

Working Arrangements for Non-Resident Foreign Companies' Turkey Operations Conducted through Local Individuals

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Introduction

In our globalized world where trade has no borders, it is a usual practice for companies to conduct operations in different countries, including Turkey. Some foreign companies prefer having an establishment in Turkey, such as a local subsidiary company, while conducting their operations in Turkey, whereas some foreign companies prefer to stay as non-resident in Turkey and conduct their operations in Turkey through local individuals. The main reason for companies choosing the latter may be that the works that needs to be performed in Turkey may require only a few individuals, thus having an establishment for such a small business may be considered as a burden for the company.

In this article, some of the commonly preferred working arrangements used by non-resident foreign companies for their operations in Turkey conducted through local individuals are explained.

Commonly Preferred Working Arrangements

(1) Direct Employment by Foreign Company

The most straightforward working arrangement used by non-resident foreign companies for their operations in Turkey conducted through local individuals is execution of an employment agreement between the local individual and the foreign company, i.e. direct employment by foreign company. There is no legal provision under Turkish labor law that prevents a foreign company from executing an employment agreement with an employee for performance of certain works in Turkey.

Having the employee under the payroll of the foreign company while having her/him stayed in Turkey is possible to the extent that regulations of the country where the company is established allows to do so. However, when in such a case, the employee cannot benefit any advantage or securities provided by Turkish Social Security Institution (“SSI”) as she/he will not be registered as an employee (insured) with SSI. For this employee to be able to benefit from medical care services in Turkey, there is a specific procedure to complete. The employee should first obtain a document, evidencing her/his revenue from the respective country’s authorized body and convey it to public bodies authorized by SSI in Turkey. Then, SSI determines the amount of premium to be paid for providing general health insurance and herewith the employee may benefit the health insurance.

The possibility of direct employment by foreign company must be examined in light of the scenario where a dispute arises between the parties. In case a dispute arises between the parties in the future and the employee initiates a lawsuit against the employer (foreign company) before Turkish courts, two issues are of significance: (i) the question of whether Turkish courts have jurisdiction to hear such a case and (ii) the question of which law will be applicable to the employment agreement.

Article 6(1) of Labor Courts Law No. 7036 (“Law No. 7036”) provides that in addition to the courts of the employer’s residence, the courts where the work is being performed have jurisdiction to hear the disputes connected to labor relationships. In case of direct employment by foreign company, the employee will perform the work in Turkey. Therefore, if the employee initiates a lawsuit against the employer (foreign company) before the courts where the employee performs the work, i.e. a Turkish court, based on Article 6(1) of Law No. 7036, the court will conclude that it has jurisdiction to resolve the dispute. In other words, Turkish courts will have jurisdiction in a possible lawsuit that may be initiated by the employee against the employer in case of direct employment by foreign company.

After establishing its jurisdiction, Turkish court will determine the applicable law to the employment agreement for resolution of the dispute. The applicable law to agreements containing a foreign element, such as the employment agreement to be executed between the employee and the foreign company, is determined pursuant to the provisions of Law on Private International and Procedural Law No. 5718 (“Law No. 5718”).

Article 27(1) of Law No. 5718 allows parties to choose the applicable law to their employment agreement. Therefore the employee and the foreign company can choose the applicable law to the employment agreement with a choice of law clause. That being said, such a choice is respected “*as long as the minimal protection that is provided by the mandatory provisions of the law of the employee’s habitual work place are reserved*”. Thus mandatory provisions of the law of the employee’s habitual work place are seen as the “*minimum protection*”. Based on these it can be concluded that even if the parties chooses the applicable law to the employment agreement in case of direct employment by foreign company, the minimum protection provided by the mandatory provisions of Turkish labor law must be regarded as a benchmark since these will be seen as the “*minimum standards*” that cannot be circumvented with the choice of law. Considering that almost all provisions of Turkish labor law are deemed mandatory in nature, practically Turkish labor law will be applied to the employment agreement. Article 27(2) of Law No. 5718 provides that “*In cases where the parties have not designated a law, the law of the habitual work place of the employee shall govern the employment agreement.*” Pursuant to this provision, in case the parties do not choose the applicable law to their employment agreement in case of direct employment by foreign company, Turkish labor law as the law of the habitual work place of the employee will be applied by Turkish courts.

As a result, it can be concluded that in practice, Turkish courts will apply Turkish labor law to the employment agreement in a possible lawsuit that may be initiated by the employee against the foreign company in case of direct employment by foreign company.

(2) Liaison Office

Another working arrangement used by non-resident foreign companies for their operations in Turkey conducted through local individuals is establishment of a liaison office in Turkey and employ the relevant individual through the liaison office. A company established under the laws of a foreign country may open a liaison office in Turkey upon the conditions that; (i) all expenses of the liaison office will be covered by the foreign currency brought from abroad, (ii) no commercial activity will be undertaken by the liaison office, and (iii) the liaison office will not generate any profits. In case a foreign company establishes a liaison office in Turkey, the relevant liaison office should be registered both with the tax office and SSI. Below elaborates on liaison offices under Turkish law.

Companies established in accordance with the laws of foreign countries are authorized to open liaison offices in Turkey upon the permit granted by the Ministry of Economy, General Directorate of Incentive Implementation and Foreign Investments (“FIGD”) located in Ankara. Liaison offices established in Turkey cannot engage in commercial activities. Liaison offices may engage in the certain activities such as (i) market research, (ii) providing technical support (providing trainings and technical support to distributors and supporting services to manufacturing suppliers in order to increase their quality standards), (iii) advertisement of products and services of the foreign company, (iv) operation as a regional management office for the foreign company (providing coordination and management services regarding activities such as preparation of investment and management strategies, planning, advertisement, sale, services following sale, brand management, financial management, technical support, research and development, external supply, testing of newly developed products, laboratory services, research and analysis, training of the employees), and (v) representation and accommodation (representation of the foreign company before relevant institutions and at relevant organizations, coordination and organization of the business contacts of the foreign company’s authorized persons in Turkey, answering the office use needs of such persons).

Liaison offices, in their first applications, are granted operation permits for 3 years at most. For term extensions, liaison offices are required to make an application before the expiration of their permissions. However, the permits obtained for market research or promotion of products or services of the foreign company cannot be extended.

Liaison offices are not allowed to have a share capital. Liaison offices are represented by individual(s) to be appointed via a certification of authorization issued in accordance with the respective jurisdiction of the foreign parent company.

(3) Contractor / Service Provider

Execution of a service agreement with an individual or a company is another working arrangement used by non-resident foreign companies for their operations in Turkey conducted through local individuals. Below elaborates on these two options.

(a) Service Agreement with an Individual

It is possible to execute a service agreement with an individual for the performance of the works to be conducted in Turkey for the foreign company's Turkey operations. The most important point regarding this working arrangement is that the individual, who is party to the service agreement, is not an employee of the foreign company; she/he is an independent contractor who performs the services requested by the foreign company in return for a service fee. In other words, there is not employment relationship between this individual and the foreign company and the fee received by this individual is only service fee, not wage. Therefore, rules of Turkish labor law will not be applicable in case of execution of a service agreement with an individual.

(b) Service Agreement with a Company

It is also possible to execute a service agreement with a company for the performance of the works to be conducted in Turkey for the foreign company's Turkey operations. In this case, the service provider company will provide the services specified in the agreement in return for a service fee. Surely the service provider company will employ some employees for realization of the services. However, there will be no employment relationship between these employees and the foreign company. In other words, these employees will remain as employees of the service provider company.

Conclusion

As explained above, there exist different working arrangements used by non-resident foreign companies for their operations in Turkey conducted through local individuals. While the working arrangement of having a liaison office requires having an establishment in Turkey, other working arrangements, i.e. direct employment by foreign company and execution of service agreement with an individual or company, do not require any establishment. The foreign companies are considered as employer in cases of direct employment by foreign company and establishment of liaison office, whereas in case of execution of service agreement the foreign company is only party to the agreement and not have the status of employer. All of these working arrangements have advantages and disadvantages compared to each other and choosing one depends on the specific needs and commercial discretion of the relevant foreign company.

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