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NITAQAT

The government in the Kingdom of Saudi Arabia (“KSA”) has a renewed focus on the issue of employment and opportunities for Saudi nationals.

It is clear that there is a real focus on Saudisation in KSA and companies that do not comply will not be able to secure or renew visas for expatriates. Last year the Ministry of Labour (“MOL”) in KSA passed Ministerial Resolution no. (4040) dated on 12/10/1432H and announced a new Saudisation initiative known as the Nitaqat Program, to encourage the employment of Saudi nationals in the private sector.

The Nitaqat system in our opinion represents a real departure from the imposed quota system that has to date operated in some Gulf States. Nitaqat creates a market for Saudisation where companies are judged against their peers and challenged to lead the field in a particular sector or to suffer disadvantages as business. Whereas a quota system is hard to enforce where no one can comply due to skill shortages in the labour market, a system that creates a “race” to Saudisation will drive the changes that are needed in that labour market over the long run. A real economic incentive has been created to become a market leader in this area. The sanctions that can be imposed for companies that are classified as non-compliant (red) are severe and include an inability to apply for new work visas or renew work permits (Iqamas) for expatriate employees. Further any non-compliant company will not be able to register any new branch or activity with the MOL in KSA. There have been further developments recently announced by the KSA government in this area including a wages monitoring systems and skills test for issuance of Iqamas.

Please note that some of the information in this article is derived from our discussions with the MOL. The Nitaqat programme may also be subject to change. We would therefore recommend that you seek legal advice to ensure that you have accurate information on the Saudisation percentages applicable and the implications of this.

What is Nitaqat?



The previous Saudisation programme divided the market into 11 activities based on which it applied the Saudisation requirements. Nitaqat seeks to implement a more tailor made system and the existing Saudisation system as follows:

- the activities of the establishment were divided into 41 activities (“**Activities**”) to account for the new activities that have arisen in the market;
- it abolished the mandatory 30% requirement for Saudisation applicable to most entities under the old system;
- issued new Saudisation percentages based on the establishment’s capability of employing Saudis and the availability of local talent for such industries; and
- based the Saudisation percentage on the size of the business. Therefore, each of the 41 activities was sub-divided, based on the business’s size into the following categories:
 1. Huge (3000+ employees);
 2. Large (500+ employees);
 3. Medium (50 – 499 employees);
 4. Small (10 – 49 employees); and
 5. Very small (9 employees or less).(together “**Business Sizes**”)

Therefore, given that there are 41 Activities and five Business Sizes, under the new system there is now a total of 205 (41 x 5) categories (“**Category**”) within which an establishment can be placed.

Under the new scheme companies are classified in the following four bands depending on the entity’s adherence to the Saudisation requirements for their Category and Business Size: premier green; green, yellow and red (“**Bands**”). Companies that are classified as premier green and green are compliant with the Saudisation requirements for its Category and will receive specified benefits. Companies classified as yellow or red are deemed as non-compliant and will be subject to punitive measures.

APPLICATION

Companies with less than 10 employees are currently exempt from the Nitaqat scheme but must still employ at least one Saudi national. All other companies in KSA will be subject to Nitaqat. We have been advised by officials at the MOL that start-up companies in KSA will be given a ‘grace period’ to comply with Nitaqat. We understand from our discussions that the ‘grace period’ will be around 12 months, however, as this is not set out in any regulations we would recommend that this is confirmed with the authorities at the time of set-up.

We understand that the ‘grace period’ that was offered to existing entities to apply with Nitaqat has now passed.

SAUDISATION PERCENTAGES

The Saudisation percentage that will apply will depend on the (i) Activity of the company; and (ii) the Business Size. For example, in the Advisory Services and Business Activity, the Saudisation percentages that will apply will be as follows:



Saudisation Percentages – Advisory Services and Business

| Business Size | Red | Yellow | Green | Premium |
|---------------------|--------|---------|----------|---------|
| Small (10 – 49) | 0 – 4% | 5 – 9% | 10 – 39% | ≥ 40% |
| Medium (50 – 499) | 0 – 5% | 6 – 11% | 12 – 39% | ≥ 40% |
| Large (500 – 2,999) | 0 – 6% | 7 – 11% | 12 – 39% | ≥ 40% |
| Huge (3,000+) | 0 – 6% | 7 – 11% | 12 – 39% | ≥ 40% |

CALCULATION OF SAUDISATION PERCENTAGES

The number of Saudi employees is calculated based on the number of Saudi employees insured with the General Organisation for Social Insurance (“GOSI”) in the past three months.

The number of foreign employees is calculated based on the average number of employees over the past three months according to the data held with the Ministry of Interior.

The following table details how certain calculations are to be made:

| Category | Calculation (how many Saudis are accounted for) | Comments |
|--|---|--|
| Employer – a Saudi national | One Saudi employee | The employer is entitled to count himself in calculating the number of Saudi employees employed by an establishment provided that he is registered with the GOSI. |
| Part-time Saudi employee | Half a Saudi employee | That employee may be accounted for twice as a maximum (so that he accounts for one employee). Please note it is not permissible for any establishment to employ more than 10% of its Saudi employees as part-time employees, except for establishments engaged in the following activities: wholesale trade, retail trade and nutrition whereby it is permissible for such establishments to have 50% of its Saudi employees as part-time employees. |
| Special needs employee | Four Saudi employees | In as far as calculation of Saudi employees is concerned, only up to 25% of the establishment’s employees who classified as special needs employees will be calculated at a rate of four Saudis. Where the establishment employs more than 25% of its employees as employees with special needs, then those employed that fall over the 25% mark will account for one employee. |
| A person that has been imprisoned and released | Two Saudi employees | |
| The husband or wife of a Saudi national | One Saudi employee | |
| An expatriate with a Saudi mother | One Saudi employee | |



It has also been reported in the press that the MOL has announced that four Burmese or African nationals will be considered equivalent to one Saudi under the Nitaqat system. At this stage it is not clear what African nations will be considered but the list is likely to include Somalis, Sudanese, Nigerians and any other African nationals who are subject to danger/prosecution in their home country. Other Africans who are in Saudi illegally will also be considered, however, this needs to be confirmed on a case by case basis.

ACTIVITY

Where the establishment is involved in two or more Activities, the MOL will deal with that establishment as if it had two separate entities, regardless of the entity's main Activity or the number of subsidiary Activities that the entity has. Therefore, where the establishment qualifies for more than one Activity this will warrant the MOL to deal with the establishment as if it is two entities.

For example, if a Limited Liability Company in KSA has two branches which have separate foreign investment licenses and commercial registration, each branch will need to comply with Nitaqat independently from the Limited Liability Company.

IMPLICATIONS OF THE NITAQAT BANDS

The benefits/penalties that are provided for under each Band are as follows:

Benefits available to Premier Green and Green

Special benefits have been provided for these two top categories which include the following:

- Ability to recruit foreign employees that were employed by yellow and red establishments and the transfer of the employees' services without the requirements of the previous employer's approval;
- Ability to obtain and renew work permits in relation to foreign employees; and
- Ability to change the profession of the foreign employee except where the profession is reserved exclusively for Saudi nationals (such as receptionists, recruitment official etc);

Benefits available to Premier Green only

- Ability to change the registered profession of the employees into any other profession with the exception of certain jobs reserved for Saudi nationals (such as receptionists, recruitment official etc);
- The MOL will grant open profession work permits (i.e. companies can select the job titles they want to include instead of the specific ones provided to companies depending on their activity); and
- Ability to recruit employees prior to them completing the two year requirement of the previous employer without the requirements of the previous employer's approval.

Category Yellow

- Ability to renew work permits for foreign employees for up to 6 years;
- Ability to apply for one new work visa only following the permanent departure of two expatriate employees; and
- Expatriate employees will be able to leave without requiring approval in order to work for green or premier green companies.

Category Red

- Inability to obtain or renew foreign employees' work permits;
- Inability to open a new company or branch in KSA; and
- Expatriate employees will be able to leave without requiring the company's approval in order to work for green or premier green companies.

OTHER SANCTIONS

We have been advised by the MOL that the penalties stated in Cabinet Resolution No. 50 dated 21/4/1415 H will continue to apply to companies that do not comply with the Saudisation requirements. Therefore Red Band companies would be barred from applying for government tenders, loans and subsidies.

PRACTICAL STEPS FOR EMPLOYERS

- Ensure that all Saudi nationals that you employ are registered with GOSI and assess whether social insurance contributions required for Saudi nationals will require an adjustment to your department's budget;



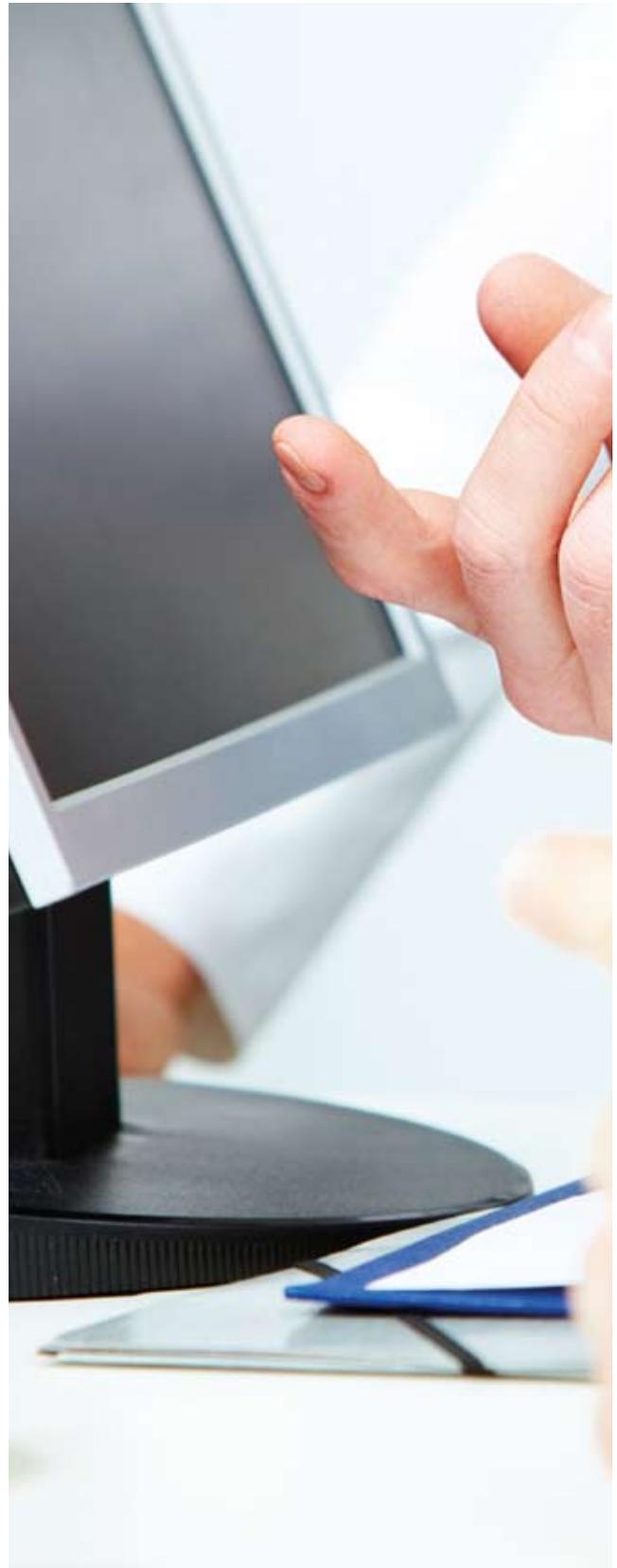
- In setting up in KSA ensure that the Activity or Activities listed on the company's trade licence and with the company file at the MOL are accurate and consider the applicable Saudisation percentages for each;
- Given that employees of companies in the Yellow or Red Band can change employers without requiring a no-objection certificate from their employer consider inserting post-termination restrictions in your employment contracts to ensure that these are drafted to properly protect your lawful business interests;
- Ensure that adequate notice provisions are contained in your employment contracts or that the term of limited term contract is of an appropriate length to meet the needs of the business and consider inserting 'garden leave' clauses for key employees; and
- Consider ways in which you can boost your Saudisation percentages.

NEW WAGE MONITORING SYSTEMS IN KSA

Recently it has been reported in the Saudi press that KSA will launch a new wage monitoring system as part of the effort to boost Saudisation. Similar to the wage protection system in the UAE the system will check that monthly salaries are paid to Saudi and expatriate employees into their KSA bank accounts in line with the terms of their employment contracts. In the long term, the system would help the MOL introduce a scheme under which companies are monitored not only according to the Saudisation percentages but also on the proportion of their payrolls being paid to Saudi citizens.

SKILLS TEST TO DECIDE ISSUANCE OF IQAMA

It was recently reported in the press that a senior government official has announced that the MOL will issue work permits to foreigners on the basis of their performance in a professional skills test. It is expected that the scheme will be implemented in early 2013 and is aimed at improving the professional competence and work quality of expatriates. Expatriates who fail the test would be allowed to resit the test a second time.



Introduction to **Tala Al-Hejailan**

Tala advises on Saudi law matters and specializes in employment.

Tala works with clients in English, Arabic and French. Tala completed her undergraduate studies in both England and France, studying English Common Law and French Civil Law before completing the Solicitors Legal Practice Course (LPC) at the College of Law in London in 2009. While studying in England, Tala worked with a charity called Victim Support for many years, giving legal advice and support to people who have been victims of crime in the borough of Camden. Tala is currently the CSR officer of the Saudi office and on the side, Tala runs a charity which focuses on teaching English in local orphanages in Saudi and works with Human Rights Organizations providing legal aid to women mostly.



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