

Outsourcing Occupational Health and Safety Responsibilities for Employers in Turkey

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The Occupational Health and Safety Law ("OHSL")¹ regulates occupational health and safety obligations for employers. These health and safety obligations were previously contained in the Labor Law.²

The OHSL requires occupational health and safety services to be provided by appropriately qualified individuals. Employers can outsource provision of these services where they do not have an appropriately skilled employee on staff. However, even where outsourcing exists, the employer is still ultimately responsible and liable for providing the services.

For detailed information, please see the official translation of the OHSL, published by the Ministry of Labor and Social Security.

Workplace Hazard Classification and Application to the OHSL

The legislative framework outlines three hazard classes for workplaces: "less hazardous", "hazardous", and "very hazardous".³

Hazard classes are based on the workplace's main work activity and apply to the whole workplace. For example, if certain parts of a workplace's activities qualify as "hazardous", this classification will apply to the whole workplace, including the parts which would not fit this classification on their own.

The requirement to provide specialist occupational health and safety staff described below (Articles 6 and 7) apply to all employers which fall into the hazardous and very hazardous classes. They also apply to employers in the less hazardous class which have 50 or more employees.

The requirement to provide specialist occupational health and safety staff will not apply until 1 July 2016 for public institutions, or workplaces in the less hazardous class which have 49 employees or less. However, the general occupational health and safety responsibilities still apply to these employers (Article 4).

General Occupational Health and Safety Responsibilities for Employers

Employers are legislatively obliged by the OHSL to protect their employees by implementing, maintaining, and monitoring certain occupational health and safety measures.

The legislation outlines employers' responsibilities as (Article 4(1)):

- Working to avoid occupational hazards,
- Informing and training employees about the risks and occupational health and safety issues which exist in that particular workplace,
- Providing employees with the necessary tools and equipment,
- Adapting health and safety measures to meet changing workplace conditions,

- Improving the current occupational health and safety conditions. This responsibility exists even if the workplace meets the minimum
- standards; employers must constantly work to improve health and safety conditions,
- Carrying out workplace risk assessments (or arranging for these to be carried out),
- Monitoring whether employees abide by occupational health and safety measures,
- Removing employees who fail to abide by occupational health and safety measures,
- When entrusting a task to an employee, considering the employee's suitability for the task with regard to health and safety,
- Taking measures to prevent uninstructed employees entering life threatening and dangerous areas.
- Employers Must Use Trained Specialists to Provide Occupational Health and Safety Services

The OHSL states that employers must designate workers as occupational safety specialists, occupational physicians, as well as other health staff (for example, nurses). These roles cannot be assigned to the same individual.

If existing employees have the required qualifications, these roles can be assigned to such employees.⁴ However, if the employer has no employee(s) qualified for this task, the employer must enlist a joint health and safety unit to partially or fully provide these services (Article 6(1)(a)).

Consequently, outsourcing occupational health and safety tasks to joint health and safety units is a common practice for employers.⁵

Joint Health and Safety Units

According to the OHSL, occupational health and safety services must be performed by trained specialists, who may be either existing employees with the appropriate qualifications, or joint health and safety units (Article 6(1)(a)).

Joint health and safety units are either private or public entities which specifically provide occupational health and safety services to workplaces and are authorized by the Ministry of Labor and Social Security to do so (Article 3(1)(m)).

Contract Structures for Outsourcing to Joint Health and Safety Units

Where employers do not have an appropriately skilled employee on staff, the Labor Law outlines two contract structures which employers may use to obtain such employees and accordingly meet their occupational health and safety obligations under the OHSL. These contract structures are temporary employment relationships and sub-employer relationships.

1. Temporary Employment Relationship

The Labor Law states that a temporary employment relationship is established when the employer transfers an employee to another employer, or to another establishment within the same holding company or the group of companies (Article 7 of the Labor law). The employer must obtain the employee's written consent to the transfer and the transfer must involve the employee undertaking work similar to what he or she was doing before the transfer. The employee must actually work within the new employer's workplace.

In the occupational health and safety context, this means that joint health and safety units may temporarily transfer appropriately skilled employees to an employer who does not have such an employee on staff already. In this way, the employer can obtain the specialist staff member required for it to meet its occupational health and safety obligations.

2. Sub-Employer Relationship

The Labor Law allows specialist employees to be employed as sub employees where the employer requires their technical expertise (Article 2 of the Labor Law). Where a sub-employment relationship exists, the employer is responsible to the sub-employee for all normal employment responsibilities, including salary, tax, and social security, among others.

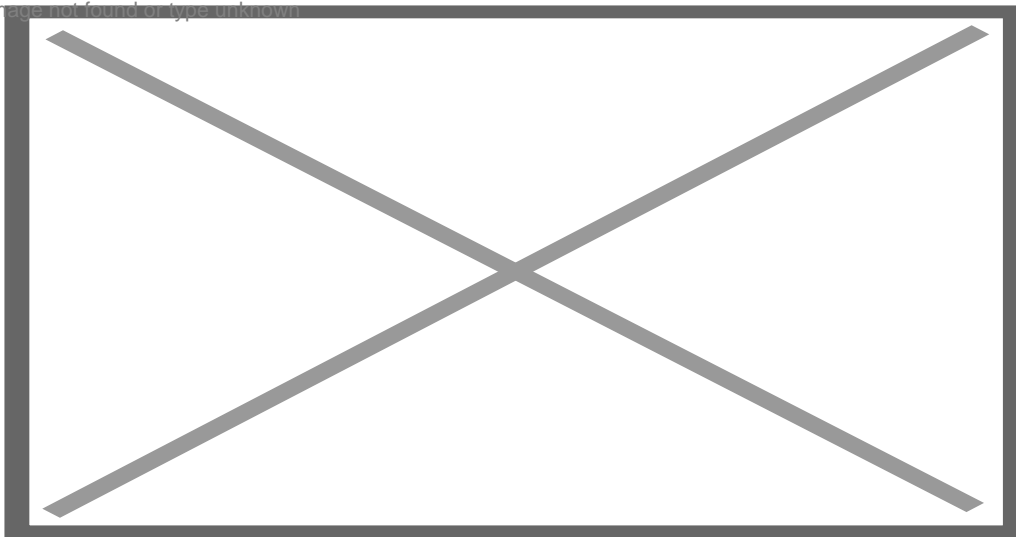
Due to the specialist nature of occupational health and safety services, employers may establish a sub-employer relationship with a joint health and safety unit on this basis. In this way, an employer can obtain specialist staff members with the skills required for the employer to meet its occupational health and safety obligations.

Minimum Working Hours for Occupational Health and Safety Specialists

The length of time which an employer must engage specialist support for provision of occupational health and safety services depends on the workplace's hazard class and the number of employees.

The minimum working hours for occupational physicians and other health staff are outlined in the table below.

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~~Employers are Responsible for Certain Things Even Where Outsourcing Exists~~

Despite an employer outsourcing the provision of the occupational health and safety services, the employer itself will remain responsible for related monitoring and surveillance obligations (Article 4(1), outlined above), as well as (Article 6):

- Meeting the requirements for means, space and time to support the designated people or organizations to fulfil their health and safety duties,
- Ensure cooperation and coordination among all people and bodies responsible for providing health and safety services,
- Implement any occupational health and safety measures which are in accordance with the legislation and notified to the employer in writing by the designated health and safety persons or organizations
- Provide information about factors which are known to affect, or are suspected to affect, the health and safety of workers. Employers must provide this information to Joint health and safety units which are providing occupational health and safety services, individual employees
- who come into the workplace from another workplace (as well as their employers), and individuals assigned to provide occupational health and safety services (including employees and individuals in a sub-employment relationship).

The Effect of Outsourcing with Regard to an Employer's Liability

An employer faces civil and penal liability if it fails to meet occupational health and safety obligations. The OHSL says that an employer remains ultimately liable for provision of health and safety obligations, even where these services have been outsourced (Article 4(2)). Administrative fines under the OHSL depend on the obligation which has been breached and can accumulate on a monthly basis until the employer remedies the breach (Article 26).

Under the Labor Law, the Supreme Court gave inconsistent decisions regarding the nature of employers' liability and whether this liability is fault-based or absolute. The OHSL goes some way to clarifying this situation by imposing positive obligations on employers to meet certain occupational health and safety standards, implying that fault-based liability exists. This interpretation is consistent with the approach taken by the Turkish Code of Obligations generally, where fault-based liability is usually applied and absolute liability is only adopted in exceptional cases.

The nature of employer liability is not totally clear though and will be further clarified when the courts consider liability under the new OHSL.

Compliance Monitoring

Compliance with the health and safety obligations outlined is monitored by inspectors from the Ministry of labor and Social Security, who have auditing powers. These inspectors may also act on complaints about non-compliance with critical issues, received from occupational health and safety specialists.

[1] Numbered 6331 and dated 30.06.2012

[2] Numbered 4857 and dated 10.06.2003. Articles 77 to 89 of the Labor Law previously outlined employer responsibilities for occupational health and safety matters

[3] This classification is contained in The Communique of Hazard Classes Regarding Occupational Health and Safety. The Communique includes a list of workplace types in each class, to assist employers in determining which class they fall into

[4] The required qualifications are outlined in the Regulation on Appointment, Authority, Responsibility and Training of Occupational Physicians and Other Health Staff

[5] Before the OHSL became effective, this situation was contemplated by Article 81(2) of the Labor Law

[6] Articles 12 and 19 of the Regulation on Appointment, Authority, Responsibility and Training of Occupational Physicians and Other Health Staff

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