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The Legal 500: Employment & Labour Law Country Comparative Guide 2022 - Turkey Chapter

30 Mar 2022

Employment law and the covid-19 pandemic

- ### What measures remain in place to protect employees against dismissal or avoid redundancies as a result of the continuing impact of the covid-19 pandemic?

During the pandemic, with the decree numbered 3592, the period regarding the termination of any employment or service agreement by the employer, regulated by the temporary article 10 of Employment Law numbered 4857 ("**Employment Law**"), has been extended for 2 months as of 17 March 2021. Then, with the decree numbered 3930, the period is extended until the date of 30 June 2021. Temporary prohibition on termination has been lifted on 1 July 2021. Currently, there is no regulation in force restricting termination of employment due to Covid-19 pandemic.

- ### Following the covid-19 pandemic, have new employee rights or protections been introduced in respect of flexible or remote working arrangements?

The Regulation on Remote Working ("**Regulation**") has been issued by the Ministry of Family, Labor and Social Services in order to regulate the works that are not compatible with remote working, to implement business rules regarding data protection and sharing, and to determine the procedures and principles of remote working. The Regulation has entered into force after being published in Official Gazette dated 10 March 2021 and numbered 31419. The Regulation has introduced rules on the content of employment contracts for remote working; allocation of work-related expenses; supply of work tools and equipment; working time, type of communication; protection of personal data, occupational health and safety precautions, converting regular employment contracts to remote working contracts and certain other issues.

Reasons for the termination of employment

- ### Does an employer need a reason in order to lawfully terminate an employment relationship? If so, state what reasons are lawful in your jurisdiction?

The ways of the employer's right to lawfully terminate an employment relationship are divided into two categories. In any case, the employer is required to have a reason in order to lawfully terminate an employment relationship.

Termination with a just cause is regulated under Article 25 of the Employment Law and allows employer to immediately terminate an employment agreement prior to its natural expiration and without notice to employee:

i. Health

- Employee who becomes ill or becomes disabled purposely or negligently, or due to drug or alcohol addiction, and fails to report for work for three successive days or more than five working days in a month.
- Health Committee determines that employee suffers from a harmful and incurable disease.

For employee illness, exclusive of the first subparagraph above, accidents, pregnancies, and childbirth, employer may terminate only after the legal notice periods have been exceeded by six weeks.

ii. Morality, Goodwill and Similar Violations

- Employee misleads at time of agreement by presenting false qualifications or possession of required skills or abilities essential to work contemplated by the agreement, or generally providing false information,
- Employee speaks or acts against to dishonor or harm the reputation of employer or a member of employer's family or makes false assertions or accusations against employer in matters of honor,
- Employee sexually harasses a co-worker,
- Employee bullies the employer or family member, or co-worker, or reports for work inebriated or under the influence of illegal drugs, or uses alcohol or illegal drugs in the workplace during work hours,
- Breach of trust, theft, or disclosure of trade secrets,
- Employee at job site commits a crime carrying prison time of at least seven days which cannot be postponed,
- Employee fails to report for work over two consecutive days, or twice in one month on first workday immediately following a rest day, or three working days in a month, without the employer's permission or a valid excuse,
- Employee fails to comply with non-performance warnings,
- Employee willfully or negligently endangers co-workers, or damages machinery, equipment, or other articles or materials whether employer's property or not, and damages cannot be remediated by payment of thirty (30) days' offending employee's salary.

iii. Force Majeure

Suspension of work at the workplace for more than one week due to force majeure.

iv. If the employee is absent due to incarceration for a duration in excess of applicable notice periods.

Regardless of term, the employer can terminate the employment agreement immediately for just cause. Grounds for termination for just cause are limited to those set forth in the Employment Law.

Notice of termination for just cause must clearly state the cause and the decision to terminate immediately. In any subsequent litigation the burden of proof of just cause is on the terminating party.

The right to terminate an employment agreement with just cause must be exercised within 6 working days of the date of discovery of just cause, or within 1 year following the date of an incident that gives rise to just cause.

The employer will be obligated to pay severance to employee except where termination is for immorality or principles of goodwill. In cases where the employee acts immorally or against the principles of goodwill, the employer will not be under the obligation to pay severance. If the employer fails to prove just cause for termination, then employee will be additionally entitled to receive notice pay.

1. Termination for valid reason is under Articles 17 and 18 of the Employment Law. In principle, if the employment agreement is terminated based on a valid reason, all of the following conditions need to be satisfied so as the employee can benefit from job security provisions:

- A workplace with over 30 employees,
- Employment term of the employee continues for at least 6 months,
- Employee is not employer's representative.

Concerning the aforementioned 30-employee condition, it must be stated that in practice, if the same employer has several workplaces, the court may take the whole number of employees in all workplaces into consideration, even if the employees work in workplaces which are in separate locations. Regarding employers who have other workplaces in foreign countries, the court may have a tendency to take number of employees in foreign countries into consideration.

Job security provisions apply to employment agreements with indefinite periods; and the employee can initiate a re-employment claim by disputing the validity of the cause for termination. If the employee wins the re-employment lawsuit, he/she must be re-instated by the employer; otherwise, the employer must pay employee in an amount equal to wages of not less than 4 and not more than 8 months. Additionally, the employer must pay employee 4 months' wages for the time during which employee was out of work due to wrongful termination. In other words, if the employee wins the re-employment lawsuit, the employer will be required to pay an amount between 8-12 months' salary to the employee.

To add more, employees can still claim, in any case, severance and notice payments and other employment rights such as overtimes, unused annual paid leaves, bonuses (if any) and unpaid salaries if their employment agreements are terminated by their employers.

- ## What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned? How many employees need to be affected for the additional considerations to apply?

Collective redundancy rules may be applicable as per Article 29 of the Employment Law depending on the number of employees to be laid off and the relevant time period. Accordingly, in order for collective redundancy obligations to trigger, the below-mentioned number of employees should be laid off within one month:

1. 10 or more employees in workplaces where 20-100 employees are employed;
2. 10% or more of employees in workplaces where 101-300 employees are employed;

- 30 or more employees in workplaces where 300+ employees are employed

The termination of contracts must be based on a valid reason (e.g. economic, technological, structural or similar requirements of the establishment, the workplace or the business). Moreover, the redundancy process involves additional procedures. An employer who intends for the collective redundancy must notify i) union representatives, ii) the relevant regional directorate of the Ministry of Labour and iii) Turkish Employment Organization (=*??kur*) at least 30 days in advance of termination. This notification must include i) the reasons of the collective redundancy, ii) the number of redundant employees and their categories and iii) the time period in which collective redundancy will take place. Employees subject to dismissal must also be notified. Further to the completion of the above-mentioned 30-days period, the employer may choose to terminate the employment agreement immediately by paying in lieu of notice or prefer the employees to work for the duration of their notice periods.

Upon the notifications, the employer must consult the union representatives and discuss the options with a view to preventing redundancy and minimisation of the adverse impacts of such redundancy. At the end of the consultations, minutes of this meeting confirming that the consultations have been held must be drawn up.

- ## What, if any, additional considerations apply if a worker's employment is terminated in the context of a business sale?

The employees are protected against termination due to business sale. As per Article 6 of the Employment Law, transfer of business or a part of business or workplace does not constitute a valid reason for termination of

employment under Turkish law, unless economic and technological reasons or organizational changes of transferor or transferee employer necessitate termination of employment.

Employment law procedures applying on the termination of employment

- What, if any, is the minimum notice period to terminate employment? Are there any categories of employee who typically have a contractual notice entitlement in excess of the minimum period?

Both employers and employees are required to give specified notification periods prior to the termination of indefinite term employment contracts. The statutory notice periods in accordance with the employees' length of service are as follows:

- 2 weeks if the employment duration is less than 6 months;
- 4 weeks if the employment duration is 6 months to 1,5 years;
- 6 weeks if the employment duration is less than 1,5 to 3 years;
- 8 weeks if the employment duration is more than 3 years.

These are the minimum notice periods stated within the Labour Code and such periods may be increased by the parties' through the employment agreement. Also, the employer must allow the employee at least 2 hours per day to search for a new job during the notice period without making any deductions from the employee's salary. The employee may aggregate these hours and, for example, take a full day off rather than having to take it on a daily basis. However, this should be determined by the parties at the beginning of the notice period.

- Is it possible to pay monies out to a worker to end the employment relationship instead of giving notice?

The employer has an optional right; it may either fully pay in lieu of notice and terminate the employment contract immediately or allow the employee to fully work until the end of the notice period and pay his salary during such period.

- Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during his notice period but require him to stay at home and not participate in any work?

Garden leave is not a recognized concept under Turkish law. Therefore, an employer can put an employee in a leave while paying his/her salary, if such employee accepts to be put on a leave. On the other hand, considering that working is not just an obligation but also a right protected under Turkish Constitution, the employee may claim that he/she wants to work and due to employer's violation of such right of the employee may terminate his/her employment agreement based on a just cause and demand severance payment from the employer. (See Question 17)

- Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.

If the termination is based on a just cause, such as the employee's immoral acts and acts against goodwill mentioned under Article 25 of the Employment Law, the termination notice should be made in writing. However, there is no need

to obtain a written defence from the employee if the employment agreement is to be terminated by the employer based on a just cause.

According to Article 19 of the Employment Law, if the termination is to be made with a valid reason, and not based on a just cause, the termination notice should be made in writing and the reason of the termination should be clearly and precisely stated. If the termination is based on a reason arising from the employee's behaviour, the employer should notify the worker of the allegations against him/her and request the worker's written defence about the allegations prior to the termination. Additionally, the termination of an employee is subject to the ultima ratio principle. In this regard, the employer must objectively try other precautionary measures before terminating an employment agreement, and if such measures do not produce effective result, only then the employment agreement can be terminated.

- If the employer does not follow any prescribed procedure as described in response to question 9, what are the consequences for the employer?

Depending on the particulars of the case, the termination of the employment agreement may be deemed null and void; or the termination may be deemed unlawful. Both of these options would result negative monetary consequences for the employer as the employee may claim severance and notice payments, as well as his/her other employment receivables. If the employee files a re-employment lawsuit and if the court accept the employee's claims, the employer would be under the obligation to either re-employ the employee in his/her previous position, or pay a monetary amount between 8-12 months' salary to the employee.

- How, if at all, are collective agreements relevant to the termination of employment?

A collective employment agreement may include provisions which limit the employer's right to dismiss individual employees, increase the notice periods, and grant additional rights to employees concerning dismissals. However, the employer cannot terminate an employment agreement solely because an employee is a member of a union. Otherwise, such employer will be under the obligation to pay administrative fines.

Furthermore, as per Article 24 of the Law on Trade Unions and Collective Bargaining Agreements, union representatives who are determined under collective agreements, cannot be dismissed by the employer without a just cause. The employer must also provide just cause for termination clearly and in written form.

- Does the employer have to obtain the permission of or inform a third party (e.g local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?

Principally, the employer does not have to obtain the permission of or inform a third party before being able to validly terminate the employment relationship. However, as explained under question number 4, if the employer is to terminate a large number of employment agreements which constitutes as a collective redundancy, the employer must inform local labour authorities.

Protection for workers from termination of employment

- What protection from discrimination or harassment are workers entitled to in respect of the termination of employment?

Firstly, it must be mentioned that Turkey is a party to multiple International Labour Organization ("**ILO**") agreements concerning discrimination, including:

- Equal Remuneration Convention dated 1951 and numbered 100,
- Discrimination (Employment and Occupation) Convention dated 1958 and numbered 111,
- Equality of Treatment (Social Security) Convention dated 1962 and numbered 118 and
- Minimum Age Convention dated 1973 and numbered 138.

Additionally, as per Article 5 of the Labour Code, employers cannot discriminate employees based on their language, race, colour, gender, disability, political opinion, belief, religion, or any other reason. Employers should comply with the principle of equal treatment of employees performing substantially similar work, of equal skill and seniority. Otherwise, the employee will be entitled to claim compensation for discrimination and the rights he/she has been deprived of.

Furthermore, the employer is required to provide protection to its employees from discrimination and harassment which may be performed by other employees. To give an example, if an employee applies mobbing to another employee, the victim may initiate a lawsuit against the employer.

Similarly, there are also regulations to protect the child workers. It is not possible to terminate the agreement in a way that does not comply with the following prohibitions: the prohibition of employing workers under a certain age, prohibition of employing child workers under the ground and water, prohibition of employing child workers more than a certain hour, prohibition of employing child workers at night, prohibition on giving child workers less than 20 days annual leave.

There are also regulations to protect the female workers regarding the gender equality. Failure to come to work during periods when it is legally prohibited to employ female workers in case of gender, marital status, family obligations, pregnancy, childbirth, and maternity does not constitute a valid reason for termination of the employment agreement.

What are the possible consequences for the employer if a worker has suffered discrimination or harassment in the context of termination of employment?

If the employer acts in violation of the equal treatment principle explained under question number 13, the employee will be entitled to claim compensation for up to 4 months of his/her salary and also request the rights and/or salaries he/she has been deprived of due to the unequal treatment.

An administrative fine is imposed on the employer or employer's proxy who employs the female worker in violation of the protective provisions and the child worker in violation of the legal prohibitions. Also, the termination is not valid since there is no rightful termination in accordance with the Turkish law.

Are any categories of worker (for example, fixed-term workers or workers on family leave) entitled to specific protection, other than protection from discrimination or harassment, on the termination of employment?

As per Article 24 of the Law on Trade Unions and Collective Bargaining Agreements, union representatives cannot be dismissed by the employer without a just cause. The employer must also provide just cause for termination clearly and in written form. (Also see Question 11)

Additionally, employees cannot be dismissed solely because they are members of a union.

Furthermore, principally, the employer cannot terminate the employment agreement of an employee who is on a medical leave. However, such an employee can be subject to dismissal if he/she has performed actions which leads to termination with a just cause.

In addition to the above, if an employee cannot benefit from job security provisions which have been explained under Question 3-B, such employee shall be entitled to claim compensation for bad faith. In this regard, the employee would be under the obligation to prove that the employer has terminated the employment agreement with bad faith, and if the court decides in favour of the employee, the employer will be under the obligation to pay 3 times the notice payment.

- ## Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?

There is no specific regulation for protection of whistle-blowers in Turkey. However, certain provisions in various laws and sub-legislation applies to whistleblowing including those listed below:

- The Constitution of the Republic of Turkey
- Civil Code, Law No. 4721 (as amended)
- Criminal Code, Law No. 5237
- Turkish Code of Obligations No. 6098
- Employment Law No. 4857
- Turkish Data Protection Law numbered 6698
- Witness Protection Law No. 5726
- Regulation on Deletion, Destruction and Anonymisation of Personal Data No. 30224
- Code of Criminal Procedure, Law No. 5271

Additionally, with regards to the whistleblower protection, Turkey is a party to all international anti-corruption conventions, such as:

- United Nations (UN) Convention against Corruption
- The International Labour Organisation's Termination of the Employment Convention No. C158.

In accordance with Article 18/3-c of the Employment Law, if an employee submits a complaint against his/her employer to administrative or legal authorities concerning his/her legal or contractual obligations, the employer cannot terminate the employment agreement of such employee. This provision provides a protection for whistleblowers, solely against their employers. However, other regulations and general rules still apply to all whistleblowing procedures.

Compensation

- ## What financial compensation is required under law or custom to terminate the employment relationship? How is such compensation calculated?

If the employer terminates the employment agreement with just cause based on the reasons stated in Article 25/II of the Employment Law (immoral acts and acts against goodwill) or if the employee terminates the employment agreement without any just cause, the employer will not be under the obligation to pay severance. However, in the event that the employee terminates his/her employment agreement with a just cause, his/her severance payment must be made. In the event of resignation due to military service and retirement, and resignation of the women

employees within one year after getting married, severance payment must be paid. If the employee dies, the severance payment shall be paid to the heritor of the employee.

Severance payments must be calculated based on the employee's latest full gross salary. The full gross salary includes the monetary equivalent of all additional payments and services provided by the employer such as transportation allowances, meal salaries, health / life insurance costs etc. The full gross salary will not include payments / services which have never been provided by the employer. There is a certain statutory cap on severance payments, which is updated each year.

The employee has the right to demand the wage until the end of the notice from the employer who notifies the termination of the employment agreement without complying with the notice requirement. Likewise, the employer has the right to demand compensation from the employee who left the work without complying with the notice precedent, equal to the wage until the end of the notice.

In order to calculate the notice pay; the last gross wage of the employee is determined. This gross wage is calculated on a weekly basis, and it is multiplied by the notice period. Income and stamp tax are deducted from the calculated amount.

The employer must also pay all of the employment receivables such as overtime, remaining annual leave right etc. regardless of the termination reason.

Please also see our explanations under Question 3-B concerning job security provisions and the employee's right to file a re-employment lawsuit.

- Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, describe any limitations that apply, including in respect of non-disclosure or confidentiality clauses.

Even though there is no regulation under Turkish law on the mutual termination of employment, such mutual termination agreements are deemed valid by Turkish Court of Appeals under certain conditions. Principally, if the employment agreement is to be terminated through a mutual termination agreement, the employer must pay a "reasonable benefit" which is a minimum of 4 months' salary, in addition to the severance payment. The employer should also provide the payment of remaining employment receivables such as unpaid salary amount as of termination date, overtime payments and unused annual leave payments. It is possible to include non-disclosure or confidentiality clauses under such agreements.

A mutual termination agreement also prevents the employee's potential claims related to the termination such as severance payment, notice payment, re-employment lawsuit etc.Miscellaneous

- Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.

During the term of employment, the employee is under the obligation to act in accordance with the loyalty and care principles as per Article 396 of the Turkish Code of Obligations. It is also possible to restrict a worker from working for competitors after the termination of employment. Non-competition obligation is regulated under the Article of 444-447 of the Turkish Code of Obligations. If the employer wants the non-compete obligation to continue after the termination of the employment, the employer should either insert a condition in the employment agreement or execute a separate non-compete agreement. The scope of non-compete obligation is explained in the Article of 444

of the Turkish Code of Obligations. It is valid only if the use of the information about client network, production secrets or the employer's work will cause significant harm to the employer. However according to the Article 445 of the Turkish Code of Obligations, the validity and scope of non-compete obligation should be interpreted in favor of the worker. The non-competition clause cannot include restrictions that unfairly effect the worker's economic future in a negative way. Moreover, duration of the non-compete obligation cannot exceed two years, except for special circumstances and conditions. If the non-competition clause is excessive, the judge may restrict it in terms of its scope or duration, or the judge may even completely remove the non-competition clause. According to the Article 446 of the Turkish Code of Obligations, the worker who violates the non-competition obligation, is responsible for the employer's all damages incurred.

Additionally, if an employee starts to work for a competitor after his/her dismissal, this may also be regarded as an unfair competition as per Article 54 of the Turkish Commercial Code, especially if there is any breach of non-solicitation obligations, which should in any case be assessed based on the specific circumstances of each case. In such a scenario, the former employer may file a lawsuit against the competitor or the employee and demand compensation (if any) and the removal of such a breach. The former employer would be under the obligation to prove any kind of breach.

- ## Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?

Similar to our explanations under Question 19, during the term of employment, the employee is under the obligation to act in accordance with the loyalty and care principles as per Article 396 of the Turkish Code of Obligations, which requires the employee to abide by confidentiality obligations even if it is not clearly stated in the employment agreement. Additionally, an employer can also require a worker to keep information relating to the employer confidential after the termination of employment. A more detailed explanation may be found under question number 19 above. If the aforementioned conditions are met, then it is possible to impose prohibition about keeping the confidential information of the employer.

Furthermore, in the event that the employee does not keep the information confidential, it may lead to unfair competition allegations as per Article 54 of the Turkish Commercial Code, which should be assessed based on the specific circumstances of each case. The former employer would be under the obligation to prove any kind of breach. However, as it is rather difficult to prove that the employee has in fact shared confidential information, it is advised to determine such obligation within the employment agreement and include a penalty clause.

- ## Are employers obliged to provide references to new employers if these are requested? If so, what information must the reference include?

There is no legal obligation or any legal rules for employers to provide reference to their (former) employees. On the other hand, if a reference is requested without employee's knowledge or permission, its implications should be examined in terms of data privacy.

- ## What, in your opinion, are the most common difficulties faced by employers in your jurisdiction when terminating employment and how do you consider employers can mitigate these?

In Turkey, employees are assumed to be in a weaker position in lawsuits, when compared to employers. Therefore, courts are generally inclined to interpret the facts in favour of the employees. Employers should duly pay their employees' rights, make all their payments through the bank, record all benefits provided to employees, and obtain signatures from employees regarding their pay slips, annual leave requests etc.

In light of our explanations above, during termination procedures (especially concerning terminations with a valid reason) the events and the process' must be carefully evaluated, legal requirements of the termination procedures and principles must be reviewed, and the termination process must be planned and executed accordingly.

- ## Are any legal changes planned that are likely to impact on the way employers in your jurisdiction approach termination of employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?

Currently there are no planned legal changes concerning Employment Law.

*This content was originally published in *The Legal 500: Employment & Labour Law Country Comparative Guide 2022.*

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