



Employment & Labour Law

Fourth Edition

Contributing Editors: Charles Wynn-Evans & Jennifer McGrandle
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Turkey

Gönenç Gürkaynak & Ceyda Karaoğlan Nalçacı
ELIG, Attorneys-at-Law

General labour market and litigation trends

There has been a change in collective employment agreements in Turkey lately. The Bylaw No. 29386, published in the Official Gazette on June 14, 2015 and entered into force on the same day, has amended the Bylaw on Determination of Authority to Execute Collective Employment Agreement and Strike Vote dated October 11, 2013, No. 28792 (the “**Bylaw No. 28792**”). The changes enacted with the Bylaw No. 29386 are as follows:

- Article 3/1/(ç) of the Bylaw No. 28792 stipulating the “*Determination of Authority to Execute Collective Employment Agreement*” and Article 4/1/(a) of the same article stipulating the “*authority conditions*” have been amended. Accordingly, an employee union is entitled to make a collective employment agreement for a workplace or a business provided that the total number of such union’s membership is equal to or more than **one per cent (1%)** of all employees working under same sector with said union.
- According to Article 8/3 of the Bylaw No. 28792, it is not mandatory to inform unions having a membership of less than **one per cent (1%)** of all employees working under same sector with said union, of any decision regarding determination of a union’s authority.
- Articles 10/1 and 10/4 of the Bylaw No. 28792 have also been amended. *Per* such amendment, unions having a membership less than **one per cent (1%)** of all employees working under same sector with said union cannot object to a decision with respect to determination of a union’s authority.
- Additionally, with the Bylaw No. 29386, certain stipulations are integrated in Articles 4 and 9 of the Bylaw No. 28792:
 - Pursuant to those integrations made to Article 4, if more than one union has higher membership than forty per cent (40%) of all employees working in an establishment, the union that has the most members shall have the authority to execute the collective employment agreement.
 - The insertion made to Article 9 stipulates that, if more than one union meets the authority conditions and numbers of members of such unions are the same, the Ministry of Labour and Social Security will reject an application for determination of authority.

Redundancies, business transfers and reorganisations

One of the most controversial issues in Turkish Labour Law is the employer’s entitlement to make amendments to an employment contract to a certain extent, and thereby oblige employees to comply with the changes borne from those amendments without the employees’

consent. Employers' rights in that regard are stipulated in the employment agreement, with a provision stipulating such entitlement. Such provisions will be hereinafter be referred to as "*Amendment Provisions*" for ease of reference.

Parties to an employment agreement may agree on an *Amendment Provision* within the scope of freedom of contract. However, the extent of the right granted to employers with an *Amendment Provision* must be explicit, transparent and equitable for employees. In other words, if employers choose to exercise an *Amendment Provision*, it should not degrade the conditions that workers have already enjoyed in the workplace. Moreover, employers should also consider the social conditions of the workers. In other words, the circumstances in which the employee agreed to an *Amendment Provision* may change, and this could make complying with the changes brought by the employer by virtue of *Amendment Provision* unbearable. In such a case, the employer is not accepted to be entitled to execute this change by relying on an *Amendment Provision*. Therefore, whether a change can be executed under an *Amendment Provision* should be reviewed based on the unique circumstances of each case at hand. Such review is carried out by a gradual procedure. At first, the content and then the fairness of the exercise of the right borne from the *Amendment Provision* are reviewed, if necessary.

Review of content is conducted within the scope of Articles 19 and 20 of the Code of Obligation. The former pertains to review of the employment agreement to reveal the real intent of parties. In that context, any article stipulating the right to amend the agreement (*Amendment Provision*) should rely on parties' authentic and mutual acceptance. The latter article stipulates that unless the parties agree on an *Amendment Provision* mutually, to wit merely the employer brings the *Amendment Provision* to the table without any prior agreement, this provision is considered to be a general term and therefore, in order to inure effect, the content needs to have been explained to the employee and the employee needs to have consented to this term. Otherwise the *Amendment Provision* is deemed null and void.

Review on fairness is based on Article 2 of Civil Code No. 4721 and Article 5 of Labour Law No. 4857. The former article regulates the principle of good faith in general, whereas the latter one regulates equality.

In a nutshell, the concept of the *Amendment Provision* is currently a controversial issue for both employers and employees. On one side, employers prefer to make certain amendments to work conditions without being obliged to seek consent from the employee, while on the other hand, employees understandably wish to be prevented from changes dictated by employers by virtue of an *Amendment Provision*, or at least from the ones that are unreasonable or may be considered as an abuse of right.

Business protection and restrictive covenants

Post-employment non-compete obligations of employees can be regulated either in an employment agreement or by a separate agreement *per* Article 445 of Code of Obligation No. 6098 ("COB") and Article 23 of Civil Code No. 4721 ("CC"). However, since non-compete clauses restrict the working area of employees, and thereby their economic freedom, there are certain limitations that need to be complied with in order to execute those clauses. Those limitations are based on time, area and type of work.

- *Limitation on time* pertains to the years that employees can be held responsible under the non-complete obligation. *Per* Article 445 of COB, this time cannot exceed two years.
- *Limitation on area* pertains to the geographical area that the non-compete obligation shall inure effect. In that regard, the parties can specify a location for the non-compete area. The High Court of Appeals' precedents show that this area can cover three cities

at most, or a certain geographical area. Furthermore, the restricted area cannot be extended beyond the area where the employer operates.

- *Limitation on type of work* pertains to the specific type of work (product, service etc.) that the employee must refrain from due to a non-compete obligation.

If the scope of the non-compete obligation goes beyond those limitations in any way, Article 445 of COB gives discretionary power to the court to restrict the aspect of the non-compete obligation that exceeds legally set limitations. In such cases, legal doctrine suggests that the court may restrict the non-compete obligation if: (i) the employee enjoys no additional compensation against this exceeding non-compete obligation, and (ii) the financial future of the employee is jeopardised due to the non-compete obligation.

In conclusion, Turkish labour law allows a non-compete obligation as long as the aforementioned limitations are not breached. Otherwise, the courts are entitled to intervene and apply the restriction that they deem fit. That being said, this may not be possible in every case, as there can be such broad non-compete obligations that further restriction made by a court can have the effect of re-creating the boundaries of this obligation, thus in such cases the courts tend to annul the non-compete obligation altogether, instead of turning it into a legally acceptable non-compete obligation.

Discrimination protection

Mobbing, or workplace bullying, in Turkey is not a long-known topic and first became a current issue in 2005. Though mobbing is the subject of much debate today, there is no comprehensive legislative regulation so far to deal with it. Labour Code No. 4857, in this context, does not include any provision stipulating mobbing and there is no code directly regulating mobbing either. Instead, Code of Obligation No. 6098 (i.e. Article 417) regulates protection of the personality of the employee and the prevention of psychological and sexual harassment, yet is not sufficient to cover it at all.

On that note, there are ongoing studies to draft a proposed code named the Code of Non-Discrimination and Equality (“the Code”). The Code is prepared in line with the European Union Directives and includes substantive reforms to eliminate mobbing. The aim of the Code, in that sense, is to provide equal treatment and protection from whatsoever discrimination in workplace. What treatments (e.g. gender, skin colour, religious, ethnicity and health status) are regarded as discrimination are defined by Article 1 of the Code, and should employers treat employees discriminatorily by any means of the foregoing topics, this will be regarded as mobbing. However, unless treatments fall under the scope of Article 1, the employee cannot exercise rights arising from the Code. Even so, employees still enjoy their rights arising from Article 417 of the Code of Obligations.

Furthermore, the Code, in Article 11, proposes a board of anti-discrimination and equality which will be mainly in charge of supporting any activities to eliminate or prevent discrimination, resolving mobbing allegations either upon the request of employees or *ex officio*, presenting its opinion upon the request of judicial organs or state institutions and organisations, and imposing administrative fines. However, under no circumstances can the board be regarded as a judicial organ but only an administrative one, *as per* the Code.

That being said, the Code proposes sanctions if mobbing allegations are regarded as justified. In this context, the board may decide for compensation along with publication of the decision on the internet, file a complaint if any actions are considered an offence, and impose an administrative fee. Moreover, the board’s decision can also be regarded as an expert’s witness report by the courts.

In conclusion, the draft version of the Code of Non-Discrimination and Equality includes positive reforms as regards mobbing. So far, there is no extensive regulation in Turkey to contend with mobbing and therefore the Code needs to be very effective to reduce incidences of mobbing and increase the awareness of such a substantial issue.

Protection against dismissal

In cases where the employment agreement of the employee is to be terminated through a mutually signed agreement instead of a unilateral termination by the employer, determination of the settlement package to be paid to the employee requires the utmost discretion on the employer's side. An additional amount that is paid on top of the employee's legal and contractual rights (severance pay, notice pay, overtime payment, vacation pay, premiums etc.) is the most crucial element that renders a settlement, i.e. mutual termination agreement, valid. This is a well-established rule brought by High Court of Appeals' precedents, with a view to protect employees who are actually dismissed unilaterally but forced by the employer to sign a mutual termination agreement under the threat of not getting any payment at all after dismissal. Thus linking validity of a mutual termination agreement to payment of this additional amount is the most effective way to protect employees who are dismissed under the guise of settlement.

In a nutshell, validity of a mutual termination agreement relies on whether the relevant employee obtains a benefit in executing such an agreement. The employee's benefit could be identified by his/her financial inducement to accept the mutual separation agreement.

The High Court of Appeals acknowledges that an additional compensation should be paid to the employee in order to prove the existence of financial inducement for an employee to accept the mutual termination agreement. In that context, pursuant to High Court of Appeals' precedents, it is accepted that the additional compensation should be defined in line with the reinstatement compensation ("Reinstatement Compensation") and the payment in lieu of the unemployment period ("Unemployment Compensation") which the employee would be entitled to in case of a reinstatement lawsuit. On that note, the compensation amount referred to herein includes the reinstatement compensation (minimum four months', maximum eight months' salary) and the payment in lieu of the unemployment period (a maximum four months' salary).

Derived from that precedent, in an effort to determine a reasonable amount of additional compensation, the abovementioned receivables will be projected, assuming a reinstatement lawsuit is brought by the relevant employee. Accordingly, projection of the Reinstatement Compensation and Unemployment Compensation that the employee could receive as a result of filing a reinstatement lawsuit becomes the priority, when it comes to determining a settlement package.

The Reinstatement Compensation can be projected by virtue of High Court of Appeals for the 9th Circuit's recent decision dated 04.02.2013 and numbered 2012/28221 E., 2013/3963 K. It is stated in the relevant decision that the Reinstatement Compensation that should be paid to the employee: (i) whose seniority is 6 months up to 5 years, is 4 months of his/her salary; (ii) whose seniority is 5 years up to 15 years, is 5 months of his/her salary; and (iii) whose seniority is more than 15 years, is 6 months of his/her salary. Unemployment Compensation is, almost without exception, ruled to be 4 months of the employee's salary, since finalisation of reinstatement claims takes far more than 4 months, i.e. 1.5–2 years.

The following conclusion emerges when the projections with regard to Reinstatement Compensation and Unemployment Compensation are jointly taken into account: the

additional compensation that should be paid to the employee: (i) whose seniority is up to 5 years, is 8 months of his/her salary; (ii) whose seniority is 5 years up to 15 years, is 9 months of his/her salary; and (iii) whose seniority is more than 15 years, is 10 months of his/her salary.

In the light of the foregoing, observing the abovementioned benchmarks would safeguard the validity of a mutual termination agreement.

Statutory employment protection rights (such as notice entitlements, whistleblowing, holiday, parental and maternity leave, etc.)

A growing economy and competitive environment in Turkey have been leading companies to seek more profitable ways to conduct their business. Therefore companies have chosen to engage in subcontractor relationships in order to reduce their costs. Consequently, subcontractors have started to limit employees' entitlements so that they can keep up in this competitive environment. This is the reason for protection of subcontractors' employees against unlawful limitations of statutory employment rights. This is, to an extent, achieved through the Law on Amendment of the Labour Law, Certain Laws and Decrees and The Restructuring of Certain Receivables No. 6552 (the "**Law**"), imposing certain crucial obligations on primary employers by amending Articles 36 and 56 of the Labour Law No. 4857 (the "**Labour Law**").

Article 36 of the Labour Law used to regulate, prior to the Law, that administrations with a general or supplementary budget, local administrations, public economic enterprises or institutions and banks established based on special legislation shall: control whether or not contractors and subcontractors duly pay employees' remunerations; and pay the respective remuneration based on payrolls to be obtained from the contractor/subcontractor by deducting it from the contractor/subcontractor's fees upon application of an employee whose remuneration is not paid. Article 36/6 of the Labour Law used to also regulate that employers that are subject to joint responsibility under Article 2/6 of the same are vested with this authorisation to grant control to certain administrations and establishments.

After the changes came into effect with the Law, Article 36 now **mandates** primary employers to: control periodically, on a monthly basis or upon employees' request, whether or not subcontractors duly pay remunerations of subcontractors' employees; and deduct unpaid remunerations from subcontractors' fees and pay them to employees' bank accounts.

Furthermore, the new clause added to Article 56 by the Law regulates that annual paid leave entitlements of employees shall be calculated based on the duration they have worked in the same workplace in case the subcontractors of primary employers change during this duration but the same employees continue working for the same subcontracted works of primary employers. Additionally, pursuant to Article 56 after the Law, primary employers are now obliged to control whether or not subcontractors let employees use their annual paid leave entitlements, and to ensure that employees use their annual leave entitlements within the respective year, whilst subcontractors are obliged to provide primary employers with a copy of their mandatory books which include records of annual paid leave entitlements.

As can be seen, whilst primary employers were not obliged to protect subcontractor employees prior to the Law, the Law amended Articles 36 and 56 of the Labour Law and imposed the above obligations on primary employers in order to prevent both primary employers and subcontractors from limiting employees' entitlements.

Worker consultation, trade union and industrial action

Right to strike, firstly legitimised in Constitution 1961, thereafter in Constitution 1982, is regulated in law as Code of Trade Unions and Collective Bargaining Contracts (“the Code”), No. 6356 came into force in 2012 along with the amended Constitution in 2010. The Code is modified in line with the general principles of the International Labor Organization (ILO) and includes fundamental changes compared to previous codifications.

One of the most contradictory amendments is that the Code does not directly prohibit the political strike, solidarity strike, workplace occupation or decreasing productivity by workers. Instead, the way the law-maker identifies the right to strike indirectly prohibits the foregoing rights. To clarify, for employees to exercise their right to strike, concrete cessation and collective abandonment are collectively necessary conditions to be met for safeguarding or improving their economic and social position. Therefore, the political strike and solidarity strike would not be legal, as strikes do not comply with the goal of improving economic and social position, and workplace occupation and decreasing productivity would not be legal either, since concrete cessation and collective abandonment of workplace are obligatory for a legal strike. Therefore, said amendment is criticised mostly on the grounds that the Code is not in line with the principles of ILO but merely incorporates abrogated codes regulating the right to strike.

Strike bans, on the other hand, include positive amendments such as the reduction of work areas that are deemed banned from strike action. Employees working in notary public, the brown coal industry, pharmacy, education and commercial air transportation have the right to strike. However, the Code also adopts the notion of “suspension of strike” just like in previous codes and, so far, by virtue of that, the government has issued many decrees for suspension of strikes, lastly in January 2015 regarding the United Metal Workers’ Union, on the grounds of public health and national security. This has been criticised as being against ILO principles.

Another amendment featuring in the Code is that during the strike, workers can work on their own behalf (e.g. agricultural activities) to earn money but still cannot work for any employer. It is different from the previous codes which banned employees from working on their behalf or for other employers. This is regarded as a positive amendment regarding the right to strike of workers in Turkey.

In conclusion, the Code has come into force so that ILO principles are met. However, there are still some debated issues remaining unsolved and many issues still to be covered.

Employee privacy

Monitoring an employee’s computer and other devices became a preventive measure for many employers in order to protect companies’ interests, as a result of the increase in potential compliance issues for companies. In Turkish legislation, there is no provision stipulating the right of the employer to monitor an employee’s computers. Thus High Court of Appeals and doctrine are taken into consideration in dealing with this subject.

The High Court of Appeals for the 9th Circuit’s decision dated 13.12.2010, numbered 2009/447 E. and 2010/37516 K., points out that the employer has the right to review its employees’ business computers and mail correspondence. Within the dispute subject to the relevant decision, the employment agreement of the employee was terminated after the employer detected certain email correspondence which involved insulting remarks about the employer. In the reinstatement lawsuit initiated by the employee, it was decided that as long as it is a business computer and business email account, any document or

file obtained during a monitoring process should be deemed legitimate. In another High Court of Appeals for the 9th Circuit decision dated 17.03.2008, numbered 2007/27583 E. and 2008/5294 K., it is mentioned that in case the employer notifies that the computers and internet should not be used for personal purposes and in case the employer, by monitoring the employees' computers, determines that the employee uses them for his/her personal purposes, the employer then has a right to terminate the employee's employment agreement of the relevant employee for cause. The foregoing is also noted within the decision of High Court of Appeals for the 9th Circuit's decision dated 17.03.2008, numbered 2007/27583 E. and 2008/5294 K. Those High Court of Appeals' precedents mention that the employer has the right to monitor the employee's computer and other devices.

According to the doctrine, the consent of the employee is not needed in case monitoring of the employee's computer and other devices is based on a reason related to the security and protection of the workplace or third parties' personal rights. Nevertheless in case there is a doubt on the existence of the above-mentioned circumstances, the employer should receive the employee's prior consent.

It is of crucial importance to note that, if the employment agreements (i) recognise that company infrastructure should only be used for business purposes at all times, and (ii) grant the employer the right to review/transfer business computers' data, or (iii) the company bylaw or regulations enables the employer to undertake such review, the consent of the employee should not be received.

The doctrine asserts that the employer's entitlement in that regard is not boundless and the employer should conduct a narrowly-tailored and target-driven review of an employee's business computer, considering the exact purpose of such monitor. In other words, the employer should in any case refrain from an unnecessary invasion, especially into the personal data of the employee, and should take into consideration the privacy right of the employees. Therefore, a review or transfer of business computers' data without the employee's prior consent would be defensible, as long as the review is realised with the sole purpose of the monitoring of compliance, and to the extent any personal data unwillingly surfacing during the investigation is kept strictly confidential. Therefore since the privacy right of the employee is the limit for such monitoring, it is important for the employer to bring into balance the company interests and the employee's privacy rights.

Other recent developments in the field of employment and labour law

Omnibus Bill numbered 6645 (the "**OB**") was published in the Official Gazette on April 23, 2015 and became effective on the same day. The OB has amended certain regulations in Labour Law No. 4857 (the "**Labour Law**"). Accordingly:

- Article 46 of the Labour Law which regulates the durations to be considered as working days has been amended by the OB. Article 46/3/(b) now refers to Additional Article 2, which is also added to the Labour Law by the OB. *Per* Additional Article 2, the employee is entitled to three (3) days paid leave in case of marriage or adoption; and five (5) days paid leave in case of death of his/her mother, father, wife/husband, sister/brother or child(ren). Additionally, the employee is now entitled to up to ten (10) days paid leave within a one-year period if he/she has a child who is disabled at the rate of 75% or has a chronic disease. The above-mentioned paid leaves shall now be considered as working days.
- Pursuant to Article 69 of the Labour Law, night works cannot be longer than 7.5 hours per day. However, now with the OB, night works of employees who are working in

the sectors relating to tourism, private security and healthcare services may be longer than 7.5 hours provided that the respective employees give their written consent in this regard.

- The OB has amended Articles 41 (regulating overtime works) and 63 (working durations) of the Labour Law. Accordingly, working durations of employees who work in underground mines cannot be longer than 7.5 hours per day and 37.5 hours per week. These durations were 6 hours and 36 hours before the OB.



Gönenc Gürkaynak

Tel: +90 212 327 1724 / Email: gonenc.gurkaynak@elig.com

Mr. Gönenc Gürkaynak is the managing partner of ELIG, Attorneys-at-Law, a leading law firm of 60 lawyers in Istanbul, Turkey. Mr. Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. He holds an LL.M. degree from Harvard Law School, and he is qualified to practise in Istanbul, New York and Brussels. Mr. Gürkaynak also became a solicitor of the Law Society of England and Wales (currently non-practising) after passing the QLTT. Prior to joining ELIG, Attorneys-at-Law as a partner more than 10 years ago, Mr. Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years.

Mr. Gürkaynak heads the “Regulatory and Compliance” department of ELIG, Attorneys-at-Law. He also holds teaching positions at undergraduate and graduate levels at two universities and gives lectures at other universities in Turkey.

He has a total of more than 100 international and local articles published in English and in Turkish, and two books, one published on “A Discussion on the Prime Objective of the Turkish Competition Law From a Law & Economics Perspective” by the Turkish Competition Authority, and the other on “Fundamental Concepts of Anglo-American Law” by Legal Publishing.



Ceyda Karaođlan Nalçacı

Tel: +90 212 327 1724 / Email: ceyda.karaoglan@elig.com

Ms. Ceyda Karaođlan Nalçacı is a counsel at ELIG, Attorneys-at-Law in Istanbul, Turkey. Ms. Karaođlan Nalçacı graduated from Galatasaray University Faculty of Law and, following many years of practice at prominent law firms and companies in Istanbul, she joined ELIG, Attorneys-at-Law in 2007. She is admitted to the Istanbul Bar in 2004. She has extensive experience in dispute resolution, employment law, intellectual property law, administrative law, media law, commercial and contracts law and tender law. Ms. Karaođlan Nalçacı has represented various multinational and national companies before Turkish courts and Istanbul Chamber of Commerce. In addition, she has authored and co-authored many articles and essays pertaining to employment law, intellectual property law, commercial and contracts law and media law matters. She is fluent in English and French.

ELIG, Attorneys-at-Law

Çitlenbik Sokak No: 12 Yıldız Mahallesi Beşiktaş 34349 Istanbul, Turkey
Tel: +90 212 327 1724 / Fax: +90 212 327 1725 / URL: <http://www.elig.com>

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