Employees (private company acquisitions) Q&A: Turkey

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Country Q&A | Law stated as at 31-Dec-2019 | Turkey

This Q&A provides country-specific commentary on *Practice note, Employees (private company acquisitions): Cross-border*, and forms part of *Cross-border private company acquisitions*.

Employees

1. Are there any obligations to inform or consult employees or their representatives or obtain employee consent on a share purchase or asset purchase?

Share purchase

Turkish Law has adopted the principle of "complete succession" with regard to share transfers. In this regard, the new shareholder of the company will gain all the benefits the former shareholder enjoyed by virtue of their shares and will also be liable for any debts arising from the same. As such, in case of a share transfer:

- The legal personality of the employer does not change.
- Employment contracts remain as they were.
- Employees do not have any right to be informed or consulted.

Asset purchase

If the entire business is subject to the transfer, employment contracts that are in force on the transfer date are also automatically transferred simultaneously with the business or related business unit/department to the transferee with all rights and obligations. As such, employees do not have the right to be informed or consulted. However, as there may be uncertainty as to whether the entire business is considered to be transferred, in practice, companies often choose to have the transferred employees sign a protocol or consent letter whereby the existing rights are reiterated and it is emphasised that the employment agreement along with the existing rights have been transferred to the new employer. In case of an asset transfer that does not qualify as a business transfer, employee consent is required.

2. What protection, if any, do employees have against dismissal in the context of a share or asset purchase? If dismissals occur, who is liable?

Employees do not have any protection against dismissal in the context of a share purchase (see *Question 1*).

Employees that refuse to give consent in the case of an asset transfer will remain the employees of the seller, and the seller does not have a specific dismissal right against these employees on the basis that they did not provide consent. Employees, who did not provide consent, cannot be forced to be transferred to the purchaser and they remain employees of the seller with their normal rights, as failure to provide consent cannot be considered as a basis for termination of employment.

If the company merges with another company, spins off, or changes its type (for example, by changing to a joint stock company or limited liability company) the related provisions of the Turkish Commercial Code (Articles between 134 and 194) will apply and the employee will be entitled to prevent the automatic transfer of their own employment agreement based on Article 178. In such case, the employee may terminate the employment relationship based on just cause and will be entitled to all their earned rights, for example severance payment, remaining annual leave and earned bonuses. However, the notice period payment will not be payable as this does not arise in cases of termination for just cause.

3. How much does it cost to dismiss employees in the context of a business reorganisation? What formalities need to be followed?

Costs

The costs that may arise from a business reorganisation is dependent on several different factors. If the reorganisation requires the dismissal of existing employees, the following must be taken into consideration:

- Payments that must be made to the employee as a result of their termination of employment.
- Costs associated with the potential lawsuit that may be filed by the employee.

Formalities

The Labour Code provides an occupational security mechanism for workplaces where 30 or more employees are employed. Under this mechanism employers can unilaterally terminate the employment agreement of an employee who has been employed for a minimum of six months if there is valid cause *(geçerli sebep)* or just cause *(haklı sebep)* for termination. The following grounds are regarded as valid causes (among other things):

- Inefficiency or lack of qualifications.
- Attitude problems.
- Necessities in relation to the business or workplace (for example, company reorganisation, financial difficulties of the company, liquidation of the company, or closure of certain departments).

Under the Labour Code, just causes that an employer to terminate an employment agreement can generally be categorised as follows:

- Health reasons.
- Lack of good faith and moral character.
- Absence of the employee.

If there is no valid or just cause for termination of an employment agreement, the employee may initiate a restitution of employment claim to its former employment within one month of the termination date, arguing that the employer did not have a just or valid cause to terminate the agreement. If the court determines that neither a valid nor a just cause exists, the employer must either:

- Re-employ the employee at their request, within one month of the termination date.
- Compensate the employee by paying a maximum of four months' wages as compensation for the employee's unemployed period. This is in addition to an amount equal to four to eight months' wages as compensation for the employer's rejection of the court's order for re-employment. This is based on the length of unemployment period. If the court proceedings take more than four months, four months' wages will be paid as compensation for the employee's unemployed period. If the proceedings take less than four months' then the compensation is calculated by taking into account the exact unemployed period.

In case of termination of an employee for valid cause, the employer must provide the employee with notice payment, severance pay, and the employee's unpaid employee receivables (for example, accrued but unpaid salary, overtime salary, unused annual leave, and additional benefits). However, on termination based on just cause, only unpaid salaries and any and all outstanding employment receivables that the employee did not receive for the time he/she worked until termination must be paid to the employee. Additionally, unless the employment contract is terminated based on just cause arising out of a lack of good faith and moral character, the employee will also be entitled to receive severance payment.

Collective dismissal/collective redundancies

Employers can terminate employment contracts on the basis of collective redundancy (also known as a collective dismissal), which is considered a valid cause under the provisions of the Labour Code. Employers can proceed with collective redundancies to the extent that dismissal is based on economic reasons, technological development, or reorganisation of the work.

Collective dismissal will be deemed to have occurred if the following number of employees have been terminated:

- Company with between 20 and 100 total employees: a minimum of ten employees.

- Company with between 101 and 300 total employees: at least 10% of total employees.
- Company with over 301 total employees: a minimum of 30 employees.

In case of collective redundancy, employers must notify the following at least 30 days prior to initiating a collective redundancy:

- Trade union representatives.
- The regional directorate of the Ministry of Family, Labour, and Social Security, and the Turkish Labour Authority.

The notification must contain grounds for the dismissals, the total number of employees to be affected by the dismissals, and the period of time in which the dismissals will take place.

Further to the notification, a meeting will be held between the trade union representatives and the employer which will aim to prevent the collective dismissal decision, reduce the number of employees to be dismissed, or reduce the adverse effects of the collective dismissal on the employees. The collective dismissal will become effective within one month of the notification.

4. Do employees have any other rights on a share or asset purchase? What happens to agreements with trade unions and other collective agreements (if any) on a share or asset purchase? Is there scope to change those agreements after the acquisition has taken place?

Employees do not have any additional rights other than those mentioned in *Question 1* and *Question 2*.

#In the case of a share purchase, the legal personality of the employer does not change, and individual employment contracts as well as collective labour agreements (if any) will remain the same.

#In the case of an asset purchase, if the entire business is subject to transfer, the collective labour agreement is also automatically transferred to the purchaser. In the case of an asset transfer that does not qualify as a business transfer, employees and related agreements will remain with the seller unless otherwise determined by the parties.

5. What information would a buyer usually request about employees in a due diligence exercise relating to a private company or an asset acquisition? Would the seller commonly provide this information? Are there any data protection or privacy issues relating to that provision?

The buyer typically requests from the seller, and the seller commonly provides, the following information about the employees of a company:

- A list of the company's employees, together with the information regarding their:
    - position;
    - current salary;
    - length of service;
    - outstanding annual leave; and
    - notice and severance pay liabilities.

- Information regarding the total liability of the company regarding severance payment, notice payment, overtime work, and unused annual leave days.
- Copies of collective labour agreements signed between the company and the syndicate representing its employees (if applicable).
- Copies of standard-form employment contracts and documents used by the company (that is, the conditions of work).
- Employee handbooks, health and safety rules, disciplinary procedures, and business conduct guidelines (if any) outlining the personnel regulation, policies and procedures of the company, including annual working days and hours, overtime rates, holiday entitlements, salary review dates, and sick pay.
- Information on any occupational accidents, and the details of any pending claims if the employees' compensation is not fully covered by insurance, thereby meaning that it will revert to the recourse of the company.
- All kinds of documentation regarding the service contracts of the directors and the senior management of the company, including non-compete and confidentiality agreements and undertakings.
- Description of employee benefits, including pensions, post-retirement benefits, incentive compensation arrangements, or other bonuses paid to the employees of the company.
- Information on whether the company has any sub-contracted employees, and if so, the number and scope of work of the sub-contracted employees. This includes copies of the agreements executed in relation to the subcontracted employees, if any.
- Information on the employment of handicapped and medical staff (including company doctors and nurses) in the company.
- Information on whether the company employs foreign personnel, and if so, copies of the permits obtained for the employment of such persons.
- Copies of investigation minutes conducted by the Regional Labour Directorate and the company's responses in relation to the deficiencies determined in such investigations, if any.

In relation to data protection and privacy issues, the buyer usually requests information on the details of the procedures for handling employees' personal data. This is in addition to requesting copies of privacy notices, consent letters, and any data protection policies issued to confirm that the company is compliant with the applicable data protection legislation in terms of processing its employees' personal data. If there is no employee consent for the sharing of their data, it would be safe to provide redacted information to the interested party.

6. What provisions would commonly be inserted in a share purchase or asset purchase agreement relating to employees?

Share purchase or asset purchase agreements commonly include, from the seller, the following information and representations related to the company's employees, which may vary depending on the size and operations of the target company and the further specifics of the transaction:

- #The number of employees in the company.
- A representation indicating the complete and accurate personnel records for all employees.
- Information regarding any conflicts, demands, claims, and disputes with employees, or any trade union, association of trade unions, work council, staff associations, or other bodies representing the employees.
- A representation indicating compliance with the applicable labour laws, workplace safety laws, job security laws, or other relevant legislation, regulations, rules, and principles.
- A representation indicating the absence of any:
    - increase in the overall level of compensation to employees since a specified date;
    - agreements or other rights in place which may entitle any of the employees to receive any form of increased compensation as a result of the transactions contemplated; and
    - private plans, private pension, retirement, death, illness, housing, or other private benefit programmes or plans for the employees of the target company.
- A representation confirming that all employees of the company are directly employed by the respective company under employment contracts and not as consultants, contractors, independent service providers, or otherwise.
- A representation about the absence of any strikes or work stoppages relating to the business and the absence of claims or demands made by employees in respect to wage increases, working conditions, overtime, or breach by the company during the last three years.
- A representation indicating the absence of any fact or situation that would constitute a just or valid cause under the Labour Code for termination of employment of any of the employees and absence of a present intention to terminate an employee.
- A representation that the company is up to date on the payment of social security obligations, and that the company has no current or accrued obligations to make any severance or overtime payments to any former employee.

7. Are there any restrictions on the composition of the board of directors or supervisory board of a private company?

The most common types of capital companies in Turkey are joint stock companies (JSCs) and limited liability companies (LLCs).

Directors of JSCs or managers of LLCs can be elected and dismissed by the shareholders. At least one shareholder of an LLC must be a company manager. Other managers can be appointed in addition to the shareholder-manager.

Both individuals and legal entities can be directors or managers. However, if a legal entity is appointed as a director or manager of a JSC or an LLC, an individual representing the legal entity must also be appointed.

In accordance with the Turkish Commercial Code, shareholders have the authority to appoint the members of the board of directors. However, the board of directors has the authority to appoint a replacement board member for the remainder of the term when one or more of the directors resigns from duty and/or the related board membership position becomes vacant for any reason.

Boards of directors of JSCs and boards of managers of LLCs can be composed of a single member, but for adopting resolutions, most companies prefer appointing an odd number of directors or managers. There is no maximum limit on the number of directors or managers.

8. Are there any requirements as to nationality or domicile of directors/management? Are there any restrictions on foreign managers or directors for companies in your jurisdiction?

There are no domicile or nationality restrictions for companies in Turkey.

9. In what circumstances can directors of a company or parent company directors be personally liable for the acts of a company?

In general, the Turkish Commercial Code adopts the principle of fault based liability. As such, board members or managers will be held liable for damages incurred by the company, shareholders, and creditors of the company due to a breach of their obligations arising from the law or the articles of association where they are at fault. They cannot be held liable for breaches of law, articles of association, or fraudulent acts that are beyond their control (*Article 553, Turkish Commercial Code*). However, as an exception to this rule, board members or managers who have the

authority to represent the company are responsible for the payment of public receivables that cannot be collected from a company regardless of the existence of their fault.

10. Do foreign nationals require a residence/work permit to live and work in your jurisdiction? How difficult is it to obtain these permits; how long does it take; what is the process and how much does it cost?

The Code on International Workforce does not contain detailed provisions on certain aspects of the employment of foreign nationals, particularly with respect to the work permit application process and the requirements for such applications. The Code on International Workforce stipulates that the application procedures, required documentation, and all relevant information regarding work permits will be governed by secondary regulation to be issued by the Ministry of Labour and Social Security. However, no secondary regulation on these issues has been introduced yet. The only published secondary legislation is the Regulation on Turquoise Cards. A Turquoise Card is a document granting a specific status to foreign persons provided that their application is considered appropriate as per their education level, professional experience or input to science and technology. The Turquoise Card holder benefits from the same rights granted by an indefinite term work permit. The Turquoise Card is granted for a transition period of three years initially. However, if the Turquoise Card is not cancelled within this transition period for one of the reasons stipulated under the legislation, it becomes indefinite at the end of the three-year period. The Regulation on Turquoise Cards:

- Regulates foreign nationals who are eligible for a Turquoise Card.
- Briefly explains the documentation required for Turquoise Card applications and the evaluation process.
- Enables Turquoise Card owners to obtain a work permit for an unlimited period of time.
- Enable the spouse and any children of Turquoise Card owners to obtain residency permits.

The provisions of the previous legislation (that is, the Code on Work Permits for Foreign Nationals No. 4817 and its secondary legislation) that do not contradict the Code on International Workforce will continue to apply until the regulation(s) implementing the Code on International Workforce enter into force (Provisional Article 1(4), Code on International Workforce). Any work permit applications to be filed in the near future will therefore be processed in accordance with the Code on Work Permits for Foreign Nationals No. 4817 and its secondary legislation.

Visas

Procedure for obtaining approval. Foreign nationals must obtain a work visa and a work permit before starting work in Turkey. The work visa is obtained from Turkey's foreign embassy and is granted by the Ministry of Labour and Social Security. Work permits are not valid without a work visa.

Foreign nationals who have obtained a residency permit (see *Permits* for how to obtain such permit) valid for at least six months do not need to obtain a work visa through Turkey's foreign embassy, as they can directly apply for a work permit in Turkey through their contemplated employers. The residency permit must be amended in accordance with the obtained work permit (if a work permit is successfully obtained). Foreign nationals who intend to extend their stay in Turkey beyond the time limit prescribed in their visa, and those who need a visa exemption or intend to stay

for more than ninety days must obtain a residence permit. There are several types of residence permits (for example, short term, family, student, long term) and the application must choose the adequate type of residence permit.

The application for a residence permit is made with the relevant consulate of the applicant's citizenship or where the applicant is currently resident. On filing the application by submitting the requisite documents, the General Directorate of Immigration Administration evaluates the application within 90 days and informs the relevant consulate of the outcome of its evaluation and the outcome is also delivered to the applicant. There are also certain exceptional circumstances where the applicant may file the application in Turkey (for example, for long term or student residence permits.)

Cost. The cost for obtaining a work visa depends on the country where the application is filed. Visa costs should be checked with the Turkish foreign embassy of that country.

Time frame. There is no specific time frame envisaged for Turkish foreign offices to grant a work visa. However, it is suggested that the application is filed at least one month before the desired departure date as there can be delays in the visa process.

Permits

Procedure for obtaining approval. Foreign nationals must also obtain a work permit to be employed in Turkey. The application for a work permit can be filed either in Turkey or abroad as follows:

- **Outside Turkey.** The foreign national must apply to Turkey's foreign embassy with a passport, a work visa, a copy of the employment agreement, and a single passport picture.
- **Inside Turkey.** Foreign nationals who have obtained at least a six-month residency permit can apply directly to the Ministry of Labour and Social Security to obtain a work permit.

The applicant must also file a residency permit application with the police department of the city in which they will work to obtain a residency permit within 30 days of their arrival in Turkey and before starting work (if the applicant has not already obtained a residency permit). The work permit becomes valid on the granting of the residence permit.

The work permit can be issued for a definite or indefinite term. A definite-term work permit can initially be granted for a maximum period of one year. At the end of this one-year period, the permit can be renewed for up to three years and then renewed again for an additional three years (that is, for up to six years in total).

An indefinite-term work permit can be granted to foreign nationals who have resided in Turkey for at least eight years or to those who have been working in Turkey for at least six years.

Cost. The fee for obtaining a definite-term work permit is:

- TRY761.10 for a permit of up to one year.
- TRY1,522.20 for a permit of up to two years.
- TRY 2,283.30 for a permit of up to three years.

Permit renewals are subject to the same fees in accordance with the renewal period. The fee for obtaining an indefinite-term work permit is TRY7,612.70.

These fees are subject to revision every year.

Time frame. Following submission of the required documentation by the applicant, the Ministry of Labour and Social Security finalises the application within one month, provided that it is complete.

Sanctions. Employers who employ foreign nationals who do not have a work permit are subject to a fine of TRY8,821 for each employee who does not have a work permit. In addition, each employee who works without a work permit will be subject to a fine of between TRY3,527 and TRY7,057 (for 2019). These fines are subject to revision every year.

11. What considerations apply when implementing post-transfer changes to terms and conditions?

The new employer can alter the terms of employment post-transfer. However, if the change to be made by the new employer constitutes a material change in the employee's working conditions, the employer must obtain the employee's written consent for such change. The employer must also bear in mind that employees must be treated equally unless there is a justifiable reason to treat them otherwise.

12. Is it common (or compulsory) for employees to participate in share option schemes in your jurisdiction? If so, are there any tax benefits and can options be granted to employees of group companies?

It is not compulsory or common for employees to participate in share option schemes established by their employing company. However, we observe that tech start-ups sometimes prefer implementing share option schemes in Turkey.

13. If an employee who participates in a share option scheme is transferred as part of a business, is the transferee under an obligation to provide an equivalent scheme? If so, how is this dealt with in practice?

If the transferee makes any changes to the employment conditions of the relevant employee that qualifies as a material change in the employee's working conditions (for example, a decrease in the employee's income), the transferee must obtain the employee's written consent. As such, if the transferee will not provide the same share option scheme or will provide a different scheme instead of a share option scheme, the safest approach for the transferee would be to obtain the employee's written consent.

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