

BDO TAX BULLETIN



Bulletin Date : 14.04.2020
Bulletin No : 2020/006

MEASURES THAT EMPLOYERS CAN CONSIDER IN LABOR RELATIONS DUE TO CORONAVIRUS OUTBREAK

COVID-19, which started in China and has spread to more than 200 countries in the world, and which is considered as a pandemic by the World Health Organization (WHO), was also identified in Turkey, which led to several challenges in the fields of public health, social, economic and international trade.

The legal aspects of labor relations and occupational health and safety measures that may be taken by employers in case of pandemic are significant for companies. Within the framework of the current legislation, general information about measures that could be taken in labor relations due to outbreak are evaluated below.

1. UNPAID LEAVE APPLICATION

Unpaid leave is a special application regarding the suspension of the employment contract. Especially in times of economic crisis, employers aim to reduce the negative effects of the economic conjuncture on the business by unpaid leave application, which creates a substantial change against the employee.

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In accordance with Article 22 of Turkish Labor Law, if the unpaid leave proposal made by the employer is accepted by the employee in a written way within six working days, the employment contract will be deemed suspended. If it is not accepted, the proposal will be deemed rejected. In case the employee does not give written approval, the unpaid leave cannot be effective with the unilateral decision of the employer. Namely, the fact that the employee does not declare their disapproval in a written way within six working days and remains silent does not mean that they approve.

In addition, the availability of paid leave, collective leave, compensatory work, remote working practices and short-term employment provisions are also significant in terms of unpaid leave proposals made by the employer. If the employers want to apply unpaid leave especially before implementing the mentioned applications and before applying to short-term employment allowance, the existence of a valid reason will not be accepted for unpaid leave. For this reason, before the proposal of unpaid leave, it is necessary to apply for short-term employment allowance and to use flexible working methods such as remote working model. In the event that these methods are used or are inconclusive, in accordance with the principle of last resort in termination, the employer can propose unpaid leave. If the unpaid leave application is also inconclusive, the employment contract can be terminated by the employer due to valid reason.

In practice, it is seen that the employers apply indefinite unpaid leave, and after a certain period of time, the employees terminate the employment contract for a rightful reason. In this case, even if the termination comes from the employee, it will be accepted that the employer has a will of implicit termination. The employer will have to make severance and notice payment to the employee, and if the conditions have been met, the employee will also be able to file a re-employment lawsuit.

During the unpaid leave period, the employee's liability of service and the employer's liability of salary payment are deemed suspended. However, the employee's liability of obedience and loyalty to the employer and the employer's liability of supervising the employee still continues.

Unpaid leave must be offered for a "reasonable period". Regarding the reasonable period, the three-month period adopted in doctrine. This period can be extended, provided that it does not breach the principle of good faith. If the measures taken in relation to the COVID-19 outbreak are thoroughly explained to the employees, the employees could also appreciate these measures. Considering the conditions emerging after WHO's announcement of COVID-19 as a pandemic, the three-month period may be regarded as reasonable. On this occasion, we are of the opinion that it would be appropriate to declare the pandemic as a force majeure condition.

2. PAID LEAVE APPLICATION

The determination of the employees' annual paid leave period can be evaluated within the scope of the employer's right to management. *It is clear that the employer should use this right within the framework of goodwill*

principle. Due to the COVID-19 outbreak in Turkey, compulsory annual leave application may also be considered as an option. It is possible to use the next year's leave as an advance leave for the personnel who are not entitled for an annual leave. In the case of an advance annual paid leave, a form must be filled and it must be documented by the employer that these leaves are used as "advance" as they will be used from the next year's paid leave.

We are of the opinion that it would be appropriate to use annual leave option primarily in the workplaces where the business has come to a halt or that are planned to be shut down temporarily.

3. COLLECTIVE LEAVE APPLICATION

In accordance with Article 10 of the Regulation on Annual Paid Leave published in the Official Gazette dated 3.3.2004 and numbered 25391, employers may apply collective leave including all or part of the employees in the period **between the beginning of April and the end of October**. Collective leave periods may be determined in a way that includes the employees who have not yet earned their annual paid leave in these periods.

4. COMPENSATORY WORK APPLICATION

Article 64 of Turkish Labor Law states that *"In cases of suspension of the work due to force majeure, closing the workplace before and after the national and general holidays or working under the normal working hours at the workplace for similar reasons or fully closing the workplace or being allowed upon the demand of the employee, the employer can get compensatory work from the employee for the periods they did not work within four months. These works are not considered as overtime."*

We can say that the state of *"suspension of the work due to force majeure"* stated in the article is available in the current situation and conditions in order to have compensation work meets. The pandemic can be considered as *"force majeure"*. In fact, this condition has already been met for the workplaces that have been temporarily shut down due to the Circular Letter issued by the Turkish Ministry of Internal Affairs.

Compensatory work could be preferred if unpaid leave, paid leave and collective leave applications are not available. Compensatory work is carried out three hours a day maximum, provided that a total working time of 11 hours per day is not exceeded. For these times, the worker is not entitled for overtime payment.

5. SHORT-TERM EMPLOYMENT ALLOWANCE APPLICATION

Short-term employment allowance (STEA) is an application that provides income support to the employees for a period not exceeding 3 months (it can be extended to 6 months by a Presidential decree) for the period they cannot work in the event of a shut-down of their workplace as a whole or in part at least 4 weeks without the condition of continuity or in the event that the

weekly working hours in the workplace are temporarily reduced by at least one third due to general economic, industrial, regional crisis or force majeure.

Periodic situations caused by the external effects that are not caused by the employer's own attitudes and management, cannot be predicted, and thus, cannot be eliminated, resulting in temporary shortening of the working time or wholly or partially interruption of the activity, or the situations such as earthquake, fire, flood, landslide, epidemic/pandemic disease and mobilization are considered as force majeure. COVID-19 outbreak, which is currently on the agenda, is also evaluated within this scope. Therefore, all employers affected by the virus can apply for STEA.

In case of short-term employment, the employees are paid a short-term working allowance from the unemployment insurance fund. The daily short-term working allowance is 60% of the average daily gross earnings taken as basic to premium of the insuree for the last 12 months. The amount of short-term working allowance calculated in this way shall not exceed 150% of the gross amount of the announced minimum wage. In the case of short-term working due to force majeure, the short-term working payments begin after the one-week period indicated in Article 40 of Turkish Labor Law.

The employer who made the decision of short-term employment should immediately report this situation with its reason in written form to Turkish Employment Agency (İŞKUR) and, if available, to the union which is the party of the collective business agreement. The short-term employment request will be evaluated primarily by İŞKUR, and they are immediately sent by İŞKUR Provincial Directorates to the Ministry of Family Labor and Social Services, Guidance and Inspection Department for further action. Short-term employment requests are evaluated by the Group Departments according to the Inspection Department region, and they are primarily examined by Labor Inspectors.

Specific for Covid-19 outbreak, the inspection will be carried out on the papers without visiting the workplace of the applicant.

6. SUSPENSION OR TERMINATION OF THE EMPLOYMENT CONTRACT DUE TO FORCE MAJEURE

In accordance with Article 24/III of Turkish Labor Law No.4857, *“in case of a force majeure that require the work to be stopped for more than a week in the workplace where the employee is working”*, the employee will be able to terminate the employment contract due to rightful reason. In accordance with Article 25/III of the same Law, *“in case of a force majeure that prevents the employee from working for more than a week in the workplace”*, the employer may terminate the employment contract with rightful reason.

In case of a one-week force majeure, as per Article 40 of Turkish Labor Law No.4857, the employer will be obliged to make a half-wage payment to the employee every day for this week. If the will to terminate is not revealed after the one-week period, the employment contract will remain suspended.

If the employees cannot to go to the workplace due to a force majeure and cannot perform their work, then the force majeure occurs not in the workplace, but in the environment of the employees, and the employees are not able to fulfill their duty not due to their own fault. Prohibition of leaving the region due to the pandemic is a force majeure. The employer can terminate the employment contract for a rightful reason after one week. If the contract is not terminated, it will remain suspended for as long as the force majeure continues. When the force majeure disappears, the employer must employ the employee, and the employee must also continue to work.

7. REMOTE WORKING

Remote working has entered our legislation with the paragraph added to the Article 14/4 of Turkish Labor Law No.4857. Remote working is defined as *“the work relationship established in a written way and based on the principle of the employee fulfilling the work at home or out of the workplace with technological communication tools within the scope of the work organization created by the employer.”* In the case of remote working, employees cannot be subjected to different process compared to its precedents due to the nature of the employment contract, unless there is a substantial cause. The employer is obliged to inform the employee about the occupational health and safety measures, to provide the necessary training, to provide health surveillance and to take the necessary occupational safety measures regarding the equipment provided, taking into account the nature of the work done by the employee with whom the employer is working in a remote working relationship.

Remote working has entered our labor legislation as a flexible working model and has become common recently. It will be significant in eliminating the effects of the rapidly-spreading COVID-19. The businesses which are suitable will be able to employ their employees in this working model. Remote working model will be advantageous in terms of minimizing the effects of the pandemic, reducing employee costs, and protecting the employees' psychological and physical health. Issues such as reduced dependency, difficulty of observation, difficulty in giving orders and instructions, low efficiency and performance could be weaknesses of this model. However, considering the consequences of the pandemic, this labor model becomes quite attractive.

Kind regards.