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Defense Contracting Special Series – Release 2: Local Employees and the Afghan Labor Code

Many contractors remain unclear about their obligations to their local employees under Afghan law, including:

- a) whether Afghan law applies;
- b) the main benefits available to local employees;
- c) how to become compliant with Afghan labor laws; and
- d) whether the application of labor laws may be modified or excluded by agreement.

This Release¹ will:

- outline why Afghan labor laws apply to employment relationships between defense contractors and their local employees;
- highlight some of the main benefits available to local employees;
- explain why it may not be possible to be in strict or full compliance with Afghan labor laws;
- examine whether labor laws may be excluded or modified by mutual agreement; and
- provide a conclusion and suggest a way forward.

Part 1: Why Afghan Labor Law Applies

The Bilateral Security Agreement (**BSA**) and the new Agreement on the Status of NATO Forces and the NATO Personnel Conducting Mutually Agreed NATO-Led Activities in Afghanistan (**SoFA**) each set out the rights and obligations of defense contractors and their local personnel under Afghan law. The BSA and SoFA unequivocally state that, with limited exceptions, defense contractors and their personnel are both subject to, and must abide by, Afghan law – this includes Afghan labor law².

Part 2: Main Provisions of the Labor Code

Afghan labor law is primarily set out in the Labor Code (2008)³. The main benefits and protections available to local employees under the Labor Code are outlined below.

Maximum working week – the maximum working week cannot generally exceed:

- a) 35 hours for pregnant women and employees under 18 years of age;
- b) 30 hours per week for those engaged in dangerous or underground activities; and
- c) 40 hours per week for all other employees.

An employee that works in excess of these maximum hours is entitled to a 25% over-time loading on normal working days. An employee required to work on a public holiday is entitled to an additional 50% loading.

Safety - the employer is responsible for ensuring that its employees are provided with a safe and hygienic work environment. This may require the employer to continuously train its employees on work safety, accident prevention and hygiene.

Unpaid breaks during work hours – the employer must provide its employees with time during the working day in which to eat and pray.

Meal and travel allowances – the employer is responsible for providing employees with reasonable meals and transport, or alternatively, a reasonable allowance in lieu.

Employment assistance – upon termination of an employee who has been unable to work for at least 6 months, or who has been laid-off due to restructuring, or who is in prison or otherwise refuses a reassignment to a previous position, the employee is entitled to payment of:

¹ Nothing in this document constitutes legal advice. We are not liable to any person that has relied on any part of this document.

² There are no applicable employment exceptions other than the exception from the requirement for foreign employees to obtain Afghan work permits. There continues to be debate about whether Afghan labor law applies to the employment relationships between defense contractors and their foreign employees. This will be examined in a future Release.

³ It has been suggested that certain parts of the Labor Code may not be appropriate for modern Afghanistan – strict compliance with the Labor Code may not be conducive to doing business in a developing market economy.

- a) 1 month's salary, where s/he has been employed for 12 months;
- b) 2 months' salary, where s/he has been employed for more than 12 months but less than 5 years;
- c) 4 months' salary, where s/he has been employed for more than 5 years but less than 10 years; and
- d) 6 months' salary, where s/he has been employed for more than 10 years.

Pension –employees have a general right to a pension although the Labor Code does not specify how such pension should be calculated.

Legal Holidays - legal paid holidays per year include:

- (a) Fridays;
- (b) New Year's Day;
- (c) Restoration of Independence;
- (d) Victory of the Islamic Revolution of Afghanistan;
- (e) the first day of Ramadan;
- (f) the three days of Eid e Feter;
- (f) the four days of Eid e Said e Adah;
- (g) the birthday of the Prophet (PBUH);
- (h) the Day of Ashura;
- (i) the day of Soviet withdrawal; and
- (j) additional days announced as holidays by the Government of Afghanistan.

Recreation – all employees who have served for more than 11 months are entitled to at least 20 days of paid recreational leave per year. Employees below the age of 18 are entitled to 25 days of paid recreational leave per year.

Employees engaged in dangerous or underground work are entitled to 30 days of paid recreational leave per year.

During their recreational leave, employees are entitled to receive their full wages and they retain their employment and labor contract rights.

Sick leave - all employees are entitled to up to 20 days of paid sick leave per calendar year. Employees employed during the first half of the year are entitled to the full 20 days. Those employed during the second half of the year are entitled to 10 days. During their sick leave, employees are entitled to receive their full wages and they retain their employment and labor contract rights.

Urgent leave – all employees are entitled to 10 days of paid urgent leave per year in the following situations:

- a) to marry;
- b) in the event of the death of an immediate family member or spouse, mother or father-in-law, uncle, aunt; or
- c) for the birth of a child.

Haj leave – all employees are entitled to 45 days paid Haj (pilgrimage) leave once during their period of employment. During their Haj leave, employees are entitled to receive their full wages and they retain their employment and labor contract rights.

Maternity leave - pregnant employees are entitled to 30 days leave prior to the approximate date of childbirth and to 60 days leave afterwards. In the event of a complication in childbirth, employees are entitled to an additional 15 days.

Employee termination – the Labor Code specifies a limited number of grounds for termination and imposes a dismissal procedure.

Part 2: Difficulties with Strict Compliance

The Labor Code can be difficult to implement due to a number of drafting and other technical defects. The drafting issues lead to ambiguity and potentially contradictory interpretations of important provisions. There are also a large number of technical legal defects. For example, the Labor Code contains several provisions that envisage the establishment of certain funds or commissions, or the enactment of regulations, to clarify or give effect to the operation of its provisions. Regrettably, the envisaged funds or commissions have not been established, nor regulations issued. As a result, important Labor Code provisions remain unclear and seemingly ineffective, resulting in employers having to improvise in the hope of ensuring compliance.

To make things worse, in practice certain provisions of the Labor Code seem to be strictly enforced, while others are less strictly enforced, not enforced at all, or enforced in a modified way. Unfortunately, the Ministry of Labor has not provided any official guidance on the application of the problematic parts of the Labor Code. Consequently, strict or full compliance with the Labor

Code is not possible in practice.

This does not mean that contractors can ignore the Labor Code. As mentioned earlier, under the terms of the BSA and SoFA, contractors must be compliant with applicable Afghan law, including the Labor Code. However, because full compliance is not possible in practice, as a minimum, currently Afghan authorities expect, and are likely to be satisfied with, substantial compliance.

However, even substantial compliance may seem difficult in the circumstances. To be substantially compliant with the Labor Code, contractors must not only understand the Labor Code as written, but must also understand how, if at all, each provision is applied in practice and how to structure their employment contracts and policies. The vast majority of contractors will require Afghan employment law advice and support to achieve substantial compliance.

Part 4: Can the Labor Code be Excluded or Modified by Agreement?

Contractors frequently implement employment contracts with local employees that are inconsistent with the Labor Code. Such contracts may stipulate a governing law other than the law of Afghanistan and may even contain a clause expressly excluding the terms of the Labor Code. These practices raise the question of whether the operation of the Labor Code may be excluded or modified by mutual agreement.

The Labor Code is silent on the issue of whether its terms may be excluded or modified. Based on a strict application of Afghan law, it would appear that the Labor Code's terms cannot be excluded or modified by mutual agreement⁴.

However, with proper advice, drafting and implementation, it is possible to limit or modify the application of certain provisions of the Labor Code to make modern employment relationships between contractors and their local staff more workable in practice.

Part 5: Conclusion and the Way Forward

Pursuant to the BSA and SoFA, all employment relationships between defense contractors and their local employees are generally subject to, and governed by, the Labor Code. The Labor Code sets out extensive employee benefits and protections.

Full or strict compliance with the Labor Code may not be possible. The best outcome that that may be achieved is substantial compliance. Given the drafting and technical issues, and the lack of official guidance from the Ministry of Labor, substantial compliance may also be difficult to achieve for many contractors. Thus, contractors may be at risk of being found to be in breach of the Labor Code.

However, with proper Afghan employment law advice and support, contractors can significantly reduce the risk of being found to be in breach of the Labor Code. Contractors that employ local nationals should carefully review their standard employment practices with their Afghan advisors. In doing so, they should ensure that the Labor Code, as applied in practice, is incorporated into their employment practices.

For a confidential discussion regarding your circumstances, contact me.

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⁴ Whilst employers and employees are free to negotiate and enter into a contract of employment, they are not free to determine all terms and conditions of their employment. The Labor Code may override some of the terms that the parties have specifically agreed. This is because the Labor Code has a protective function. This reflects the need to protect employees from the effects of inequality of bargaining power inherent in the employment relationship. Thus, it appears that the Government of Afghanistan has legislated for the minimum conditions of employment as specified in the Labor Code and that the parties cannot change these minimum conditions.