage*”, which is not catered for in the Current Law in terms of how such Employees’ Daily Wage is calculated.

- Q1. Do you have any comments or suggestions in respect of the Proposed Amendments?**
- Q2. Would you rather not have a mandatory defined contribution end-of-service benefit savings plan (in the form of a Qualifying Scheme) being introduced in the DIFC. If so, please provide specific reasons.**
- Q3. Do you think enough time is provided for the implementation of the Qualifying Scheme regime (i.e. 01 January 2020)? If not, please provide your reasons for this view and what you would suggest as an alternative.**

The Proposed Regulations

18. Article 9 of the Current Law enables the Board of Directors of the DIFCA to make Regulations in respect of any matter that facilitates the administration thereof. The Proposed Regulations will be issued pursuant to Article 9 of the Current Law as it relates to the administration of Article 66 of the Current Law, including:
- (a) the requirements of a Qualifying Scheme; and
 - (b) the Application procedures to obtain a Certificate of Compliance in respect of a Qualifying Scheme.
19. The Proposed Regulations were drafted with its focus on the requirements of a Qualifying Scheme *with less focus on the duties and responsibilities of the functionaries to a Qualifying Scheme*, specifically bearing in mind that the latter will be regulated by the DFSA (or another Recognised Regulator), hence there being no need for the Regulations to do so.

[Note: The DFSA will issue its own proposed DFSA Rules and proposed amendments to the

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DIFC laws administered by it to deal with the regulatory requirements of, inter alia, the Operator and the Administrator of a Qualifying Scheme established in the DIFC.]

20. The Proposed Regulations are divided into 8 parts. The contents of Part 2 (*Qualifying Scheme Requirements*), Part 3 (*Membership*), Part 4 (*Contributions*), Part 5 (*Payment of Benefits*), Part 6 (*Investment Requirements*), Part 7 (*Qualifying Scheme Fees and Charges*) and Part 8 (*Applying for a Certificate of Compliance*) are in line with the recommendations of the Working Group and are consistent with international best practice based on benchmarking conducted in jurisdictions such as Australia, Hong Kong, Singapore, the Isle of Man and the United Kingdom.
21. The key requirements of what qualifies as a Qualifying Scheme can be summarised as follows:
- (a) a Qualifying Scheme is built around the concept of an “*Employment Money Purchase Scheme*”, in line with the definition found in section 181B of the Pension Schemes of 1993 in the United Kingdom, which in turn centres on “*Money Purchase Benefits*” that are defined as “*benefits the rate or amount of which is calculated solely by reference to assets which (because of the nature of the calculation) must necessarily suffice for the purposes of their provision to the member (it being immaterial for the purposes of this definition if the calculation of the rate or amount of the benefit includes deductions in relation to administrative expenses or commission).*”
 - (b) A Qualifying Scheme must also make provision (i) for the payment of contributions by an Employer in respect of Employees, at no less than the Core Benefits; (ii) for the payment of Benefits in the event of a Member, or their legal successor in title, leaving their employment or service; and (iii) that each of the Operator, Administrator, Investment Adviser and Fund Manager of the Scheme in question must be regulated by a Recognised Regulator. In the latter context, it is within the discretion of the Board of the Directors of the DIFCA to approve what is a Recognised Regulator (if it is not the DFSA) when it issues a Certificate of Compliance, but it shall only do so after it has consulted with the DFSA.
 - (c) The remainder of the Regulations is concerned with what the Board of Directors of the DIFCA consider as the minimum functionary, operating, reporting and investment requirements for a Qualifying Scheme, primarily to also ensure parity with what will be put in place under the scheme rules for the DEWS Plan. In this context, the established practice in the Isle of Man served as a primary example.
 - (d) Note also that the Proposed Regulations make a distinction between (i) Members as

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Employees; and (ii) any individual, who is not defined as an Employee under the Law but is employed by, or in the service of, a Participating Employer, or its holding company, parent or branch, for whom the Employer wishes to make Member Contributions to a Qualifying Scheme, or any other individual permitted by an Operator to be a member of a Qualifying Scheme. This distinction was specifically introduced to cater for Employers in the DIFC that wish to provide individuals (who are not entitled to Core Benefits) with the opportunity to also be part of a Qualifying Scheme.

- (e) The provisions of Part 8 of the Regulations are also worth considering, specifically insofar as it envisages the requirement for Employers to obtain a Certificate of Compliance in respect of the Qualifying Scheme that it makes contributions to for and on behalf of Employees. This essentially means that anyone who wishes to obtain such a certificate will only be able to do so (i) prior to 1 January 2020; and (ii) then 30 days before the anniversary of that date every year (i.e. they cannot apply for it as and when they wish to do so during the remainder of the year).

- Q3. Do you have any comments or suggestions in respect of the Proposed Regulations?**
- Q4. Do you think enough time is provided for Employers to use a Qualifying Scheme other than the DEWS Plan? If not, please provide your reasons for this view and what you would suggest as an alternative.**
- Q5. What are your views of the Board of Directors of the DIFCA having the ability to decide what is a Recognised Jurisdiction and a Recognised Regulator after consultation with the DFSA?**

Related issues

22. One of the related issues that came up in the Working Group's consultation with DIFC centre establishments during the design stages of the DEWS Plan was whether individuals who are equity partners/ shareholders in firms that exclusively draw their earnings from current or future partnership profits or shareholder dividends from a drawings account should be considered as Employees in the DIFC and, as a consequence, whether their firms are obliged to make Core Benefits contributions in their favour as an Employer.
23. DIFCA is considering to make changes in the Current Law to clarify this issue to the extent that such drawings will not be considered as Remuneration under the Current Law and that consequently they will be exempted in the above regard. Your comments and/or suggestions in this regard will be sincerely appreciated.

- Q6. Do you have any comments or suggestions in respect of DIFCA clarifying this matter in the Current Law?**
- Q7. Do you think that equity partners/ shareholders that derive no other salary or wage from a firm in the DIFC should be exempted from the obligation to contribute Core Benefits for the benefit of such individuals?**

Legislative Proposal

24. The legislative proposal contained in this Consultation Paper consists of the following:
- (a) the Proposed Amendments in legal blackline against the text of the Current Law (at Annex A);
 - (b) the Proposed Regulations (at Annex B); and
 - (c) a table of comments to provide your views and comments on the consultation paper (at Annex C).