Turkey

Sidika Baysal Hatipoglu

Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The main statutes relating to employment are found in No. 4857 Turkish Labour Law (TLL), but we also have No. 2821 Trade Union Code, No. 5953 Press Labour Law, No. 854 Maritime Labour Law, Law No: 4851 on Work Permit of Foreigners, Regulation on Work Permit of Foreigners, No. 2822 Collective Bargaining Agreement and Strike and Lockout Law, No. 5510 Social Security and General Health Insurance Law.

2 Is there any legislation prohibiting discrimination or harassment in employment? If so, what categories are regulated under the legislation?

Article 10 of the Turkish Constitution prohibits discrimination in general and article 5 of the TLL has a similar approach with regard to the employment relationship, as stated below:

No discrimination based on language, race, sex, political view, philosophical belief, religion, or similar reasons is permissible in the employment relationship.

Other than these general provisions TLL has some other provisions that disapprove of discrimination in particular, such as:

- unless there are essential reasons for differential treatment, the employer must not make any discrimination between a full-time and a part-time employee or an employee working under a fixed-term employment contract (contract made for a definite period) and one working under an open-ended employment contract (contract made for an indefinite period); and
- an employee is entitled to break the contract for just cause if there is an immoral, dishonourable or malicious conduct or other similar behaviour such as harassment against to the employee.

3 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

There is not yet a specific law regarding this subject, however there is a draft law on Protection of Personal Data, which is in the agenda of the Turkish Grand National Assembly (TGNA).

Article 20 of the Turkish Constitution introduces the right to demand respect for one's private life as follows; everyone has the right to demand respect for his or her private and family life and privacy of individual and family life cannot be violated.

Nevertheless under No. 5237 Turkish Criminal Law (TCL), the unlawful storage, transmission or reception of personal data is punished with penalty of imprisonment.

On the other hand, TLL allows and requires the employers to keep personnel files of their employees. Together with the information regarding the identity of the employee, the employer is obliged to keep all the documents and records which are required to be arranged in accordance with TLL and other related legislation and to submit them to the authorised officials when requested. In any case the employers must keep these records confidential unless it is required to disclose them, by law. The records regarding the salaries of the employees, which are one of the obligatory records that are required to be in personnel files, are considered as confidential data of employees, as well.

4 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Ministry of Labor and Social Security, Affiliated District Offices (which work subject to the Ministry of Labor and Social Security), the Turkish Employment Agency, the Social Security Institution, and labour inspectors that are governed by Ministry of Labor and Social Security, are the primary agencies responsible for the enforcement of labour legislation at the government level. In addition to this, there are some other independent audit firms that provide private audit services for some working places, upon demand.

Worker representation

5 Is there any legislation mandating or allowing the establishment of a works council or workers' committee in the workplace?

According to the Trade Union Code, it is allowed to have a trade union representative in working places. This representative works as a bridge between the employer and the other employees. There are tasks defined for the representative such as listening to the employees' claims, finding solutions to their problems and most importantly, enabling the enforcement of working conditions which are prescribed in the related labour legislation.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

It is generally possible to require a background check on candidate employees by employers. However this procedure shall not be contrary to the principle of equality as defined in the Turkish Constitution.

In Tukery there are no companies or other third parties that are engaged in background checks on employees business. However, a data protection article brought by TCL might be creating a barrier to establish a company for conducting checks and collecting background information of people.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Medical reports can be required by employers concerning mental and physical efficiency. Moreover, if other reports are necessary as a custom of the trade, employers shall be entitled to ask for those examinations as well. For instance, TLL has two articles regarding medical reports as a condition of employment as follows: according to article 86 of TLL, an employee shall not be engaged for or employed on any arduous or dangerous work without a certificate based on the results of a medical examination; and according to article 87 of TLL, the employers shall ask for a medical report from the employees, which are under 18 years old.

On the other hand, this requirement shall not be used to create a discrimination among the candidate employees during the hiring period.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There is not an existing particular provision in our labour legislation related to drug and alcohol testing on candidate employees.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to particular people or groups of people?

In TLL, there are some requirements for employers for them to hire particular people and groups. In articles 30, 31 and 81, it is indicated respectively that:

- the employers who have 50 or more employees are obliged to employ disabled persons, ex-convicts, and victims of terror considering the ratios that are determined by the Council of Ministers and calculated with respect to the total number of the employees that are working in their working places;
- the employers are required to re-hire their employees, who apply to them within two months following the completion of military or statutory duties; and
- the employers of working places, in which at least 50 employees are employed, are also required to hire one or more physicians.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

According to article 8 of TLL, the employment contract is not subject to any special form unless the contrary is stipulated by law. Written form is required for employment contracts with a fixed duration of one year or more.

Nevertheless, in cases where no written contract has been made, the employer is under the obligation to provide the employee with a written document, within two months at the latest, showing the general and special conditions of work, the daily or weekly working time, the basic wage and any wage supplements, the time intervals for remuneration, the duration if it is a fixed term contract, and conditions with regard to the termination of the contract. This provision is not applicable for the fixed term contracts, the duration of which does not exceed one month.

Even when it is required to make the employment contract in written form, this is not a validity clause, it is just a proving clause which is in favour of the employees. Thus, lack of written form shall not invalidate the employment contract.

11 To what extent are fixed-term employment contracts permissible?

If there is a real reason for concluding a fixed term employment contract in stead of an indefinite term employment contract, then it is permissible to conclude a fixed-term employment contract. Such a real reason might be deriving from the technical characteristics or required term of the business in question and the qualifications or the particular conditions (such as pregnancy and birth for the women employees) of the employees. Nevertheless, this criteria for determining the real reason is not very explicitly stated in TLL; it is generated from the decisions of the Court of Appeals and shall be applied to the concrete employment contracts, considering their particular conditions.

Moreover, according to article 11 of TLL, an employment contract for a definite period must not be concluded more than once, except when there is an essential reason which may necessitate repeated (chain) contracts. Otherwise, the employment contract is deemed to have been made for an indefinite period from the very beginning.

12 What is the maximum probationary period permitted by law?

According to article 15 of TLL, if the parties have agreed to include a probationary period in their employment contract, than the duration of this probationary period shall not exceed two months.

This probationary period may only be extended up to four months by collective bargaining agreement.

13 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

It is possible to make contracts which include 'non-compete clauses' as well as particular contracts that prevent competition after the termination of employment contracts. However there are limitations for the conditions of such contracts, to prevent the employees from strict obligations, which might affect their professional lives in an unjust way. These limitations are observed in the decisions of the Court of Appeals.

Such clauses and agreements are considered as acceptable, if the employee, who is a party to it, has expertise with regard to a particular field of business or used to be a technical key personnel of the demanding employer. A non-compete contract or a clause shall be valid as long as the employee is going to be active in the employer's circle of customers and such an action by him or her is likely to harm the employer, owing to the utilisation of the secrets of production acquired in his or her former working place. According to the Code of Obligations, this kind of clause shall be valid if it is limited by region, sector, and time.

Two years of a non-compete clause has been considered acceptable by the Court of Appeals in a past decision, but this ruling might change depending on future cases.

If the employee doesn't obey the non-compete clause, then the employer shall oblige this person to pay a penalty or can sue for compensation, in accordance with their agreement.

14 What are the primary factors that distinguish an independent contractor from an employee?

An employee gets a salary in return to his work while an independent contractor gets paid in accordance with his performance with regard to the contract.

An employee has to obey the commands of the employer; however an independent contractor is obliged to do what is determined in the contract and is not directly subject to commands of the opposite party of the contract.

An employee serves as a dependent person with either a fixed term or an open-ended term contract and dedicates all of his or her time and effort to his or her employer; while an independent contractor is only responsible for obligations that are stated in the contract and is not entitled to dedicate all of his or her time and effort to the opposite party of the contract.

There is a protection for employees regarding occupational health, safety and employment conditions, which are not entirely applicable for independent contractors.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

In the Turkish Passport Code, entrance visa, transit and exit visas are mentioned; however, a working visa is not mentioned. It is accepted that a working visa is necessary for foreign employees and there is legal basis for this such as bilateral agreements and European Charter for Citizens of European Council Members States.

Moreover there is a specific Code regulating the conditions and application procedures of the working visas to be obtained by foreigners. Accordingly, in order to work as a foreign employee, a person needs to have a working visa and residence permit, unless otherwise determined by laws and regulations.

16 Are spouses of authorised workers entitled to work?

According to article 28 of the Regulation on Work Permit of Foreigners, spouses of authorised workers are entitled to work provided that they are living together with the authorised worker, continuously, for at least five years.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Foreigners are allowed to work in most fields if and only if it is not forbidden by law. There are different regulations about this matter in numerous laws (for example, for the moment, there is a working ban for foreign doctors, pharmacists, vets, notaries and dentists).

Furthermore employees are obliged to have a working permit in permissible fields. Otherwise employers who employ workers without legal working permits are punished with an administrative fine of 5,600 Turkish lira (this amount is determined from time to time by the Ministry) per each illegal worker. In addition to this sanction, these employers are obliged to pay the accommodation and travelling expenses of the illegal foreign worker and those of his or her family members, until they are deported.

18 Is a labour market test required as a pre-cursor to a short or long-term visa?

According to the Law on Work Permit of Foreigners, the reasons of being employed as a foreigner instead of a local employee should be demonstrated in the work permit application that is addressed to the Ministry. One should understand from the application form that there are reasonable grounds for preferring a foreigner applicant to a local employee for the particular job, in question. If a local employee, meeting the required standards of the job, for which the foreigner is seeking employment, is found in a four-week period then, the application of the foreign worker shall be rejected by the Ministry of Employment and Social Security (article 14/b). In other words the Ministry is required to examine the requisite documents of the foreigner applicant to see if he or she is appropriate for the requested job, and explore if there is an available local employee for the same job before responding to the application of the foreigner applicant.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

According to article 63 of TLL, the maximum weekly working time is 45 hours. Unless the contrary has been decided, this working time shall be divided equally between the days of the week, worked in the particular working place.

If the parties have so agreed, this working time may be divided between the working days of the week, in different forms provided that the daily working time does not exceed 11 hours.

This is not an optional situation for employees who are working on a full time basis; time schedules, either determined by law or created with the mutual agreement of the parties, shall be respected by the employees.

20 What categories of workers are entitled to overtime pay and how is it calculated?

Overtime work is work which, under conditions specified in TLL, exceeds 45 hours a week. The approval of the employee is a pre condition of overtime work and this approval may be obtained either at the beginning of the employment relationship or before each occurence of overtime work. However, if approval is obtained beforehand, at the beginning of the employment relationship, then the employer is required to re-obtain it each year, provided that the approval meets the rules under the related current regulation.

Fees for each hour of overtime shall be remunerated at one-and-a half times the normal hourly rate. The employee is entitled to claim one-and-a-half hours of spare time in consideration of one hour of overtime work, in stead of overtime pay.

21 Is there any legislation establishing the right to annual vacation and holidays?

The right to annual vacation is recognised by TLL; the employees are entitled to annual vacation after completion of one year in the particular working place.

According to article 53 of TLL, employees who have completed a minimum of one year of service in the particular working place (probationary period is included in the calculation of this one year), shall be entitled to annual leave with pay. The length of the employee's annual leave with pay shall not be less than:

- 14 days if his or her length of service is between one and five years, (five years included);
- 20 days if his or her length of service is between five and 15 years; and
- 26 days if his or her length of service is 15 years and more (15 years included).

Nevertheless, for employees who are below the age of 18 and above 50, the length of annual leave with pay shall not be less than 20 days. Annual leave shall not be divided, unless both parties have agreed to divide it. Even if they have agreed to do so, one part of it shall not be less than 10 days.

22 Is there any legislation establishing the right to sick leave or sick pay?

According to article 18 of Social Security and General Health Insurance Law, up to three days of temporary illness or injury, the

employer shall be responsible for paying the salary of these sick days to the employee.

However, if the temporary illness or injury of the employee continues more than three days and if this illness or injury is approved by the doctors or health institutions approved by the Social Security Institution (SSI), then a temporary disability allowance is paid to this employee during the term of his or her illness or injury by the SSI, depending on the medical report given to him or her either by the doctor or by the health institution approved by SSI.

23 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

According to article 46 of TLL, up to three days leave of absence in the event of the employee's marriage and up to three days leave of absence in the event of the death of the employee's mother, father, spouse, brother or sister, and child, shall be reckoned as days worked.

24 What employee benefits are prescribed by law?

In Turkey, the current labour legislation has created these provisions that are favouring employees in the employment relationship:

- employee's right to break the contract for just cause (article 24 of TLL);
- employee's right to request the necessary measures related to occupational health and safety such as instituting a board (article 83 of TLL);
- employee's right for annual leave with pay (article 53 of TLL);
- employee's right for requesting remuneration for holidays such as remuneration for a weekly rest day (article 47 of TLL);
- employee's right for requesting temporary disability pay (article 48 of TLL);
- employee's right to have overtime pay (article 41 of TLL);
- employee's right to seek new employment (article 27 of TLL);
- employee's right to ask for occupational health and safety protection (article 77 of TLL);
- employee's right to engage in collective bargaining agreements and to utilise the rights that will be obtained with such agreements;
- employee's right to seek health care benefits in accordance with Social Security and General Health Insurance Law;
- employee's right to receive severance pay and pay in lieu of notice when his or her labor contract is terminated, under certain conditions;
- employee's right not to be dismissed by the employer without relying on a valid or a just cause and to be informed of the reasons of the termination when he or she is dismissed; and
- employee's right to benefit from labour security and reinstatement provisions.

25 Are there any special rules relating to part-time or fixed-term employees?

According to article 13 of TLL, an employee working under a part-time employment contract must not be subject to differential treatment in comparison to a comparable full-time employee solely because his or her contract is part-time, unless there is a justifiable cause for differential treatment.

In addition to this, the divisible benefits to be accorded to a part-time employee in relation to salary and other monetary benefits must be paid in accordance to the length of his working time proportionate to a comparable employee working in a full-time basis.

Liability for acts of employees

26 In which circumstances may an employer be held liable for the acts or conduct of its employees?

According to No. 818 Code of Obligations (CoO), employers are responsible for the damage resulting from the act and conduct of their employees, which take place during the working hours of the employees. However, if the employer proves that he or she has taken every measure to prevent the damage, then he or she will be released from this liability.

Taxation of employees

27 What employment-related taxes are prescribed by law?

All of the employment related taxes, such as income tax, stamp tax and insurance and unemployment premiums that are required to be paid by the employee are statutorily deducted form the gross salaries of the employees and declared to the tax authorities by the employers. The employees receive the net salary, which is free from tax and social security obligations.

Employee-created IP

28 Is there any legislation addressing the parties' rights with respect to employee inventions?

Both the employee and the employer have rights with regard to employee inventions.

Employee's inventions are defined in No. 551 Decree on Protecting Patent Rights. According to this decree, two types of invention are mentioned: free invention and service invention. Employee's service inventions are accrued as a result of working in the working place of the employer and while working for the business of the employer, or they are mainly related to experiences of the business or public administration. Free inventions are the inventions that are not service inventions.

In either case, an employee shall be obliged to inform his employer of the invention. Only, if it is clear that the invention is not related to the field of employment, then there is no obligation for notice. The employer shall have the right to benefit from the invention fully or partly in consideration of a fair compensation paid to the employee.

Business transfers

29 Is there any legislation to protect employees in the event of a business transfer?

According to article 6 of the TLL, in the calculation of all of the entitlements based on the employee's length of service, the transferee (new employee) shall consider the day in which the employee had started work for the transferor (old employer) as the beginning day. In case of termination, the severance pay that the employee is going to receive shall be calculated considering the total length of the employment contracts (the contracts both with the new employer and the old employer).

The transferor or transferee is not authorised to terminate the employment contract solely because of the transfer of the business.

In addition to these ones in TLL, there is a provision in CoO regarding the liability from the obligations. In a business transfer executed in accordance with the above provisions, the transferor and transferee shall be jointly liable for the obligations which have materialised before the transfer and which must be defrayed on the date of the transfer. The liability of the transferor is limited, however, for a two year period starting from the date of the transfer.

Termination of employment

30 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

There should be either a 'just' or a 'valid' cause to terminate the labour contract of an employee. Valid cause is defined as the causes that are deriving from the performance or behaviour of the employee or the requirements of the working place or the business. In case of termination with valid reason, the employer is required to give a notice period to the employee and to terminate the contract in written form, after providing the employee with the grounds of the termination. Such a termination is applicable for employees who are working in working places with at least 30 employees and who have a minimum six months of length of service.

If this procedure is not followed by the employer, then the employee would be entitled to apply to the court for reinstatement.

Just cause is defined under four sub groups, namely, health reasons; immoral, dishonourable or malicious conduct or other similar behaviour of the employee; force majeure; and the act of being arrested and imprisoned, under certain conditions. If one of the reasons that are falling within these groups exists, the employer is entitled to terminate the labour contract without giving a notice period and under certain conditions without even paying severance.

31 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

The employer is required to give notice of termination prior to dismissal and so wait for a notice period, determined in TLL, depending on the length of service of the employee, to pass. However it is possible to dismiss the employee without waiting for the notice period to pass, by paying his or her salary corresponding to the notice period, in advance.

32 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

According to article 25 of TLL the existence of a just cause (in the existence of the reasons mentioned above in question 30) makes it possible to terminate the labour contract with immediate effect (immediately, without notice or payment in lieu of notice).

33 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Severance pay is not indicated in No. 4857 (new) TLL, however there is a reference to article 14 of No. 1475 (old) TLL, for the determination of the conditions and calculation of severance pay. For each year spent in the working place of the same employer, the employee will be entitled to receive the amount of 30 days of his salary as severance pay. The actual starting date of the employee shall be considered as the beginning day of his or her length of service and the last gross salary of the employee shall be the basis of the total amount to be calculated as the severance pay.

34 Are there any procedural requirements for dismissing an employee?

According to article 17 TLL, before terminating a continual employment contract made for an indefinite period, a notice to the other party must be served by the terminating employer. And according to article 19, the notice of termination shall be given by the employer in written from including the reason for termination which must be specified in clear and precise terms.

Update and trends

Our labour legislation is quite new (TLL was just enacted in 2003 and gone through some amendments and Social Security and General Health Insurance Law was just enacted in 2006) so right now, EU legislation and developments are being followed and the government is trying to implement EU principles and procedures into employment relationships.

Still, dismissal of an employee by the employer is not subject to the approval of a government agency; only the employer is required to notify SSI and the related tax authorities from the dismissal, in accordance with the related legislation.

However, the employee that is dismissed is entitled to open a court case for reinstatement, under certain conditions that are mentioned in question 30.

35 In what circumstances are employees protected from dismissal?

It is not possible to terminate a labour contract relying on one of these reasons:

- union membership or participation in union activities outside working hours or, within working hours, relying to the consent of the employer;
- acting or having acted in the capacity of, or seeking office as, a union representative;
- filing a complaint or participation in proceedings against an employer involving alleged violations of laws or regulations or recourse to competent administrative or judicial authorities;
- reasons relating to race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin of the employees (this is related to the principal of equity in the employment relationship);
- absence from work due to maternity leave, when female workers must not be engaged in work, as foreseen in article 74 of TLL (a total period of 16 weeks, eight weeks before and eight weeks after confinement); or
- temporary absence from work during the waiting period due to illness or accident foreseen in article 25 of TLL.

36 Are there special rules for mass terminations or collective dismissals?

According to article 29 of TLL, when the employer contemplates collective terminations for reasons of an economic, technological, structural or similar nature necessitated by the requirements of the enterprise, the establishment or activity, he shall provide the union shop-stewards, the relevant regional directorate of labour and the Public Employment Office with written information at least 30 days prior to the intended dismissal.

Dispute resolution

37 May the parties agree to private arbitration of employment disputes?

If the parties agree, article 20 of TLL allows disputes to be referred to private arbitration within one month of receiving the notice of termination in case an employee claims that no reason was given for the termination of his or her employment contract, or the reasons that were indicated, were not valid enough to justify the termination.

38 May an employee agree to waive statutory and contractual rights to potential employment claims?

In our legal system, it is not permitted to waive statutory and contractual rights to potential employment claims. The essential idea of TLL is protecting employees, thus, it does not allow such a waive for potential employment claims.

39 What are the limitation periods for bringing employment claims?

In TLL the limitation period is specified as five years for employment claims such as salary, annual pay, vacation and overtime wage. However the limitation period for severance pay and payment in lieu of notice is 10 years referring to CoO since there is no specific article in TLL.

Contact Information;

B&B LAW OFFICE

Sıdıka BAYSAL HATİPOĞLU
Managing Partner

Cumhuriyet Cad. No:147/7 Harbiye
ISTANBUL - TURKEY

Tel : 0090 212 219 16 30 (pbx)
Fax : 0090 212 219 16 32
E-Mail: sbaysal@bb-legal.com
Web : www.bb-legal.com