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Recent Measures and Amendments Introduced in Employment Law due to COVID-19

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The novel COVID-19 pandemic continues to have substantial impacts on our lives in various ways. In order to fight against the adverse effects of this pandemic, Grand National Assembly of Turkey has recently adopted an omnibus law: Law No. 7244 on Reducing the Effects of the Novel Coronavirus (COVID-19) Pandemic on Economic and Social Life and the Law on the Amendment of Certain Laws ("Omnibus Law"). This Omnibus Law is published in the Official Gazette No. 31102 and dated April 17, 2020 and brought significant changes pertaining to employment relationships.

This Omnibus Law is legislated with a view to maintain continuity of employment and to protect both the employers and the employees from the brunt of COVID-19 pandemic. Accordingly, the below amendments have entered into force with the Omnibus Law.

1. Prohibition of Termination of Employment Agreements and Entitlement for Unilateral Decision for Unpaid Leave

Prohibition of Termination of Employment Agreements: One of the most significant amendments made with the Omnibus Law is regulated under Article 9, which incorporates Provisional Article 10 into the Turkish Labour Code No. 4857 ("TLC"). Provisional Article 10 prohibits employer from terminating any kind of employment or service agreement for a period of three months starting from April 17, 2020 (*the President is entitled to extend this period up to a total of six months*), regardless of whether or not that agreement is in the scope of TLC. So employees who are subject to, *inter alia*, Turkish Code of Obligations No. 6098, Press Labour Law No. 5953 and Maritime Labour Law No. 854 are also included in the scope of prohibition of termination.

Only exception provided for this prohibition is the employer's right to execute immediate termination with just cause connected to employee's behaviour breaching moral and good faith principles or due to similar cases, as per Article 25/II of TLC or other applicable laws.

So this prohibition prevents termination of employment agreements by employers, based on valid reasons (*for instance, business requirements or underperformance or incompetency of the employee*), health reasons or compelling reasons, which are the most common grounds that employers resort to in face of COVID-19. This prohibition does not cover mutual termination of employment agreement though. In addition, if the term of a fixed-term employment agreement expires during the prohibition, this would not be regarded to be against the prohibition as well.

Furthermore, if employer or employer representative terminates an employment agreement and thereby breaches the Provisional Article 10 of TLC, an administrative fine will be imposed in the amount of minimum monthly gross salary valid on the termination date (*which is TRY 2.943 in 2020*) for each terminated employee. On top of this administrative fine, the employer will be subject to legal repercussions attached to invalidity of termination, such as reinstitution of the employment and compensation connected to this invalid termination.

Unpaid Leave Right of the Employer: Provisional Article 10 of TLC further provides that, after April 17, 2020, employer can unilaterally put employee on unpaid leave for a maximum period of three months (*the President is entitled to extend this period up to a total of six months*), either partially or completely. This regulation changes the fundamental rule for the concept of unpaid leave. The rule was that the employees' written consent to unpaid leave is a must for initiation of unpaid leave, i.e. employer cannot impose unpaid leave on employees. This has changed with the amendment.

Provisional Article 10 explicitly states that being put on unpaid leave by employer does not give employee the right to terminate employment agreement based on just reason (*putting employee on unpaid leave without employee's consent was just cause for termination of employment by employee*). In that sense if employee acts contrary to this provision and

terminates employment agreement, this termination will be deemed as unlawful and the employee will liable for notice payment against the employer, along with damages incurred by the employer due to termination, if any of course.

It should be noted that there is no provision preventing employer to put only a part of the employees on unpaid leave, *per se*. That said Article 5 of TLC, regulating "the principle of equal treatment" will still be applicable in such cases. As per this principle, employer cannot engage in any differential treatment between the employees unless there are objective and reasonable grounds for this. Therefore, if an employer chooses to put not all but only certain employees on unpaid leave, this must be based on objective and reasonable grounds. For instance employer might choose to put on unpaid leave the employees who are not deemed critical and/or essential for performance of the limited scope of work that is being done in the workplace under the current epidemic.

Unless there is such an objective and reasonable grounds for differential treatment, the employees who are put on unpaid leave will have the right to request compensation amounting up to their 4-month-salary, along with other rights that they have been deprived of due to this differential treatment. Also these employees may terminate their employment agreements based on just cause and this termination will not be considered as a termination done due to being out on unpaid leave, as it is rather due to unjust differential treatment. So there is no prohibition for such termination.

On that front, the status of fixed-term employment agreements must be examined as well. As per Article 11 of TLC, fixed-term employment agreements can only be concluded based on objective conditions, such as fixed-term work, or completion of a certain work, or emergence of a fact. In light of that, if a fixed-term employee is put on unpaid leave, this would mean that this employee would not be able to perform the duties arising from the employment agreement and in such a case the objective conditions, based on which that this fixed-term employment agreement was formed, could not be satisfied. In other words, the definition of fixed-term employment agreement suggests that such agreement cannot be concluded in the absence of objective conditions; and if the employment relationship gets suspended through

unpaid leave, the objective conditions prompting this agreement would remain unfulfilled. Therefore, the period during which the purpose of the fixed-term employment agreement is not realized, should be added on top of the pre-determined fixed-term. To wit it is reasonable to conclude that the term of fixed-term employment agreements will be extended for the duration of unpaid leave. Accepting otherwise would be contrary to principles surrounding fixed-term employment agreements.

Unpaid Leave Payment: Article 7 of the Omnibus Law adds Provisional Article 24 to the Unemployment Insurance Law numbered 4447 ("UIL"). Pursuant to Provisional Article 24 of UIL, the following employees will receive a daily salary support of TRY 39.24 from the Unemployment Insurance Fund, for the duration of their unpaid leave or unemployment:
(i) Employees who are put on unpaid leave in accordance with the Provisional Article 10 of TLC and who are not eligible for short-time working allowance.
(ii) Employees whose employment agreements are terminated by the employer within the scope of Article 51 of UIL after March 15, 2020 (*so the employment agreement must not be terminated due to employee's breach of moral and good faith principles and other similar circumstances*) and who cannot benefit from for unemployment benefits

On the other hand, the employees who receive retirement pension from a social security organization cannot benefit from this support payment. This salary support will not be subject to any deduction, excluding stamp tax. Lastly, term of this payment shall not exceed the 3-month-period regulated under Provisional Article 10 of TLC pertaining to prohibition of termination of employment agreements.

If it is determined that the employee who is on unpaid leave and therefore benefiting from the salary support is being put to work by the employer, an administrative fine will be imposed on the employer, in the amount of the minimum monthly gross salary valid on the violation date (which is TRY 2.943 for 2020) per employee and for each month the employee was put to work. In such a case, the salary support that was already paid to the respective employee(s) will be collected from the employer along with legal interest accrued from the payment date of the salary support.

Moreover, those who benefit from salary support as per Provisional Article 24 of UIL and are not included in the scope of "*general health insurance holder*" or "*dependant of a general health insurance holder*" in terms of the Social Insurances and General Health Insurance Law No. 5510 will be considered as a general health insurance holder pursuant to Article 60/1-g of the same law and their premiums pertaining to general health insurance will be covered by the Unemployment Insurance Fund.

2. Short-Time Working Allowance

Another noteworthy amendment brought by the Omnibus Law is regulated under Article 8, which incorporates Provisional Article 25 into UIL. This article aims at facilitating and shortening the process of providing short-time working allowances. Prior to this amendment, grant of short-time working allowance was possible only after completion of eligibility assessment by Turkish Labour Authority. Upon entry into force of Provisional Article 25 of UIL, the short-time working allowances will be granted upon the employers' statement without waiting for completion of the eligibility assessment, in terms of short-time working applications made by the employers due to compelling reasons based on COVID-19.

Additionally, if there is any overpayment or undue payment that is made to the employees as short-time working allowance due to incorrect information or documents provided by the employer, these payments will be collected from the employer, along with legal interest.

The effective date of Provisional Article 25 of UIL is regulated as February 29, 2020. Therefore, short-time working allowances will be granted based on the employers' statement for all short-time working applications made after February 29, 2020.

In relation to short-time working application, Article 6 of the Omnibus Law adds the phrase of "*excluding eligibility assessment*" to Provisional Article 23 of UIL and amends the respective article as such: "*The applications made within the scope of this article shall be concluded within 60 days as of application date, excluding eligibility assessments*." Thus, this

article is altered in a way that is compatible with Provisional Article 25 into UIL; in other words, with a view to ensure that there is nothing that could prevent Turkish Labour Authority from granting allowance without waiting for the eligibility assessment.

3. Extension of the Periods Regulated in the Trade Unions and Collective Labour Agreement Law No. 6356 ("Law No. 6356")

In accordance with Article 2/1-ı of the Omnibus Law, the periods within the scope of Law No. 6456, pertaining to granting competence, executing collective labour agreements, resolution of collective labour disputes and strike and lockout have been extended for three months as of the effective that of the respective article, i.e. April 17, 2020. The President is entitled to extend this three-month period up a total of six months.

This provision does not preclude the parties from conducting collective bargaining and concluding collective labour agreements. This extension is regulated to avert any forfeiture of the parties.

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