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Kakar Advocates LLC is a full-service law firm based in Kabul, Afghanistan. The firm was founded by the Managing Partner, Kawun Kakar. The Legal Department is headed by Thomas Kraemer, Senior Counsel. The legal team is comprised of 12 attorneys, and three legal assistants. Kakar Advocates' main areas of practice, in addition to labour and

employment law, include energy, taxation, aviation, public procurement, banking and Islamic finance, and general business matters. Labour and employment specialisation includes the review and drafting of employment contracts and human resource manuals; Ministry of Labour audits; and dispute resolution in all venues.

Authors



Kawun Kakar is the founder and managing partner specialising in commercial law.



Murtaza Rahimi is an associate attorney whose practice covers labour and employment, civil law, and human rights and constitutional law.



Thomas Kraemer is a senior counsel (head of legal department), specialising in labour and employment, commercial law, energy, mining, and legislation.



Wajiha Timori is an associate attorney with expertise in labour and employment and commercial law.

1. Terms of Employment

1.1 Status of Employee

The Afghanistan Labour Law makes no distinction between blue-collar and white-collar workers.

The Labour Law does not generally distinguish among specific categories of employees (although there are a few provisions applicable to women and/or children). The Labour Law contains provisions specific to state civil servants, but overall it is equally applicable to all categories of employees.

1.2 Contractual Relationship

Under the Labour Law, employment contracts may be concluded for a definite or indefinite period of time and may be full-time or part-time. Employment contracts may also be limited to the provision of a specific task or work. A definite contract is for a period of one year, and will be converted into an indefinite-term contract if not terminated by either party before the end of the year. Any contract with a duration exceeding one year is considered to be a contract for an indefinite term.

The Labour Law requires a written agreement between employer and employee. The contract should include the essential terms of the agreement, including the wage, the location and type of work of the employee. It should further set out the duration of the agreement, working hours and days, and leave entitlements.

1.3 Working Hours

Maximum Working Hours

The Labour Law sets a maximum of 40 working hours per week on average. This number is lower for the following categories of employees: employees of 15–18 years of age (35 hours/week), pregnant employees (35 hours/week), night work (35 hours/week), and employees working underground or performing arduous work (30 hours/week). A workday is typically eight hours and must include a one-hour break, which is not included in the official work hours.

Flexible arrangements are possible but typically require payment of extra wage for hours in excess of the daily or weekly maximum.

Part-Time Contracts

The Labour Law allows for the conclusion of part-time contracts. Part-time contracts may not be concluded as a second contract between employers and employees that already have a contract in place covering the same official hours. The number of working hours specified in a part-time contract may not be less than three hours per day and three days per week.

Part-time contracts may only be entered into if there is a justifiable need for a part-time employee.

Overtime

Under the Labour Law, overtime means any work that is performed outside the normal working hours – as a rule of thumb, any time in excess of eight hours a day – on the initiative of the employer. The overtime may not exceed four hours a day. Overtime work is prohibited for employees performing arduous work, night workers and pregnant women. In general, overtime is only permissible if circumstances so necessitate and when agreed to by the employee.

1.4 Compensation

Minimum Wage

The Afghan government determines the minimum wage. The current minimum wage set by the Afghan government is AFN5,000 (approximately USD70) per month. A draft bill proposing the increase of the minimum wage to AFN12,000 (approximately USD165) per month is currently pending.

Wages are doubled for work performed during national holidays, unless compensatory leave days are granted within two weeks, with the consent of the employee. Overtime payment has to be 25% higher than the wage of a normal working day. If the overtime work is performed during a national holiday, the increase has to be an additional 50%.

Extra compensation is also obligatory for night workers. If the night worker is an administrative or service employee an increment of 15% has to be paid on top of the regular wage. This increase is 25% for production employees.

Bonuses

The Labour Law states that employers may provide incentive payments to employees, but sets no specific rules in this respect. The Law does provide for certain types of social security benefits to the employee and in some cases even family members of the employee. These benefits have to be paid from the employer's funds and include, inter alia, health services (according to financial capacity of the employer), financial aid at retirement, and assistance for childbirth. Employees are also entitled to a pension, which is paid from the pension fund.

Government Intervention

The Labour Law provides that the minimum wage will be set by the government. Wages in the private sector may not be less than the minimum wage set for government employees.

1.5 Other Terms of Employment

Vacations and Vacation Pay

Employees are entitled to paid leave during the public holidays listed in the law. Employees are furthermore entitled to 20 days of paid recreational leave per year. Youth employees and employees performing arduous work enjoy a higher number of recreational leave days per year. Educational institutions benefiting from the general vacations of the

educational institutions are not entitled to the recreational leave provided in the law.

Recreational leave days that are not used by the employee have to be paid out in proportion to the work performed during the relevant year.

Required Leave

In addition to recreational leave, the Labour Law provides for various other types of paid and unpaid leave.

Employees are entitled to ten days of urgent leave every year. This leave is paid and employees are also entitled to other allowances during the leave, as is the case for recreational leave. Urgent leaves are generally requested for urgent family matters.

The Law also provides for leave in the event of sickness of the employee. Employees may take up to 20 sick leave days per year with preservation of salary and other entitlements. If a sick leave exceeds five consecutive days, the employee has to present a medical certificate to the employer. If so required for health reasons, employees may be entitled to up to a one-year additional paid sick leave.

Female employees are entitled to 90 days of paid maternity leave, 30 days of which is taken before delivery of the child. An additional 15 days of maternity leave is granted in the event of delivery of twins or complications during delivery. Payment of salary and other entitlements is conditional upon the presentation of the hospital certificate.

Employees may request up to 45 paid leave days for the performance of the Hajj or pilgrimage to other sacred places. In order to benefit from this type of leave, the employee has to present a certificate from the Ministry of Hajj and Religious Affairs to the employer, as proof that the leave days were used for pilgrimage purposes. Hajj leave may be taken once in a lifetime.

Confidentiality and Non-Disparagement

The employee is obliged to protect the confidentiality of secrets relating to the job and profession. There are no statutory limitations on the confidentiality that may be required from the employee. The Labour Law similarly does not contain any provision setting limitations on non-disparagement obligations of the employee.

Employee Liability

The employee is under an obligation to act responsibly regarding the properties and assets of the employers. The employee further has to take all precautionary measures to prevent damage to such properties and assets. Employees can be held liable to pay damages if these result from their fault. There is no employee liability for any damages that

result from the normal work process. If damages result from the fault of several employees, each employee will be held liable separately in proportion to that employee's type and degree of responsibility.

2. Restrictive Covenants

2.1 Non-Competition Clauses

There are no requirements for the validity of non-compete clauses under the laws of Afghanistan. However, it is expected that non-complete clauses that go beyond what is required to protect the employer's legitimate business interests will not be considered legally valid and thus not be enforceable. Therefore, it is advised to limit the scope and duration of non-compete clauses.

Disputes arising under a non-compete clause, like any contract dispute, would be submitted to the Commercial Court. Court procedures do not include any mechanism for expedited procedures in the event of the violation of a non-compete clause.

2.2 Non-Solicitation Clauses - Enforceability/ Standards

Afghan law does not contain rules on non-solicitation clauses with respect to employees or customers. Here it is also advised, in order to secure legal validity and enforceability, to limit the scope and duration of the non-solicitation clause to what is proportionate in view of protecting the employer's legitimate business interests.

3. Data Privacy Law

3.1 General Overview of Applicable Rules

No rules on data privacy are applicable under Afghan law.

4. Foreign Workers

4.1 Limitations on the Use of Foreign Workers

The Labour Law is applicable to both domestic and foreign workers. Additionally, there is a regulation for foreign workers that provides, inter alia, that if both domestic and foreign workers are available for a position, priority should be given to domestic workers. This means foreign workers can only be hired if no Afghan employee with similar qualifications is available for the position. The employment of foreign workers is limited to their relevant specialisation.

4.2 Registration Requirements

Foreign citizens eligible for employment in Afghanistan must obtain a work visa in order to be able to enter the country. Work visas are generally granted upon presentation

of an introduction letter of the employer and valid identity documents. The employee must subsequently obtain a work permit from the Ministry of Labour, Social Affairs, Martyrs and Disabled. Work permits are generally valid for the period of one year.

5. Collective Relations

5.1 Status of Unions

Both employers and employees can establish unions. The Social Organisations Law governs the establishment and functions of unions. In order to prevent government interference or influence in their functioning, unions cannot be sponsored by the State or political organisations.

Unions are members of the High Labour Council that is mandated to make decisions on labour-related issues and to recommend amendments or policies for the improvement of job-related affairs to the Ministry of Labour, Social Affairs, Martyrs and Disabled.

Currently, there are two active employees' unions in Afghanistan, including the National Union of Afghanistan Workers and Employees (NUAWE) which was established in 1964. The NUAWE has a representative in each industrial zone in the country to protect its members' rights. Recently, the Ministry of Women's Affairs has established a branch of NUAWE in the Ministry with the aim to protect and improve its members' rights and privileges.

5.2 Employee Representative Bodies - Elected or Appointed

The employers' and employees' unions, being social organisations, must be registered with the Ministry of Justice. These unions must have an elected board of directors or executive board, which manages the union based on the Social Organisations Law and the charter of the union. Since the Labour Law prohibits State and political organisations from sponsoring unions, the government has no role in the appointment of the members of the board of directors.

5.3 Collective Bargaining Agreements

The employee unions in Afghanistan, particularly NUAWE, have signed some agreements with some factories and companies in order either to improve job conditions or to protect members' rights. However, there is no general practice of concluding bargaining agreements between unions and employers. There are no separate provisions for the negotiation, implementation or enforcement of collective bargaining agreements.

6. Termination of Employment

6.1 Grounds for Termination

Under the Labour Law, an employment contract may be terminated under the following circumstances:

- agreement by the parties;
- end of contract term;
- retirement;
- death of the employee;
- a disability hindering the performance of work;
- cessation of work for more than six months;
- dissolution of the company or reduction in the number of staff;
- final conviction leading to at least two months' imprisonment of the employee;
- disciplinary reasons;
- refusal to work; and
- an unsatisfactory probationary period.

The procedures for dismissal generally require 30 days' notice, although it is common for employers to provide one month's salary and benefits in lieu of notice. Under some circumstances, the employee may also be entitled to severance pay. The Labour Law does not make any provision for immediate termination.

Collective redundancies can generally not be carried out without the approval of the Ministry of Labour, Social Affairs, Martyrs and Disabled.

6.2 Notice Periods/Severance

If the employer wishes to terminate the employment agreement for any of the reasons provided for in the law, one month's notice is required. Although the law does not state explicitly that the notice must be given in writing, it is generally recommended. Termination upon immediate notice is possible during the probationary period, unless the reason for termination is unsatisfactory performance of the employee.

Employees may terminate the employment agreement without prior notice if the employer has violated the labour law or breached the provisions of the employment agreement. Termination without notice to employer is also allowed in the case of incurable illness of the employee. In other circumstances, one month's prior written notice is the general rule.

When an employee is terminated because of cessation of work, reduction in staff, imprisonment or refusal to work, the employer is obliged to make severance payments, based on the duration of employment as follows:

- less than one year: one month's salary including entitlements;

- one to five years: two months' salary including entitlements;
- five to ten years: four months' salary including entitlements; and
- more than ten years: six months' salary including entitlements.

Other than the requirement of one month's notice, and the payment of severance in some circumstances, there are no particular procedures for termination under the law.

6.3 Dismissal for (Serious) Cause (Summary Dismissal)

Disciplinary penalties can be imposed on employees if the employee violates the law or the organisation's internal policies. The law does not further define what are grounds for discipline. It does define various disciplinary measures that can be taken against the employee in the case of a discipline violation: (i) advice; (ii) warning; (iii) deduction of salary; (iv) transfer of the employee; and (v) termination of the employment agreement.

The employer is free to determine which measure is imposed, but shall consider the severity and circumstances of the violation, the personal situation of the employee, and the employee's past history. In the case of multiple violations, a measure may be taken for each violation. Measures have to be issued in writing and have to be recorded in the employee's record file.

The employment agreement can only be terminated for disciplinary reasons after two previous disciplinary measures have been taken against the employee in the period of a year.

6.4 Termination Agreements

The Labour Law allows for the conclusion of termination agreements (agreement by the parties) as a ground to terminate the contract.

6.5 Protected Employees

The Labour Law protects employees against dismissal or termination of their employment contract during paid leave periods or during service on missions/secondment assignments unless the company of the employer has been totally dissolved. The Labour Law does not provide for categories of employees that enjoy specific protection against dismissal.

7. Employment Disputes

7.1 Wrongful Dismissal Claim

If the employee considers a dismissal unjustified, the employee may submit a complaint to the Labour Settlement Commission of the employer. If the Commission does not take the necessary steps to resolve the complaint, the em-

ployee may submit a complaint to the Central Commission for Dispute Settlement. Finally, if the parties do not reach an agreement to resolve the dispute, the employee may submit a complaint to the competent court.

7.2 Anti-Discrimination Issues

The Constitution of the Islamic Republic of Afghanistan forbids any kind of discrimination among the citizens and states that all the citizens have equal rights and duties before the law. The Labour Law also prohibits any kind of discrimination in workplace with regard to recruitment, payment of wages and entitlements, profession, field or speciality, and social security. It particularly prohibits non-recruitment of pregnant women or women who are nursing their children.

The Civil Procedure Code and the Commercial Procedure Code provide that the burden of proof is on the plaintiff, in this case the employee. Proof is by a preponderance of the evidence.

If the Dispute Resolution Commission or the competent court determines that the employee's termination was unlawful, the Commission or the court can order the employee's appointment or reappointment. In addition to the employee's reappointment, the Commission or the court may order the employer to pay the wages and other benefits accrued during the period of the employee's dismissal. This payment shall be based on the average monthly wage as well as the other benefits of the six months immediately preceding the employee's dismissal.

Kakar Advocates LLC

Shahre Naw,
Kabul, Afghanistan

Tel: +93 783 300 400
Email: Office@KakarAdvocates.com
Web: <http://www.kakaradvocates.com>



8. Dispute Resolution

8.1 Judicial Procedures

The employee must first submit a complaint to the Dispute Settlement Commission of the employer before any judicial procedure can be initiated. If the Commission does not take necessary measures to resolve the dispute, the employee may complain to the Central Commission for Dispute Settlement of the Ministry of Labour, Social Affairs, Martyrs and Disabled. If the parties do not reach an agreement in this Commission, then the case may be referred to the competent court. There are no special judicial requirements or proceedings for employment matters in the courts.

There is no mechanism for class action lawsuits in Afghan courts.

Both the employer and employee may present their own case before the court, or may be represented by an attorney.

8.2 Alternative Dispute Resolution

Arbitration is possible in theory. However, while attempts are being made to create a practical framework, there are few organisations in Afghanistan offering competent arbitration services.

According to the Afghanistan Arbitration Law, the employer and employee can include an arbitration clause or provision in the employment contract. The arbitration clause is enforceable.

Even if the parties have not included an arbitration clause in their contract, the parties can refer the dispute to arbitration upon mutual consent.

8.3 Awarding Attorney's Fees

The awarding of attorney's fees is common in civil procedures in Afghanistan. The court may award the prevailing employer/employee partial or full compensation of attorney's fees and other expenses related to the lawsuit.