Effects of COVID-19 Circumstances on Employment Relationships under Turkish Law

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Introduction

While the first case of novel coronavirus 2019 ("COVID-19"), a member of the macro-coronavirus family, had been diagnosed in January 13, 2020 in the city of Wuhan, China; the disease was firstly seen on March 10, 2020 in Turkey[1], later than many Asian and European countries such as Italy, United Kingdom and United States of America. Thereafter, considering the facts that the disease is highly contagious with a crude mortality rate of 3-4%[2] and World Health Organization characterized the outbreak as a pandemic on March 11, 2020[3]; precautions affecting daily business routines dramatically, such as curfew or temporary closure of work places, where people get in close encounter with each other[4], immediately followed. Regardless of being one of the temporarily closed businesses or not, employers and employees have been pondering on the effect of this pandemic on employment relationship. This study is aimed to evaluate these effects as well as the actions available for the employers as per Turkish Labor Law ("TLL").

The actions that employer may take:

COVID-19, as a highly contagious disease, is very likely to spread very swiftly among people in work places, due to the close interaction between colleagues. Accordingly, in order to minimize the spreading speed of the outbreak, the closure of the businesses, where people intensely interact with others, was the first wave of precautions that the Turkish Government has taken. Following that, some employers also have closed or still considering closing their businesses voluntarily to serve the same purpose that the Government embraces. Accordingly,

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[1] Please see *(in Turkish)* : <https://covid19bilgi.saglik.gov.tr/tr/sss/halka-yonelik.html> accessed April 12, 2020.

[2] Please see: <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200306-sitrep-46-covid-19.pdf?sfvrsn=96b04adf_2> accessed April 12, 2020.

[3] Please see: <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> accessed April 12, 2020.

[4] Pleasee see *(in Turkish)* : <https://www.icisleri.gov.tr/81-il-valiligine-koronavirus-tedbirleri-konulu-ek-genelge-gonderildi> accessed April 12, 2020.

several legal instruments that are available for the employers in the scope of TLL will be introduced below.

A. Remote Working

Remote working, also known as home office, is a type of employment relationship regulated under Article 14 of TLL, which is based on performance of the employee's obligations from home or from outside of the office through technological communication tools. The respective article provides that employment relationship based on remove working may be established in writing.

Taking into account the fact that "self-isolation" is the first and most crucial measure against the COVID-19 pandemic, employers may opt for implementing remote working to prevent the rapid spread of COVID-19, to the extent it is allowed by the specifics of the work. As explained above, in principle, remote working model requires a written agreement between the employer and the employee. Nonetheless, in consideration of the great significance of social distancing in terms of this outbreak, "wet-ink signature" of the employee should not be regarded as an essential component; rather, e-mail correspondence between the employer and the employee should suffice to lawfully enforce remote working. In other words, employer's announcement regarding the switch to remote working via e-mail and employer's written acceptance through e-mail should be deemed permissible in these extreme circumstances.

Differential treatment of employees subject to remote working is strictly prohibited under Turkish labor law. In this regard, the employer is not entitled to unilaterally decrease the employees' remuneration or restrict their rights born from their employment agreements or workplace practices, in any way.

B. Annual Paid Leave - Collective Leave - Offer for Unpaid Leave

Annual Leave: Under Turkish labor law, an employee would have the right of annual paid leave, upon the complementation of his/her one year of service in the workplace, as per Article 53 of TLL and Article 9 of Regulation on Annual Paid Leave ("Annual Leave

Regulation"). Nevertheless, the employee is not entitled to freely schedule his/her annual paid leaves and it is subjected to the consent of the employer within the scope of employer's right to govern and, according to an opinion[5] in the doctrine, employer's burden of surveillance. Otherwise, the employment can be terminated with just cause by the employer due to contradiction to his/her obligation to work[6]. Accordingly, the rule is that employer is entitled to schedule annual paid leave of employees, considering their work load or working conditions.[7] That said, employer is subject to certain rules while arranging the leave periods. Accordingly, employer should make the employees use their annual paid leave at once and only upon mutual agreement. Also annual leave period can be divided into three parts, one part of which cannot be less than ten days, as per Article 56 of TLL.

In light of the above explanations on annual paid leave and in consideration of the effects of COVID-19, it can be clearly indicated that the employer is entitled to make the employees take their annual leave as a part of precautions against COVID-19.

Collective Leave: The Annual Leave Regulation also acknowledges the motion of "*collective leave right of employers*" in Article 10, providing that employer is entitled to implement a collective leave, for either all or a part of employees, in a period starting from the beginning of April to end of October of each year. Yet, it should be kept in mind that the collective leave option requires employees to be fully paid as if employee takes annual paid leave upon mutual agreement between the employee and the employer.

Taking into account that the COVID-19 pandemic occurred in March in Turkey but is expected to remain further, employers are entitled to implement its collective leave right starting from April 1, 2020 as well.

Unpaid Leave: As a commonly applied business practice in Turkey, unpaid leave is considered by employers, especially due to the economical stroke caused by the sharp lack of demand in the market. By virtue of the vagueness regarding the length of the COVID-19

[5] Özlem Ulusoy Tuncal, "*Yıllık Ücretli İzin*", Selçuk Üniversitesi Sosyal Bilimler Enstitüsü Özel Hukuk Ana Bilim Dalı, Yüksek Lisans Tezi, Konya, 2010, p. 107-108.
[6] *Ibid*.
[7] *Ibid*.

pandemic and second and even further after-effects of it, unpaid leave appears to be an option for employers.

Despite lack of regulation with respect to unpaid leave in Turkish labor law, there are still several requirements set forth by precedents to have the employees take unpaid leave. First of all, employers cannot force employees to take an unpaid leave. Unpaid leave is considered to constitute a substantial change in the employees' working conditions under Turkish labor law, and such change is permissible only with the employees' written consent as per Article 22/I of TLL. Accordingly, if employer is willing to proceed with unpaid leave option, employees must be notified about this in the form of an "offer" for unpaid leave in writing and their consent[8] must be sought in 6 (six) business days as per Article 22/I of TLL. Unless employees give their written consent in 6 (six) business days, the offer will be deemed to be rejected and unpaid leave option cannot be exercised.

Additionally, the term for the "unpaid leave" should be clearly indicated[9]. Under Turkish Law, putting an employee on unpaid leave for an uncertain period might be interpreted as an implicit termination, which would lead to invalidity of termination alongside compensation liability. Thus, it is advisable to indicate a certain and determinable period for unpaid leave in the written notification to be made to the employees, just to be on the safe side with respect to possible future conflicts. To sum up, the requirements of unpaid leave can be summarized as below:

i. The employee should be notified of an offer regarding the unpaid leave.
ii. The period of non-paid leave should be clearly indicated.
iii. Written consent of the employee is strictly required.
iv. The term of the non-paid leave should be clearly indicated.
v. The written consent should be obtained in 6 business days as of the offer notified.

[8] 9th Civil Chamber of the High Court of Appeals, decision dated 24.03.2016 numbered 2015/27438 E., 2016/7211 K.
[9] İzzet Otru, "*İş Hukukunda Ücretsiz İzin*", İstanbul, 2010, p. 65

Unless the elements listed above are met collectively, the unpaid leave has a risk to be interpreted as a termination of employment. Having said that, in such case, the employer may face with claims for severance and payment in lieu of notice in addition to the reemployment obligation and compensation liability connected thereto. Therefore it is crucial to ensure that those criteria have been met in an unpaid leave procedure.

C. Half-wage

As per Article 40 of TLL, in case of a compelling reason that withholds the employee from performance of work or compels the work to be stopped wholly or partially, employer may deduct the salaries of employees, who are relevant for the ceased work, by half for each day up to one week. This half wage to be paid during one week should be paid for each day of the one-week period.[10] During this time period the employment agreement is deemed to be suspended, i.e. the parties are not bound with the legal and contractual rights and obligation borne from the employment relationship.

As mentioned above, Article 40 of TLL requires (i) a compelling reason and (ii) this compelling reason withholding the employee from work. A "compelling reason" must be an inescapable, unforeseeable and an uncontrollable external and extraordinary event.[11]

Based on the effects of COVID-19, the effect of official and voluntary closure of workplaces in terms of half wage implementation will be examined below.

a. Official closure of workplaces

Turkish Government decided for closure of particular types of businesses where people get close interaction due to the nature of work, such as gyms, barbers, restaurants *et cetera*, starting from March 17, 2020; and the re-opening timings of those businesses are not yet certain. To that end, it should be evaluated whether the half-wage notion is applicable on employees of those employers.

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[10] Derya Akat, "*Türk İş Hukukunda Kısa Çalışma*", Ankara, 2012, p. 57, 69, 78
[11] Seda Arslan, "*İşverenin Haklı Nedenle Fesih Hakkı*", On İki Levha Yayıncılık, 2012, p. 139 – 140

Before passing on to the examination with respect to official closure of workplaces, the first evaluation in this regard must focus on COVID-19's classification as a compelling reason for the officially closed work places. In light of the history of COVID-19, it can be easily argued that COVID-19 meets every element that is required to be deemed as compelling reason since it was inescapable, definitely unforeseeable, externally sourced with respect to the work place and it is highly extraordinary. In conclusion, COVID-19 fits the definition of compelling reason.

After determination of As COVID-19 being a compelling reason in the context of labor law, the issue of whether this compelling reason withholds the employee from work must be assessed. For the work places that were closed by the hand of government, it is evident that the employees working in these places are unable to work. Thus it can be concluded that the employer of such work place is entitled to implement half-wage on employees.

After expiry of the one-week-period during half-wage will be paid by employer, employee is entitled to terminate employment as per Article 24/III of TLL, since the compelling reason stems from the workplace, not the employee, and thereby gets entitled to severance payment, but not notice payment. If employee does not resort to termination though, employment relationship remains to be suspended, i.e. the parties are not bound with the legal and contractual rights and obligation borne from the employment relationship. Basically employee will not be performing work and employer will not be obliged to pay wages.

b. Voluntary closure of workplaces

In the doctrine, it is highly debated whether "voluntary" closure of a workplace as a health measure against COVID-19 pandemic might be considered as a "compelling reason" in the context of Article 40 of TLC, because when the High Court gives an example of compelling reason due to health-threatening events in the precedents, the case of "*official quarantine due*

to an epidemic" is mentioned.[12] Since there is no official quarantine at the moment, we cannot exclude the possibility that voluntary closure of a workplace might not be deemed as a "*compelling reason*".

However, despite the above-mentioned wording of precedent, COVID-19 epidemic fits the definition of "compelling reason". This is due to the fact that, COVID-19 is an unforeseeable event that compels the employer to stop work as a precaution not to increase spread of the disease among its employees. Cease of work might even be seen as a duty of the employer too, considering that the employer has the duty to take measure to protect the health of its employees.

Also the government, as a part of a support plan against the adverse economic effects of COVID-19 epidemic, has amended the Unemployment Insurance Law for state-allowance for short-time work, which is applicable in cases where there is "compelling reason". This amendment is done due to COVID-19 epidemic and it clearly mentions so in the Provisional Article 23, so this might be interpreted as the state acknowledging that COVID-19 epidemic is a "compelling reason". The details of such allowance will be explained separately below in detail under the Section (E).

The ambiguity here is due to the fact that there is no legal precedent for an event such as COVID-19 epidemic, which is why one should make assessments based on the general notion of "compelling reason" and similar precedents, though not entirely applicable for COVID-19 epidemic. The safest route for the employers might be to not see the COVID-19 epidemic as a "compelling reason" due to the labor courts' pro-employee approach and tendency to make interpretation to the favor of employee, because all in all, acknowledgment of COVID-19 epidemic a "compelling reason" would enable the employer to pay only the half of the employees' salary for one-week and also put the employment relationship on suspension too. But it is possible to argue that there is room for COVID-19 to be considered as a "compelling reason" stemming from both the workplace and employee, despite the lack of official quarantine as well. This is elaborated under Section (F-b-iii).

[12] 9th Civil Chamber of the High Court of Appeals, decision dated 20.11.2018 and 2016/14140 E., 2018/21011 K.

D. Short-time working routine

Turkish labor law entitles the employer to adopt a short-time working routine in the event of partial or complete closure of a workplace due to "*compelling reasons*". In cases of "compelling reason", the employer can apply for grant of allowance for short-time work for 3 months maximum. In the Unemployment Insurance Law, which is recently amended upon COVID-19, "epidemic" is referred as a one of the compelling reasons. So it is safe to say that Turkish Government considers COVID-19 pandemic as a compelling reason for business, as mentioned above. Accordingly it is possible to shift to short-time working routine due to COVID-19 pandemic.

In terms of what constitutes "short-time working routine", reduction of the workplace's weekly working hours by at least at the ratio of one third or being forced to partially or fully cease operations for a minimum of four weeks in total, either intermittently or perpetually, is considered as shift to short-time working routine. In such a case, the employer can also apply to the Turkish Labor Authority and request for a grant of allowance for short-time work. Below we elaborate on the conditions and scope of the allowance.

Short-Time Working Allowance: Employees who have been working for 60 days under an employment agreement and have paid unemployment insurance premiums for 450 days over the course of the last three years might benefit from the allowance[13]. The amount of daily allowance for short-time work is 60% of daily gross average earning that is calculated in consideration of the earnings of the insurant, i.e. the employee, for the last twelve months.

There is an upper limit to the allowance. Accordingly, the allowance cannot exceed 150% of the minimum wage. Lastly, if employee have not ceased working completely but was subject to a reduction in working hours, the allowance will be calculated *pro rata* the reduced hours against the full working hours.

[13] This information bases on the Provisional Article 23 of Unemployment Insurance Law and the said article clearly indicates that it will be in force until June 30, 2020. Therefore, this information will not be applicable one the period defined in the article expires.

There is a specific rule as to the timing of being granted to allowance for short-time work. Accordingly, the allowance will be granted after the one-week period, during which the employee is paid half salary due to "compelling reason". So in a nutshell, upon a "compelling reason", first, employee receives half salary for a period of one-week, and after that grant of allowance for short-time work is possible.

After expiry of the maximum period for grant of allowance, which is three months, if the compelling reason (i.e. the restrictive effects of COVID-19 epidemic) is still ongoing and this still forces complete cease of work in the workplace, then employment will remain to be suspended unless employer or employee, depending on the party that will be deemed to be the source of the compelling reason, terminate employment.

At this point we should reiterate that the issue of whether the COVID-19 epidemic can be considered as a "compelling reason" in case of voluntary closure of workplace is open to debate, but this issue might be clarified if employer is granted allowance for short-time work, since this might be interpreted as the approval of Turkish Labor Authority about COVID-19 epidemic constituting a "compelling reason" for that particular workplace, which would allow employment relationship to remain suspended unless employee resorts to termination of employment due to compelling reasons stemming from workplace. As explained above, in case of suspension of employment, the parties are not bound with the legal and contractual rights and obligation borne from the employment relationship.

E. Termination

According to the statistics of International Labor Organization, over 25 million people is expected to become unemployed by the end of 2020 due to COVID-19 epidemic[14]. Although termination of employment is acknowledged as last resort, termination remains to be an option for employers.

[14] Please see: <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_740877.pdf> accessed April 12, 2020.

Article 25/III of TLL, which regulates termination with just cause by employer, stipulates that if a compelling reason withholds employee from work for more than 1 (one) week, this constitutes just cause for termination. For exercise of this termination right by employer, the compelling reason that withhold employee from work must stem from employee, not employer. For an accurate evaluation regarding termination option, the topic should be evaluated separately based on the presence of individual or collective curfew.

a. In terms of employees subject to curfew

Turkish Ministry of Interior declared that people who are older than 65-year-old and having chronical diseases such as KOAH or asthma *et cetera* shall be subjected to a curfew as a measure against COVID-19 starting from March 24, 2020[15]. In other words, people meeting the criteria defined by the Ministry are subject to "individual" curfew and thus these employees cannot, and withheld, from going to work.[16]

As explained in summary above, as per Article 25/III of TLL employer is entitled to terminate employment in the event of a compelling reason that withholds the employee from work for more than 1 (one) week. It is evident that COVID-19 is a compelling reason with respect to employment. Furthermore, individual curfew *de facto* prevents people, who are older than 65-year-old and having chronical diseases, going to work.

Therefore, if an employee is subject to the individual curfew declared by the Ministry, it can be concluded that there is a compelling reason in the context of Article 25/III of TLL in terms of these employees, which means that employer must pay half-wage for one week throughout which the employee is withheld from work, as per Article 40 of TLL. After that, employer can resort to termination of employment based on Article 25/III of TLL, if it is not possible to implement remote working for that specific individual. That said the "*ultima ratio*" principle

[15] Please see *(in Turkish)* : <https://www.icisleri.gov.tr/65-yas-ve-ustu-ile-kronik-rahatsizligi-olanlara-sokaga-cikma-yasagi-genelgesi> accessed April 12, 2020.

[16] On April 3, 2020, Turkish Ministry of Interior issued a circular announcing a curfew for those who were born before or on January 1, 2000, starting at midnight on April 3, 2020. Nevertheless, (i) public officers, contracted personnel or employees in public institutions and organizations; (ii) those who have a regular job in the private sector and document this with a social security registration document; and (iii) seasonal agricultural workers are exempt from this curfew, unless they were born after January 1, 2002.

must still be observed in such cases too. Thus employees cannot directly terminate after expiry of the one-week period, as there are various steps that are available to preserve employment relationship, such as short-time working or unpaid leave.

In this scope, if remote working is not an option for the relevant employee, the employer should enforce the short-time working routine first (if conditions are met), before terminating the employment. The reason behind this necessity is that, during the period of short-time, the employee will be paid a certain amount of payment and the employment continues. As explained in Section (E), the short-time working can last 3 (three) months at most. Therefore, if the compelling reason lasts more than 3 (three) months and 1 (one) week, then the short-time working routine cannot be maintained and the employee should consider the options of unpaid leave, before going for termination of employment.

In light of above, if employee accepts unpaid leave; then the requirements explained above under Section (C) must be met. On the other hand, if employee does not accept unpaid leave, employer is entitled to exercise termination based on Article 25/III of TLL with immediate effect. Although the employment gets terminated with just cause, employer must still pay severance, but there will be no obligation to make notice payment since Article 25/III inures effect immediately.

b. In terms of employees that are not subject to curfew

Turkey has not yet declared a collective curfew, except the two-day-long curfew in several cities in Turkey on April 11-12, 2020. The legal assessment on the option of termination of employment differs based on whether the work place is closed due to law or voluntarily.

i. If the work place is officially closed

While the employer is entitled to terminate employment due to employee being withhold from work for more than 1 (one) week due to a compelling reason as per Article 25/III of TLL, employee is also entitled to terminate employment if the work has stopped for more than 1 (one) week due to a compelling reason as per Article 24/III of TLL.

If the work place is closed for more than one week, employee will be paid half-wage during the first one week. After that, employee is authorized to terminate employment. Such termination requires payment of severance to employee. Unless employee resorts to termination, employment remains to be on suspension, i.e. the parties are not bound with the legal and contractual rights and obligation borne from the employment relationship.

ii. If the workplace is voluntarily closed

The Turkish Government, similar to other governments of other countries, encourages self-isolation for its citizens to minimize the spread speed of COVID-19. In accordance with this, some employers has chosen to close their business for an unknown period of time to ensure the health and well-being of their employees, which complies with both the calls of the Government and employers' occupational health and safety obligations.

In such cases, acknowledgement of COVID-19 as a compelling reason bears crucial significance. By definition, a compelling reason must be such that one cannot avoid it with precautions taken by the employee; otherwise the relevant event does not constitute compelling reason. At this stage, there is no cure, vaccination or precaution that could completely eliminate the risk of COVID-19. Considering the fact that even the World Health Organization presents masks or gloves as a partial protection against COVID-19 and there is no consensus on the function of those among scientists, one can argue that COVID-19 is unavoidable. This basically means that employee might not be able to protect himself/herself with zero risk; thus one can argue that there is a compelling reason that not only stems from employer, but also from employee. This is simply because employee cannot eliminate the possibility of being infected in his/her own surroundings too, not only in the workplace, considering that the risk of infection is not confined to workplaces, but the whole country.

In addition, it is a fact that the circumstances created after COVID-19 is one of a kind and such conditions were not experienced for a long time in the modern times of history of humanity, maybe ever. Therefore, literal interpretation of the criteria set forth in the jurisprudence of the High Courts of Appeal, which exemplifies compelling reasons through

"*official quarantine due to an epidemic*", might be a too restrictive interpretation in terms of this unprecedented health crisis.

Under these circumstances and real-life facts with respect to COVID-19, one can assert that even in case of a voluntary closure of workplace, there is still a compelling reason stemming from employee and accordingly employer should be entitled to terminate the employment in compliance with our explanations mentioned in Section F(a) above.

As a last note, as of the date of this article, there is a draft law ("Draft Law") under examination which is expected to be legalized in following days. The Draft Law prohibits termination of employment for 3 (three) months as of the publication of the Law, unless the right to termination arises as per Article 25/II of TLL. The Draft Law proposes that the employer shall be entitled to put the employees on unpaid leave, without need for consent of employee. Then again the Draft Law is not even finalized yet and thus the law might be amended further. Therefore, the specifics of these provisions will be determined in following days as well.

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