

Consultation Paper No.9

Introduction

1. Why are we using this paper?

This Consultation Paper aims to explain the proposed amendments to the existing AIFC Employment Regulations (the “Regulations”).

The proposed amendments to the Regulations retain the structure and contents of the Regulations, but one of the core benefit provisions are refined. The proposed amendments affect the Section 64.

Section 64 – End-of-service gratuity

Basic provisions are suggested to be described in the Proposed Regulations regarding the End-of-Service gratuity. Depending on the type of organization and the job, the end-of-service gratuity may be quite different. The proposed provisions in the Regulations will give an opportunity for each Employer to set up and offer the end-of-service gratuity in alignment with business needs and based on the cost-effectiveness of the organization budget.

2. Who should read this paper?

This Consultation Paper may be of interest to the current and prospective AIFC Participants, as well as all the AIFC Bodies and their organisations, individuals employed by AIFC Participants or AIFC Bodies or individuals seeking to be employed by AIFC Participants or AIFC Bodies, as well as legal advisors and human resources departments of the abovementioned entities, and generally, to all interested in providing their feedback to the Proposed Regulations.

3. How to provide comments?

AIFC encourages interested parties to provide their views and comments in writing on the issues outlined in the Consultation Paper.

All comments should be provided to the following person:

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You may as well identify your organisation in the provided comments.

By submitting your comments to the AIFC Authority you expressly consent to the processing by the AIFC Authority of the personal data pertaining to you, including, but not limited to the collection, recording, organisation, storage, adaptation or alteration, retrieval, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction of thereof, as per the AIFC Data Protection Regulations 2017.

The AIFC Authority reserves the right to publish, including on its website, any comments you provide, unless you expressly request otherwise at the time of making comments. Comments supported by reasoning and evidence will be given more weight by AIFC Authority.

4. What happens next?

The deadline for providing comments on the proposals in this Consultation Paper is January 4, 2021.

Once we receive your comments, we will consider if any further refinements are required to the Proposed Regulations annexed to this Consultation Paper at Annex 1. Once the task is complete, the draft of the Proposed Regulations will be further processed in accordance with the requirements, stipulated in the AIFC Regulations on AIFC Acts 2017.

The Proposed Regulations are in draft form only and are, therefore, subject to change following consultation as mentioned above. Consequently, you should not act on it until the Proposed Regulations are formally enacted.

This legislative proposal

Annex 1 – Policy paper

Annex 2 – the proposed AIFC Act

Annex 1: Policy Paper on Amendments to the AIFC Employment Regulations 2017

Nur-Sultan

Date December 4, 2020

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2. Proposal type

a) New	<input type="checkbox"/> Regulations	<input type="checkbox"/> Rules	<input type="checkbox"/> Policy	<input type="checkbox"/> Procedure	<input type="checkbox"/> Other: _____
b) Amendment to	<input checked="" type="checkbox"/> Regulations	<input type="checkbox"/> Rules	<input type="checkbox"/> Policy	<input type="checkbox"/> Procedure	<input type="checkbox"/> Other: _____

3. Introduction

The AIFC Employment Regulations 2017 (the "Regulations") has been developed with purposes to provide minimum employment standards, to promote the fair treatment of Employees and Employers, and to foster employment practices that contribute to the prosperity of the whole AIFC. The AIFC participants must comply with the Regulations, give due consideration to local practices and respect relevant international standards. In many situations, the Regulations, providing a minimum standard, should not impede an Employer from choosing different ways to establish own criteria for employee benefits. Such approach will give an opportunity to recognise and value the different backgrounds of employees and seek to attract and retain the best qualified ones.

4. Purpose and scope of the Proposed AIFC Act

It is proposed to minimize the end-of-service gratuity terms in the Regulations and let the Employers to specify additional provisions/supplementary conditions through the Contracts of Employment.

The proposed amendments to the Regulations will clear the terms and conditions for providing a long-term benefit to the Employee, this kind of benefit will be attractive and could be various for all AIFC Bodies, their organisations, AIFC Participants. As the Regulations provide minimum employment standards the Employer will have an opportunity to offer more favourable conditions for end-of-service gratuity payment than those required under the Regulations and within the capabilities (including financial possibilities) of the organisation itself. The proposed amendments are also important for the AIFC during its ecosystem successful development to engage more financial institutions, financial, consulting services providers, to give them an opportunity to set own limits for their Employees' compensation and benefits packages.

5. Operation of the Proposed AIFC Act

Section 64, Subsections (1) – (6):

The whole section proposed to be omitted. The gratuity payment and compensation of the pension contributions are considered as the long-term benefits. Such benefits require case-by-case approach. In regards with gratuity the one-year employment for receiving such payment is not the best way to retain employees and Contracts of Employment within the AIFC' organisations are concluded for one year. Moreover, since AIFC establishment there are numbers of employees of the one organisation moved to other within AIFC pool. So, it is important to let the parties – Employer and Employee – agree their own, acceptable for both, terms either to pay/receive gratuity nor to compensate a pension contribution.

The gratuity payment calculation method has to be omitted as the current wording provides minimum days for each worked year, moreover it is stating 5 years of employment as the trigger where the organisations may apply more suitable and attractive methods using another practices. The total amount of the gratuity is also limiting an opportunity to set out other types of calculation methods for the choice of the Employer.

Limitation of the daily rate establishment at the date of termination is questionable as the Basic Pay may be changed for example a day before the Employee resignation, so such provision should be established by the Employer and again considering the best practices.

Deduction terms already stated in Section 20 of the Regulations and might be detailed under Employee's Contract of Employment.

However, the clarification of how to calculate an amount of gratuity payment for the worked period within the year till the date of termination could be stipulated by Employee's Contract of Employment and/or more detailed description could be written in internal policies .

Furthermore, it should be highlighted that the proposed amendments alleviates practical application in regards of pension scheme considered by Subsection (5) – (6)

The End-of-service gratuity is available for Employees who have no pension scheme supported by the Employer. Current terms described in Regulations are still making questionable an eligibility due to the obligatory pension contributions for local Employees.

In result of removing of the existing minimal and maximal limits for end-of-services payment there will be introduced a flexibility and will be allowed to offer individual (contractual) amount in relation to the needs of the AIFC Participant and its business as well as its financial abilities.

6. Best practice

An international practice varies in respect of benefits packages, an Employers enjoy a total freedom to establish a competitive remuneration. Additional benefits related to the fact that employment is terminated are maybe regulated by the legislation and more compensations above the obligatory ones maybe considered by the Employer.

International practice on gratuity payment varies and there is no single approach. For instance, some countries have individual severance payment account schemes under which employers and/or employees pay pre-defined contributions to the employee income provision funds during the whole, or parts of, duration of the employment relationship. At the time of employment termination, accumulated funds are either provided to the employee, or carried over to a new employer, or may be transferred to a pension fund. For the employee, even if these payments respond to a social criterion of protection of the labourer against the income loss, they also represent a deferred remuneration, a payment of something that in any case belongs to the employee and that may even inherited in case of employee's death. In some countries like Brazil, these funds may also be used for purposes other than compensation of income loss because of the employment termination. Given these particularities, these payments are not considered as part of standard severance or redundancy pay. This list of countries with such schemes includes (not exhaustive):

- Chile: there exists a system of substitute indemnity regardless of the reason for termination, through the Administrators of Pension Funds (Administradoras de Fondos de Pensiones). There is the possibility for an agreement to be made between the employer and the employee on a substitute indemnity, from the beginning of the seventh year of employment up to the end of the 11th year of the employment relationship. Under these agreements, a monthly contribution of 4.11 per cent of the employee's monthly wage or salary, with the salary to which this percentage applies limited to 90UF, is deposited by the employer in an insured pension fund. As of July 1, 2010, 1UF was equivalent to Ch\$21,204. This indemnity would be payable in any case of termination and also in case of death. As such, it is not included into the calculation of the severance pay.

- Italy: *Trattamento di fine rapporto*, or end-of-employment contract indemnity, is a certain amount of salary set aside each month to be paid to each employee upon termination of the employment contract. Since 2007, the employee can choose between leaving the employer's contributions within the enterprise or transferring them to either a state pension fund or private complementary pension funds.

- Peru: *Compensacion por Tiempo de Servicios (CTS)*, or a seniority award, is a social benefit payable to a worker upon termination of employment irrespective of the reason for the termination, and equivalent to one monthly average salary per year of service. The CTS is deposited to a bank chosen by the employee each semester, 50 per cent at all times (in May and November). While prior to 1991, the CTS was to be paid only once the employment relationship was terminated, the employee can now freely withdraw up to 50 per cent of the CTS. Initially, this benefit was linked to the unjustified dismissal, being considered as an indemnity for dismissal. As it developed, its field of action widened, and currently the worker has the right to collect it regardless of the termination cause, including voluntary retirement and grave fault. By nature, this benefit is considered to be a deferred remuneration (ELL, 1990 in IELLIR, 2012).

With regard to the above mentioned the provision of the payments may be provided in collective agreements or in employment contracts, for example, in Sweden, Denmark (for blue-collar

workers), Japan, Central African Republic, Democratic Republic of the Congo, New Zealand, Norway, and the United States.

Particularly, the end-of-service gratuity is a statutory severance pay in Gulf countries, similar to retirement savings or pension scheme (example cases mentioned in above). It is a key benefit for non-national employees working in each of the Gulf countries.

The DIFC introduced a mandatory savings scheme to replace the end of service gratuity currently being offered to expatriate employees. Under the new scheme, all DIFC employers will be required to make mandatory monthly contributions into a qualifying scheme for each eligible employee. Employees will be able to make voluntary contributions and will retain an entitlement to an end of service gratuity on the basis of service up to 31 January 2020. It should be noted that any employee, even an employee who is otherwise exempt, who wishes to contribute any part of their remuneration into a Qualifying Scheme can inform their employer in writing of their wish and the employer is then permitted to deduct the agreed amount from the employee's remuneration to pay into the Qualifying Scheme on behalf of the employee.

In consideration the international practice and unique features of the it is proposed to allow AIFC employers to define own criteria for eligibility and calculation methods of the gratuity payment.

Offering the end of service payment is important for the Employee's future. Same time some of the AIFC organisations as non-profit organisations must ensure and afford to comply with such payment. Those organisations for whom the budget allocation for such payments requires additional funds should have a possibility in setting certain conditions and other organisations may even implement their own pension scheme. But it must be covered by the Contract of Employment.

7. Outcomes

The ultimate outcome of the proposed amendments is establishment of statutory ground for the unique and various terms and conditions for gratuity payment based on every organisation capability.

Subsections (1) (2), (3), (4), (3) of section 64:

The limitation of the continuous employment and total amount for gratuity payment should be optional for each organisation, for example, an amount of gratuity payment might be linked to the grading system, might depends from overall performance rate or unlimited, and its again depends on each organisation capabilities within consideration of the best practices.

Subsections (5), (6) of section 64:

Provisions under these subsections are purely depends on the readiness of the Employer to establish own saving funds (compensation of pension scheme), on the financial capability to cover the obligatory pension contributions in accordance with National legislation of the Republic of Kazakhstan and additionally ensure the end-of-service gratuity payment as well as make the saving funds open for Employees who already receiving pension contributions made by the Employer.

As the AIFC in Kazakhstan is emerging centre, the most its organisations are financed by the government for the beginning while its grow and success. The benefits package for the Employee require an additional budgeting and funds that is limited. Some organisations within AIFC may not cover the end-of-service gratuity and they should have an opportunity to establish own criteria.

An ultimate outcome is to create a business environment tailored to the needs of each AIFC Participant and provide liberal employment policy.

8. Financial implications

The proposed amendments do not require an additional expenditure from the AIFC budget.

9. Proposal

To delimit the part in Section 64 concerning the conditions for end-of-service gratuity payment.

**AIFC EMPLOYMENT
AMENDMENT REGULATIONS 2020**

**AIFC REGULATIONS No. ___ of 2020
_____ 2020
Nur-Sultan, Kazakhstan**



CONTENTS

PART 1: GENERAL 7

- 1. Name 7**
- 2. Date of enactment 7**
- 3. Commencement 7**
- 4. Legislative authority 7**
- 5. Interpretation 7**

PART 2: AMENDMENTS OF AIFC EMPLOYMENT REGULATIONS 2017 8

PART 1: GENERAL**1. Name**

These Regulations are the *AIFC Employment Amendment Regulations 2020*.

2. Date of enactment

These Regulations are enacted on the day they are approved by the Governor.

3. Commencement

These Regulations commence on ____ 2020.

4. Legislative authority

These Regulations are adopted by the Governor under paragraph 3 of article 4 of the Constitutional Statute and subparagraph 3) of paragraph 9 of the Management Council Resolution on AIFC Bodies.

5. Interpretation

Terms used in these Regulations have the same meanings as they have, from time to time, in the AIFC Employment Regulations, or the relevant provisions of those Regulations, unless the contrary intention appears.

PART 2: AMENDMENTS OF AIFC EMPLOYMENT REGULATIONS 2017

6. This Part amends the *AIFC Employment Regulations 2017*.

7. Omit section 64 (End-of-service gratuity), substitute:

“64. End-of-service gratuity

- (1) An Employee’s Contract of Employment may provide that the Employee is entitled to payment of a gratuity by the Employer on the termination of the Employee’s employment with the Employer.
- (2) However, if the Employee was an Employee of the Employer immediately before the commencement of the *AIFC Employment Amendment Regulations 2020*, this section as in force immediately before that commencement continues to apply in relation to the Employee unless:
 - (a) the Employee’s Contract of Employment with the Employer is amended or is replaced by another Contract of Employment with the Employer; and
 - (b) the amended or replacement contract provides that that section does not apply in relation to the Employee.”