

## Defense Contracting Special Series – Release 4: Are Employment Arrangements Between Defense Contractors and their Foreign Employees Governed by Afghan Labor Laws?

October 3, 2017

By Zmarak Zhouand FCI Arb

The United States Federal Acquisition Regulation requires United States Government (**USG**) contractors to comply with Afghan labor laws. In Release 2, issued on March 6, 2016, we outlined contractor compliance obligations with respect to local (aka, Afghan) employees under Afghan labor laws.<sup>1</sup> We are frequently asked whether Afghan labor laws also govern the employment relationship between defense contractors and their foreign employees based in Afghanistan. The answer, on a proper application of the law, is yes.

### Legal Framework for Operation of Defence Contractors

Afghanistan is a sovereign nation and has the exclusive right to legislate on any matter in its territory. A person who is inside Afghanistan must abide by Afghan law and is subject to the jurisdiction of the Afghan courts and other authorities. This does not apply where Afghanistan has agreed to exempt that person from compliance with Afghan law or the jurisdiction of its courts or authorities.

Afghanistan has entered into separate agreements with the United States and the North Atlantic Treaty Organisation (**NATO**).<sup>2</sup> Under these agreements, Afghanistan has agreed: (i) to grant limited exemptions from compliance with Afghan law to United States and NATO military forces and their civilian personnel, as well as contractors and their employees<sup>3</sup> and (ii) to relinquish jurisdiction over United States and NATO military forces and military civilian personnel.<sup>4</sup>

Importantly, under the above referenced agreements, there are no exemptions from compliance with Afghan labor laws. Further, whilst Afghanistan has agreed to relinquish jurisdiction over United States and NATO military forces and military civilian personnel, it has retained full jurisdiction over contractors and their employees.

Based on the above, it follows that: (i) contractors and their employees (both local and foreign) are subject to, and must comply with, Afghan labor laws; and (ii) Afghanistan may exercise jurisdiction over contractors and contractor employees with respect to Afghan labor law matters.

---

<sup>1</sup> A copy is available at: <http://lawyers.af/media/592541c75a4fd.pdf>. In that Release, we indicated that we would examine the question of whether the employment relationship with foreign employees was also governed by Afghan labor law in a later Release.

<sup>2</sup> The agreements are as follows: (i) Status of North Atlantic Treaty Organization Forces and North Atlantic Treaty Organization Personnel Conducting Mutually Agreed North Atlantic Treaty Organization-Led Activities in Afghanistan, between Afghanistan and North Atlantic Treaty Organisation dated September 29, 2014 (**SoFA**); and (ii) Security and Defence Cooperation Agreement between the United States of America and the Islamic Republic of Afghanistan, an international agreement between Afghanistan and United States dated September 29, 2014 (**BSA**).

<sup>3</sup> These include limited exemptions from paying certain taxes, licensing and permit requirements, import levies and restrictions, etc. Contractors and their personnel are not exempt from complying with Afghan labor laws.

<sup>4</sup> It is important to note that contractors and their employees are not part of the civilian component of the military. The civilian component of the military generally means its civilian employees. It does mean contractors (or their employees) retained to provide goods and services to the military under commercial contracts.

## Application of Labor Code

Afghan labor law is primarily set out in the Labor Code. The Labor Code regulates the employment relationship between local and foreign employers operating in Afghanistan, with their local and foreign employees working in Afghanistan. Article 5 is as follows.

### **“Article 5:**

*(1) This Law regulates the general labor relations of all categories of employees, whether local or foreign, with their administration...”*

Article 5(1) makes it clear that the Labor Code governs the employment relationship between local and foreign employees and local and foreign employers in Afghanistan. This includes the employment relationship between defense contractors and their local and foreign employees.<sup>5</sup>

## Drafting Issues with Labor Code

There are a number of drafting issues with the Labor Code. As a result of these drafting issues, some have argued that the Labor Code does not apply to foreign employees of defense contractors. A full analysis and discussion of these issues is beyond the scope of this Release. However, having undertaken a full analysis, we wish to highlight the following.

- The agreements between Afghanistan, the United States and NATO respectively do not exempt contractors and their employees, local and foreign, from compliance with the Labor Code.
- Based on the ordinary and plain meaning of the language of the Labor Code, the Labor Code covers the employment relationship between defense contractors and their employees, both local and foreign. A contrary reading would require a court to either ignore the ordinary and plain meaning of the language of the Labor Code, or attribute a substantially different meaning to it.
- The Labor Code and the Constitution of the Islamic Republic of Afghanistan 2004 make it clear that the Labor Code cannot be applied in a way that discriminates against employees on the basis of national origin. Consequently, a finding that foreign employees are not entitled to the benefits available under the Labor Code, because they are foreign, would be discriminatory and unlawful.
- Overall, we are satisfied that, on a proper application of the law, the Labor Code applies to govern the relationship between defense contractors and their foreign employees based in Afghanistan.<sup>6</sup>

---

<sup>5</sup> Article 3 of the Labor Code sets out the relevant definitions. Article 3(1) defines “administration” as “Ministries, state or non-state administrations, independent commissions, enterprises, private or mixed business, and international organizations in the Islamic Republic of Afghanistan in which Employees engage in production work or service.” Article 3(2) defines “employee” as “a State civil servant, worker or service personnel, whether male or female.” Article 3(3) defines “worker” as a “person that is employed by an administration on a contractual basis.”

<sup>6</sup> In January 2017, in separate meetings with senior representatives at the Ministry of Justice and the Ministry of Labor, Martyrs & Social Affairs, both agencies agreed with our analysis and that the Labor Code covered the employment relationship between defense contractors and their local and foreign personnel. Obviously, any interpretation offered by the subject ministries, or any other executive agency, is not binding nor determinative. Under the Afghan constitution, only the Afghan courts are entitled to make binding interpretations of law.

## Labor Code benefits

The Labor Code, on a proper application, does not discriminate between local and foreign employees. Both local and foreign employees are entitled to the same benefits. A summary of the main benefits available under the Labor Code is set out in Release 2 which can be found at: <http://lawyers.af/media/592541c75a4fd.pdf>.

There are no limitation periods on Labor Code actions.

## Way forward

It is important for foreign employees and their defense contractor employers to educate themselves on their respective rights and obligations under Afghanistan's labor laws.

This is especially important for employers given their obligations to comply with the Afghan labor laws under the Federal Acquisition Regulation and the generous benefits available to both foreign and local employees under the Labor Code including, but not limited to, overtime.

Zmarak Zhouand FCI Arb, Partner

Member, New York Bar Association, NY, United States, Barrister & Solicitor, NSW, Australia, Fellow, Chartered Institute of Arbitrators, London, United Kingdom

Afghanistan Lawyers International, a TerraLex Firm - 162 premier law firms, over 19,000 attorneys, 102 countries

(t) +93 791 669 999 (Afg), +971 505 543 584 (UAE)

(e) [z@lawyers.af](mailto:z@lawyers.af)

(w) [www.lawyers.af](http://www.lawyers.af)

This document does not constitute advice and should not be relied upon by any person. We shall not be liable to any person that relies on the contents of this document. In each case, formal specific advice should be obtained from qualified counsel or other qualified advisor.

<b>The Legal 500 Europe, Middle-East and Africa 2017</b>	<b>IFLR1000 2017</b>	<b>Chambers &amp; Partners (Global &amp; Asia-Pacific) 2017</b>
Top Tier Law Firm (Afghanistan) – Afghanistan Lawyers International	Leading Lawyer (Banking) – Zmarak Zhouand	Band 1 General Business Law (Firm) – Afghanistan Lawyers International
Leading Lawyer (Afghanistan) – Zmarak Zhouand	Leading Lawyer (Mergers & Acquisitions) – Zmarak Zhouand	Band 1 General Business Law (Individual) – Zmarak Zhouand
Recommended Lawyer (Project Finance and Telecommunications) – Zmarak Zhouand	Leading Lawyer (Financial Services Regulatory) – Zmarak Zhouand	
Recommended Lawyer (Dispute Resolution) – Abdul Shukor Mahjoor		