

Employment-related Consequences of Workplace Transfer

Although global M&A trends are changing constantly, share purchase and asset purchase deals are still the most preferred structures in performing M&A transactions in Turkey. No need to say that in a share purchase deal, only the shareholding structure of the target company is changed. From an employment law perspective, the identity of the employer (*i.e.*, the target company) remains the same, which means that the employment relationship between such company and its employees is not affected at all by the deal.

On the other hand, in an asset purchase deal where the assets and businesses of a certain enterprise are transferred to a separate entity together with the employees employed therein, employment issues should be taken seriously.

On the European Community scale, employment-related consequences of workplace transfer are governed by the Council Directives numbered 77/187/EEC¹ and 2001/23/EC². In Turkey, there had not been any specific provision regulating the status of employees in the event of workplace transfer before the enactment of the Labour Law No. 4857 (the **Law**) in 2003. This gap had been being filled by way of analogy, based on other statutory provisions such as those contained in the Turkish Code of Obligations No. 818 (the **TCO**).

Since the Law is in full force and effect, employees' rights in the event of workplace transfer are now safeguarded by its Article 6. Below you may find the legal framework established by the Law.

1. Scope of Application

Article 6 of the Law simply sets forth the respective rights and obligations of the parties (*i.e.*, the employee, the transferor employer and the transferee employer) in case of workplace³ (*isyeri*) transfer. Only the employees whose employment agreements are effective on the date of the transfer may benefit from the protection provided. In order for an employee to be subject to Article 6, the following conditions must also be met: (i) There has to be a workplace; (ii) There has to be a transfer of the whole or a part of such workplace⁴; and (iii) Such transfer must be based on a legal transaction (*e.g.*, sale; lease; donation; etc.). In addition to these exhaustively listed conditions, the following should also be noted;

- Employees' consent is not required for workplace transfer.
- Article 6 explicitly refers to the employment agreements effective on the transfer date. Accordingly, the rights and obligations arising from the employment agreements that had been terminated by the transferor employer before the transfer and those deriving from the employment agreements executed after the transfer are not subject to Article 6.
- Whether the agreement executed between the transferor employer and the employee is a definite or indefinite term agreement has no effect on the application of Article 6.
- Article 6 of the Law does not cover workplace transfers resulting from (i) liquidation of assets due to bankruptcy and (ii) inheritance.

¹ Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, published in the OJ L 61, 5.3.1977, ps. 26–28.

² Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, published in the OJ L 82, 22.3.2001, ps. 16–20.

³ Pursuant to the Law, a workplace is defined as a unit where material and immaterial elements and employees are organized by an employer for producing goods and/or services.

⁴ A part of workplace may be defined as a part of workplace that can operate independently.

2. Workplace Transfer and the extent of Employee Protection

Workplace transfer is a transaction which changes the employer of the employees working in the relevant workplace. Notwithstanding with the foregoing, in case of a workplace transfer, the employment agreements effective on the date of the transfer are not terminated *per se*; but they are transferred to the transferee employer (this would be the purchaser in an M&A deal) with all rights and obligations attached thereto. In other words, the transferor employer's rights and obligations arising from the said employment agreements as of the transfer date are transferred to the transferee employer with the same terms and conditions. As a result:

- Starting from the transfer date, the transferee employer shall be liable for the rights and obligations arising from the transferred employment agreements.
- The term of service (*hizmet suresi*) of the transferred employees must be calculated (e.g., for severance or notice pay purposes) by the transferee employer, starting from the date on which they first started working with the transferor employer.
- In terms of severance pay, the transferor and the transferee employers are jointly and severally liable towards the transferred employees, regardless of the date when the respective employee qualifies for severance pay. In such case (i) the transferor employer's severance pay liability will be limited to the employee's service term under its supervision and to the salary paid by it; and (ii) the transferee employer will be liable for the entire severance pay, calculated over the last salary of the employee. The joint severance pay liability is not limited to any timeframe. Therefore, in case the transferee employer makes the entire severance payment on some day, it has a right of recourse (rucu) to the transferor employer for its part.
- Transfer of workplace (or a part of it) on its own does not constitute a just cause (*hakli sebep*) for dismissal. Therefore, neither the transferee employer nor the transferred employees may unilaterally terminate the employment agreement with just cause merely due to workplace transfer.
- After the transfer date, the transferor employer -alongside the transferee employer- will continue to be jointly and severally liable for a period of two (2) years with respect to the obligations arising from the employment agreements existing on the transfer date (the **Joint Liability**).
 - Although the term of Joint Liability may be increased by mutual agreement of the employers, it cannot be reduced.
 - The Joint Liability is not applicable to (i) termination of legal personality by way of merger (*birlesme*), participation (*katilma*), or change of company type (*tur degisikligi*); and (ii) workplace transfers resulting from liquidation of assets due to bankruptcy and inheritance. For the said cases, Articles 179 and 180 of the TCO apply.

Finally, we would like to underline that Article 427 entitled "*Transfer of Workplace or a Part of Workplace*" of the Draft TCO which is before the Parliament for discussion, opts a solution similar to that of Article 6 of the Law.