FREQUENTLY ASKED QUESTIONS ON EMPLOYMENT CONTRACTS

Under this memorandum, we have tried to answer frequently asked questions in labour law.

1. Are there any requirements as to form for employment contracts?

According to Article 8/1 of the Labour Law No. 4857 ("**Law**"), an employment contract is a contract in which the employee undertakes to perform work in subordination to the employer and the employer undertakes to pay wages in return. Unless otherwise stipulated in the Law, an employment contract is not subject to a special form. Accordingly, an employment contract may be concluded in writing or orally. However, there are some special cases in the Law:

- Employment contracts with a duration of one year or more must be concluded in writing.
- All fixed-term employment contracts must be concluded in writing.
- Agreements regarding temporary employment relations must be concluded in writing.
- Part-time employment contracts based on teleworking and on-call work are also concluded in writing.
- The team contract must be concluded in writing, regardless of the period of time agreed for the employment contracts to be concluded.

2. What happens if the employment contracts which are required to be concluded in writing by law are not concluded in writing?

According to some authors in the doctrine, failure to conclude an employment contract in writing, which is required by law, results in the invalidity of the employment contract. In case of invalidity of an employment contract due to breach of the written form, the sanction of invalidity is not retroactive, but has prospective effect and results.

Another opinion accepted by the Turkish Court of Cassation is that the fact that the employment contract is not made in writing does not affect the existence of the employment contract between the parties. Therefore, an employment contract that must be concluded in writing cannot be invalidated on the grounds that it is not concluded in writing. Besides, fixed-term employment contracts that are not concluded in writing are automatically deemed to be concluded for an indefinite period of time.

3. Is it necessary to give a written document to the employee in the absence of a written contract?

According to Article 8/3 of the Law; in cases where there is no written contract, the employer is obliged to give the employee a written document within 2 (two) months at the latest, indicating the general and special working conditions, daily or weekly working hours, basic wage and wage supplements, if any, the wage payment period, the duration of the contract if the duration is fixed, and the provisions that the parties must comply with in case of termination. However, this paragraph shall not apply to fixed-term employment contracts with a duration not exceeding 1 (one) month.

Again, if the employment contract is terminated before the expiry of the two-month period, this information must be given to the employee in writing at the latest on the date of termination. Otherwise, in accordance with Article 99 of the Law, the employer shall be fined to an administrative fine for each employee.

4. Are employment contracts subject to stamp duty?

According to Article 8/2 of the Law, employment contracts are exempted from stamp duty and all kinds of duties and fees.

5. Under which conditions a fixed-term employment contract can be concluded?

Although as a rule employment contracts are concluded for "indefinite term", according to Article 11/1 of the Law, a fixed-term employment contract may be concluded in writing in the presence of fixed-term works (by their nature) or objective conditions such as the completion of a certain work or the occurrence of a certain event.

6. Is the existence of objective conditions sufficient for a contract to be considered as a fixed-term employment contract?

The existence of objective (or essential) conditions merely is not sufficient for an employment contract to be considered fixed-term. In order for an employment contract to be deemed fixed-term, it must be recognized by the parties and especially by the employee that the contract is limited to the purpose and duration of the work undertaken by the employee (e.g. fulfilment of the order, completion of the construction, completion of the work within the scope of the tender), in other words, that the contract will end with the end of the work, and the parties must have agreed on this issue.

In addition, in order for the employment contract to be accepted as a fixed-term employment contract, the time of termination of the contract must also be known by the parties and especially by the employee, or it must be objectively and with sufficient clarity determinable or foreseeable.

7. Is it possible to renew a fixed-term employment contract?

According to Article 11/2 of the Law, a fixed-term employment contract cannot be concluded more than once in a row (successively) unless there is a substantial reason. Otherwise, the employment contract is deemed to be indefinite from the beginning. However, a fixed-term employment contract may be renewed if the objective condition that constitutes the basis for the conclusion of a fixed-term employment contract continues to exist or if a new objective condition has emerged.

In the meantime, pursuant to Article 9/1 of the Law No. 625 on Private Education Institutions, since it is obligatory to conclude fixed-term employment contracts with teachers working in private education institutions, successive contracts concluded with these persons do not turn into indefinite-term employment contracts.

8. How many times can a fixed-term employment contract be renewed?

The law does not set a maximum limit for the number of consecutive renewals of fixed-term employment contracts. However, Turkish Court of Cassation has ruled that *"The plaintiff has worked for the employer for a period of six years... Except for special laws, fixed-term employment contracts concluded consecutively for a period of six years should be accepted as the employee has been working with an indefinite-term employment contract, since it would go beyond the purpose of Article 11 of Law No. 4857."* (Court of Cassation 9. CC. Case No: 2005/12170 Decision No: 2005/15792 Date: 05.05.2005).

As is seen, if a fixed-term employment contract is renewed more than once unless there is a substantial reason, the contract will turn into an indefinite-term contract.

9. Is there any limitation on the duration for fixed-term employment contracts?

There is no provision in the Law that limits fixed-term employment contracts in terms of duration. What is important in fixed-term employment contracts is that the work to be undertaken by the employee will continue for a certain period of time. In this respect, it does not matter whether the duration is less than one year (e.g. 1 month or 6 months) or more than one year (e.g. 3 years or 5 years).

However, the Turkish Court of Cassation has stated that *"Although a four-year fixed-term employment contract has been arranged between the parties, there is no objective justifiable reason for a fixed-term employment contract with the plaintiff employee who works as a manufacturing employee in the continuous work of the defendants. Therefore, it should be accepted that the contract is indefinite term from the beginning."* (Court of Cassation 9. CC. Case No: 2005/12959 Decision No: 2005/14208 Date: 21.04.2005).

10. When does a fixed-term employment contract expire?

Unless a condition of notification is agreed between the parties, fixed-term employment contracts automatically expire upon the expiry of the contractual term agreed by the parties when concluding the contract. In this case, since the contract is not terminated but expires automatically, the legal consequences attached to the termination of the employment contract do not arise.

11. What happens if a fixed-term employment contract is continued despite the expiry of the contract period?

If a fixed-term employment contract is continued implicitly by the parties despite the expiry of the contract period, the contract converts into an employment contract for an indefinite-term. In this way, when a fixed-term contract turns into an indefinite-term contract, a new contract is not established between the parties. At this stage, the indefinite-term contract is considered as the continuation of the first fixed-term contract (with the same conditions other than the duration condition). However, the parties may prove that a new fixed-term employment contract has been concluded based on the existence of a substantial reason.

12. For how long the probation period can be agreed under employment contracts?

According to Article 15 of the Law, the probation period that the parties may agree in the employment contract may be maximum 2 (two) months. However, the probation period can be extended up to 4 (four) months by collective employment contracts. If the parties agree on a probation period longer than the period stipulated in the Law or collective employment contract, these periods are invalid. In this case, the periods stipulated in the Law or collective employment contract shall apply.

13. When does the probation period start?

The probation period starts not on the date of the contract, but on the date when the employee actually starts performing its work. However, the existence of reasons that suspend the employment contract such as illness or strike does not prevent the probation period from starting.

14. What is the opportunity of the probation period?

A probation period is a period of time agreed by the parties in order to get to know and evaluate each other (the employer to have information about the knowledge, personality, abilities and productivity of the employee; the employee to have information about the work to be performed, the workplace and working conditions). The probation period allows the parties to terminate the employment contract during this period without any reason, the need for a notice period and compensation. The wages and other rights of the employee for the days worked are reserved.

15. What happens at the end of the probation period?

Upon the expiry of the probation period, the employment contract, including the probation period, becomes a final and definitive contract and binding for the parties. Therefore, the contract cannot be terminated without notice and compensation on the basis of Article 15/2 of the Law after the probation period has expired.

16. Is it possible to change the working conditions after the conclusion of the contract?

According to Article 22 of the Law, the employer may make an essential change in the working conditions arising from the employment contract or the personnel regulations and similar sources annexed to the employment contract or workplace practice only by notifying the employee in writing.

17. Is it necessary to notify the employee in writing for every change in working conditions?

It is obligatory to notify the employee in writing of the intended change in working conditions only if it is an essential change. The parties may change the working conditions at any time by mutual agreement. Changes in working conditions cannot be brought into force retroactively.

18. What is the meaning of an "essential change in working conditions"?

The Law does not provide a clear definition of the concept of "essential change". However, due to certain needs that arise during the course of the employment relationship, it is possible to characterise changes made to the essential elements of the employment contract (such as wages, workplace, type and nature of the work performed, working hours, etc.) to the disfavor of the employee, and which aggravate the situation of the employee by creating a difference in the pre-change situation of the employee, as an essential change.

However, if the changes made in the working conditions are within the scope of the employer's right of management (e.g. working hours, workplace order, where and how the work will be done, transfer of the workplace, etc.) or if they are based on a valid reason (such as the employee's productivity and behaviour or workplace requirements), the changes made are not considered as essential changes.

19. Is the essential change in working conditions binding for the employee?

According to Article 22 of the Law, "... and changes not accepted in writing by the employee within six working days are not binding for the employee." Therefore, if the employee does not accept the changing proposal in writing or remains silent, he/she will be considered to have rejected the proposal. In this case, the conditions in the employment contract prior to the changes remain valid.

However, if the employee accepts the proposed change in the working conditions duly in writing and within the time limit, the changing agreement is established and binds the employee. According to the Turkish Court of Cassation, the employee's acceptance of the change is valid only in terms of this transaction. In other words, the employer cannot use the employee's acceptance of the change once for other changes in the following periods.

20. Are contractual provisions authorising the employer to make changes in working conditions valid?

It is possible to authorise the employer to make changes in the working conditions in the collective employment contract or in the individual employment contract signed by the parties with their free will. The Turkish Court of Cassation accepts the contractual provisions in the employment contract executed by the parties that authorise the employer to make changes in the working conditions (*that the employer reserves the right to make changes in the working conditions*) as valid (Court of Cassation 9. CC. Case No: 2005/9605 Decision No: 2005/11820 Date: 04.04.2005).

In this case, the contractual provision authorising the employer to make changes in the working conditions replaces the *"written consent of the employee"* required by Article 22 of the Law. Under no circumstances, unilateral changes leading to a reduction in the wage of the employee shall be deemed valid. These provisions may be included in employment contracts, provided that they arise from the nature and needs of the work and are made in good faith.

21. What is the limit of the amendment authorisation granted to the employer under the contract?

According to Article 2 of the Civil Code No. 4721, "*Everyone is obliged to comply with the rules of good faith when exercising his rights and fulfilling his obligations. The legal order does not protect the flagrant abuse of a right"*. Accordingly, the authorisation to make changes reserved in the contract must be used within the framework of the rules of good faith. As stated in a decision of the Turkish Court of Cassation, the implementation of the contractual provision regarding the amendment in order to ensure the termination of the employee's employment contract is an abuse of the employer's management right (Court of Cassation. 7. CC. Case No: 2014/11841. Decision No: 2014/18857 Date: 15.10.2014).
In addition, according to Article 27/1 of the Turkish Code of Obligations No. 6098, *"Contracts that are contrary to the mandatory provisions of the law, morality, public order, personal rights or whose subject matter is impossible are absolutely null and void"*. Accordingly, the changes to be made in the working conditions determined in the employment contract (amendment agreement) must also not be contrary to the law and morality.

22. What are the situations where the obligation to conclude an employment contract is imposed by the Law?

According to Article 30/1 of the Law, employers operating in the private sector and employing 50 (fifty) or more employees are only obliged to employ disabled employees (to employ them in jobs suitable for their occupational, physical and mental conditions) in private sector workplaces, and it is required by law to employ disabled employees at the rate of 3% (three percent) of the total number of employees.

According to the same article of the Law, employers operating in the public sector and employing 50 (fifty) or more employees are obliged to employ at the rate of 4% (four percent) disabled and 2% (two percent) ex-convicts or those who are injured as a result of the cause and effect of terrorist incidents (in jobs suitable for their occupational, physical and mental conditions) in public workplaces (to be calculated according to the total number of employees).

23. What are the situations in which it is prohibited to conclude an employment contract?

As a rule, the parties are free to conclude an employment contract with whomever they wish, provided that they have the capacity to conclude an employment contract. However, in accordance with Article 50 of the Turkish Constitution, employers are prohibited from concluding employment contracts in certain circumstances. These circumstances are as follows:

- Disabled employees cannot be employed in underground and underwater works (Art. 30/4 of the Law).
- It is forbidden to employ children under the age of fifteen. However, children who have completed the age of fourteen and have completed the compulsory primary education may be employed in light work that does not interfere with their physical, mental, social and moral development and the attendance of those who continue their education (Article 71/1 of the Law).
- It is forbidden to employ men under the age of eighteen and women of any age in underground or underwater work such as mines, cable laying, and sewerage and tunnel construction (Art. 72 of the Law).
- It is forbidden to employ children and young employees under the age of eighteen at night in industrial work (Art. 73/1 of the Law).
- Local municipalities shall prohibit the employment of children under the age of eighteen in bars, cabarets, dance halls, coffee houses, casinos and public baths (Article 176 of the General Hygiene Law).
- Without prejudice to the legal exceptions, people under the age of eighteen may not be employed in places open to the public for entertainment, gaming, drinking and similar purposes, of which their opening is subject to a business permit (Article 12/1 of the Law on Police Duties and Powers).
- Pursuant to Article 22, Paragraph 2 of the International Labour Force Law No. 6735, "Foreigners who obtain a work permit or work permit exemption and employers who employ foreigners fulfil their obligations arising from social security legislation within the legal period in accordance with the provisions of the Social Security and General Health Insurance Law No. 5510 dated 31/5/2006."

  Therefore, in the absence of a work permit, it is not possible for these persons to actually work, since no notification can be made to the social security institution. Otherwise, both the unauthorised foreigner and the employer will be penalised with a fine in accordance with Article 23 of the Law No. 6735. Moreover, foreigners can only work in jobs that are not prohibited by law. As per Article

9/1ç subparagraph of Law No. 6735, work permits are granted for "jobs and professions that are reserved for Turkish citizens in other laws". As a result, it is not possible for foreigners to work in professions where only Turkish citizens are allowed to work.

24. What is the effect of foreigners not having a work permit on the employment contract?

As stated above, although foreigners who do not have a work permit cannot actually work by law, there is no legal obstacle to executing an employment contract with such foreigners. However, in this case, it is not possible to perform the contract without obtaining a work permit. The Turkish Court of Cassation has also accepted that an employment contract concluded without obtaining a work permit is valid by stating that *"In cases where the work permit could not be obtained for the plaintiff employee or this permit was obtained indefinitely, it must be accepted that the employment contract has become indefinite."* (Court of Cassation 9. CC. Case Number: 2004/24583 Decision Number: 2005/20488 Date: 07.06.2005).

25. What is the legal consequence of the invalidity of an employment contract?

There is no provision under the Law regulating the legal consequences of the invalidity of an employment contract. However, Article 394/3 of the Turkish Code of Obligations No. 6098 stipulates that *"A service contract, the invalidity of which is subsequently recognised, shall have all the provisions and consequences of a valid service contract until the service relationship is terminated"*. This provision in the Code of Obligations is also applicable to employment contracts subject to the Law, since there is no regulation on the subject in the Law. As it is understood from this provision, just like the service contracts regulated under the Code of Obligations, the invalidity of the employment contracts subject to the Law has prospective effect (*in accordance with the principle of protection of the employee*). That is to say, the employment contract shall have the same provisions and consequences as a valid contract until the invalidity is claimed.

However, if the employee knows that the employment contract is invalid, he/she will not be able to benefit from this provision since he/she cannot be considered to be in good faith. Similarly, the employer who employs an employee even though he/she knows that the employment contract is invalid cannot claim the invalidity of the employment contract. In addition, employment contracts that are contrary to morality and decency (*such as employment contracts made to employ employees in a workplace that prints counterfeit money or grows drugs*) and employment contracts that are contrary to prohibitions imposed for public interest (*employment contracts regarding the employment of foreigners in jobs that are prohibited for them to work*) are invalid from the beginning.

If you have any questions regarding the above matters, you can contact us.

Best Regards,

Selim DÜNDAR
sdundar@dundarsir.com