Labour & Employment 2020

Contributing editors
Matthew Howse, Sabine Smith-Vidal, Walter Ahrens, K Lesli Ligorner and Mark Zelek

LEXOLOGY®
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2006
Fifteenth edition
ISBN 978-1-83862-357-9

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Labour & Employment 2020

Contributing editors

Matthew Howse, Sabine Smith-Vidal, Walter Ahrens, K Lesli Ligorner and Mark Zelek

Morgan Lewis

Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Labour & Employment*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Angola, Belgium, Ghana, Israel, Kenya, Myanmar, Netherlands, Poland, Slovenia, Turkey and Zambia.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Matthew Howse, Sabine Smith-Vidal, Walter Ahrens, K Lesli Ligorner and Mark Zelek of Morgan Lewis, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

London
May 2020

Contents

Global overview 5
Mark E Zelek
Morgan Lewis

Conducting global investigations amid uncertainty: a practical guide 7
Louise Skinner, Keir Baker, Rebecca Kelly and K Lesli Ligorner
Morgan Lewis

Angola 11
Nuno Gouveia, Joana D'Azevedo Cunha, Carolina Bonina Cariano and Elieser Corte Real
Miranda Alliance

Argentina 20
Mercedes Balado Bevilacqua and Analía Durán
MBB Balado Bevilacqua Abogados

Australia 30
Joydeep Hor
People + Culture Strategies

Bangladesh 38
Tanvir Quader and Maliha Ahmed
Vertex Chambers

Belgium 44
Chris Van Olmen
Van Olmen & Wynant

Brazil 53
Ana Lúcia Pinke Ribeiro de Paiva, Flavia Sulzer Augusto Dainese and Marília Chrysostomo Chessa
Araújo e Policastro Advogados

China 66
K Lesli Ligorner
Morgan Lewis

Colombia 77
Vicente Umaña Carrizosa and Isabella Gandini
Holland & Knight LLP

Costa Rica 84
Alexander Godínez Vargas
Bufete Godinez & Asociados

Denmark 92
Yvonne Frederiksen
Norrbom Vinding

Egypt 101
Mahmoud Ahmed Belal and Richard G Tibichrani
Eldib Advocates

Finland 106
Pekka Kiviniemi and Tuuli Willgren
Kalliolaw Asianajotoimisto Oy

France 114
Sabine Smith-Vidal and Charles Dauthier
Morgan Lewis

Germany 125
Walter Ahrens
Morgan Lewis

Ghana 137
Paa Kwesi Hagan and Joshua Hormenoo
Globetrotters Legal Africa

Greece 145
Christos Theodorou, Maria Kloni and Viktoria Chatzara
Rokas Law Firm

Hong Kong 154
Vivien Chan and Patty Chan
Vivien Chan & Co

India 162
Rohit Kochhar
Kochhar & Co

Indonesia 171
Fahrul S Yusuf
SSEK Indonesian Legal Consultants

Ireland 179
Louise O'Byrne and Sarah Faulkner
Arthur Cox

Israel 187
Netta Bromberg
Barnea Jaffa Lande

Italy 193
Angelo Zambelli
Grimaldi Studio Legale

Japan 205
Motoi Fujii and Tomoko Narita
TMI Associates

Kazakhstan 218
Klara A Nurgaziyeva, Marat Mukhamediyev and Zhamilya Bilisbekova
Morgan Lewis

Kenya 227
Desmond Odhiambo and Peter Mutema
Kieti Advocates LLP

Luxembourg 234
Guy Castegnaro, Ariane Claverie and Christophe Domingos
Castegnaro

Malaysia 248
Selvamalar Alagaratnam, Siva Kumar Kanagasabai and Foo Siew Li
SKRINE

Mexico 256
Humberto Padilla Gonzalez
Morgan Lewis

Monaco 263
Sophie Marquet and Florence de Guzman de Saint Nicolas
CMS

Myanmar 271
Lester Chua and Min Thein
Rajah & Tann Asia

Netherlands 278
Eric van Dam, Wouter Engelsman and Dennis Veldhuizen
CLINT | Littler

Nigeria 285
Kunle Obebe
Bloomfield Law

Norway 291
Tore Lerheim and Ole Kristian Olsby
Homble Olsby | Littler

Philippines 299
Ronald Mark C Lleno, Emmar Benjoe B Panahon, Mark Kevin U Dellosa and Hans Cedric I Santos
SyCip Salazar Hernandez & Gatmaitan

Poland 308
Daniel Książek, Wojciech Bigaj and Paweł Krzykowski
Baran, Książek, Bigaj

Portugal 317
Joana Almeida
Morais Leitão, Galvão Teles, Soares da Silva & Associados

Puerto Rico 325
Melissa C Rodriguez
Morgan Lewis

Russia 337
Bela Pelman and Dmitry Dmitriev
Morgan Lewis

Singapore 347
Ian Lim, Nicholas Ngo and Elizabeth Tan
TSMP Law Corporation

Slovenia 364
Martin Šafar and Polona Boršnak
Law firm Šafar & Partners

South Korea 371
Ja-Hyeong Ku, Jane Young Sohn, Kwang-Sun Lee and Young-Hwan Kwon
Jipyong

Sweden 379
Robert Stromberg and Maja Kjellander
Advokatfirman Cederquist KB

Switzerland 388
Roland Bachmann, Cristina Solo de Zaldivar, Milena Münst Burger, Sébastien Gobat, Yannick Hostettler and Fatma Zencirkiran
Wenger Plattner

Thailand 396
Pisut Rakwong and Wayu Suthisarnsuntorn
Pisut & Partners

Turkey 404
Sinem Birsin and Beril Çelebi Cem
Inanici Tekcan Law Office

United Arab Emirates **412**
Charles S Laubach and Zahra Zaidi
Afridi & Angell

United Kingdom **422**
Lee Harding and Matthew Howse
Morgan Lewis

United States **432**
Thomas F Hurka, David A McManus and Michelle Seldin Silverman
Morgan Lewis

Zambia **443**
Misozi Hope Masengu and Nchimunya Mwale
Novus HM Legal Practitioners

Turkey

Sinem Birsin and Beril Çelebi Cem
Inanici Tekcan Law Office

LEGISLATION AND AGENCIES

Primary and secondary legislation

1 What are the main statutes and regulations relating to employment?

The primary statute on individual employment is the Labour Law (Law No. 4857), which covers the basis of all individual employment relations. Certain aspects are also defined under the Maritime Labour Law (Law No. 854) and the Press Labour Law (Law No. 5953). Collective employment is regulated under the Law on Trade Unions and Collective Bargaining Agreements (Law No. 6356) and the Law on Government Employee Unions and Collective Agreements (Law No. 4688). The Code of Obligations (TCO) and the Occupational Health and Safety Law (Law No. 6331) are other main sources of labour law, as are international treaties, the Constitution, secondary legislation and regulations and Supreme Court decisions.

Protected employee categories

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Freedom of labour is a fundamental right under the Constitution, which is established not only for Turkish citizens but for everyone, and accordingly, prohibition of discrimination is also mentioned as a material principle under the Constitution. These apply to all employment relations and are also specifically reflected in the Labour Law as the equal treatment principle, which prohibits any discrimination based on language, race, sex, political opinion, philosophical belief, religion and sect or pregnancy and requires the employer to treat employees equally and to apply the same working conditions and monetary benefits to employees with the same or similar qualities and job definitions. Employees who have been discriminated against can claim discrimination indemnification, which will be in the amount of up to four months' salary of the employee.

In addition to that, the TCO defines the employer's liability to safeguard employees' personality rights, and it provides that the employer's main obligation is to ensure that employees are not sexually or psychologically harassed and that any victim of sexual or psychological harassment suffers no further adverse consequences. This clause is the basis for the protection of employees against mobbing: the Supreme Court decisions define mobbing as misconduct and hostile behaviour or psychological harassment systematically carried out against an employee by his or her colleagues, managers or the employer, such as threatening, humiliation, maltreatment and similar actions. In the case of mobbing, the employer may:

- terminate the employment agreement for a justified cause and claim severance payment;
- claim material compensation (eg, medical expenses, such as psychiatry invoices) and moral indemnity; or
- claim discrimination indemnity if the specific actions are also discriminatory.

Although the burden of proof belongs to the employee, the courts are more flexible for mobbing cases and accept witness statements and reasonable doubt as sufficient proof.

Sexual and physical harassment are also deemed as criminal acts under the Criminal Code.

Enforcement agencies

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The main authority for the administration and enforcement of the Labour Law is the Ministry of Family, Labour and Social Services and its departmental directorates. The other main entities responsible for labour and employment issues are the Social Security Institution and the Turkish Employment Agency. Otherwise, claims regarding employment relations are discussed before civil courts (labour courts) and mediators.

WORKER REPRESENTATION

Legal basis

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

According to article 6 of the Law on Trade Unions and Collective Bargaining Agreements (LTU), any legal entity or real person who's actively working and has the capacity to act can organise a trade union.

The Occupational Health and Safety Law, the Labour Law and relevant secondary legislation also allow workers to form works councils and annual leave committees.

Powers of representatives

5 What are their powers?

According to article 27 of the LTU, the duties of the shop steward and chief representative who are assigned by the trade union are to hear workers' requests with regard to the workplace and solve their problems; to maintain cooperation and harmony at work and peaceful relations between the workers and the employer; to protect the rights and interests of the workers; and to assist the application of working conditions stipulated by labour legislation and collective labour agreements.

According to the Occupational Health and Safety Law, the employer must ensure that authorised representatives have the opportunity to be

consulted with regard to occupational health and safety issues; make proposals and take part in discussions related to occupational health and safety issues; and be consulted about the effects of introducing new technology, the choice of equipment, the working conditions and the working environment to the safety and health of workers.

BACKGROUND INFORMATION ON APPLICANTS

Background checks

6 | Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

There is no specific regulation regarding background checks on applicants. However, applicable legislation, such as the Law on Protection of Personal Data, the Criminal Code and the Labour Law, should be taken into consideration when determining the limits and methods of background checks. The main rule is to request the information directly from the employee and not to collect private information without the applicant's consent. The application process, however, may be conducted by the employer or its vendors provided that the process complies with applicable legislation. In addition, the requested background information should be deemed necessary to evaluate the applicant's suitability for the position.

Medical examinations

7 | Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

According to the Occupational Health and Safety Law, a medical examination is required under the following situations, and the employer may refuse to hire an applicant who does not submit the relevant examination report:

- pre-employment;
- a change of position;
- in the case where the worker returns to work after repetitive absence from work owing to occupational accident, occupations disease or health problems; and
- at regular intervals, recommended by the Ministry of Family, Labour and Social Services in accordance with the worker's status, nature of work and hazard class of the workplace.

The scope of examination should be determined according to the scope of the work and the hazard class of the workplace. To be deemed as a prerequisite, the medical examination must be relevant and necessary for the position, otherwise the applicant has the right to refuse it and, in this case, the employer cannot avoid hiring the applicant owing to not having the irrelevant medical examination.

Drug and alcohol testing

8 | Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

The applicant's consent is required for drug and alcohol tests, and the employer may refuse to hire an applicant who does not submit the test results.

HIRING OF EMPLOYEES

Preference and discrimination

9 | Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Discrimination against any group is forbidden. There are also some provisions under the Labour Law that require giving preference in hiring to particular groups of people: private sector establishments employing 50 or more employees must employ a defined percentage of disabled persons, ex-convicts and victims of terrors. In some cases, there is an obligation to contract with employees who previously worked for the employer. For instance, if the employee terminates the employment agreement owing to a legal obligation, such as military service, and applies to the employer within two months following completion of duty, the employer must rehire the employee, giving priority over other applicants, when hiring for the same or a similar position in which the employee formerly worked.

10 | Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Written form is not mandatory unless otherwise stated in applicable legislation. If there is no written agreement, the employer must provide the employee with a written certificate, within two months at the latest, showing the general and special conditions of work, the daily or weekly working time, the basic salary and any benefits, the payment date of the salary and the conditions concerning the termination of the contract. Fixed-term employment contracts should be made in writing. However, whether fixed-term or not, we suggest concluding the agreement in writing to set forth essential parts of the employment relation and, in particular, specific clauses, such as clauses relating to non-competition and intellectual property.

11 | To what extent are fixed-term employment contracts permissible?

A fixed-term contract can be established if the work is fixed-term (eg, contracts of seasonal workers) or the work depends on an objective condition, such as completion (eg, construction of a building) or an occurrence of an event (eg, until the pregnant employee returns to work). Parties cannot enter a fixed-term contract if there is no objective reason as stated above.

The fixed-term contract cannot be renewed until there is an objective reason.

Probationary period

12 | What is the maximum probationary period permitted by law?

The probationary period of a labour contract is a maximum two months; however; it may be extended up to four months by a collective labour agreement.

Classification as contractor or employee

13 | What are the primary factors that distinguish an independent contractor from an employee?

The relationship between the parties will be interpreted as a labour contract if:

- the work is being performed in accordance with the instructions and work regulations of the employer;
- there is subordination or dedication to the employer; and
- salary is paid.

Temporary agency staffing

14 | Is there any legislation governing temporary staffing through recruitment agencies?

According to article 7 of the Labour Law, a temporary labour relation may be established by means of private employment agency or within a holding or at another business connected with the same group of companies in certain circumstances. Assignment by means of a private employment agency is regulated under the Labour Law, the Turkish Employment Agency Code and the Private Employment Agent Directive.

FOREIGN WORKERS

Visas

15 | Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

In general terms, a visa can be described as a permit that provides 90 days of stay within a period of 180 days. Foreign nationals who will stay up to 90 days in Turkey must get a visa stating their purposes for visiting.

There are different kinds of short-term visas, such as the short-term residence permit, work permit, tourist visa, transit visa, education visa, official duty visa and other visas.

Foreign workers can apply for a work permit and depending on the duration of the foreign worker's employment contract or job, it is given for a maximum of one year to work in a particular workplace or business and in a particular profession. After one year of legitimate work, the length of the work permit can be extended up to three years.

There is no specific provision for transferring between different corporate entities.

Spouses

16 | Are spouses of authorised workers entitled to work?

Spouses of authorised workers are not automatically entitled to a work permit, but they may be granted with a temporary work permit provided that they have lived with the authorised worker for at least five years.

General rules

17 | What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Work permit applications are evaluated according to international workforce policy. To employ a foreign worker, employment of at least five Turkish employees in the workplace is mandatory. In the case of work permit applications for multiple foreign workers in the same business, the condition to employ at least five Turkish employees is required for each foreign worker applying for a work permit. If the foreign national is seeking permission as a partner of the new established company, the employment requirement of five Turkish employees will apply solely to the last six months of the one-year term.

The paid-in capital of the business must be at least 100,000 Turkish lira. If the capital requirement cannot be met, then gross sales must be at least 800,000 Turkish lira or the previous year's export volume must be at least US$250,000. The share of a foreign partner, who is seeking a work permit, must be at least 20 per cent, provided that the shares are not worth less than 40,000 Turkish lira.

The requirement for five Turkish employees is not applied if the work permit request is for the first and only foreign employee, who is the key personnel in a foreign direct investment.

Administrative fines for illegal employment of foreign workers are as follows:

- 10,812 Turkish lira for employers who employ a foreign worker without a work permit (for each foreign employee);
- 4,323 Turkish lira for a foreign national working dependently under an employer without a work permit;
- 8,650 Turkish lira for a foreign national working independently without a work permit; and
- 719 Turkish lira for a foreign national working independently and for employers employing foreign employees who do not fulfil their obligation to notify the Ministry of Family, Labour and Social Services.

In the event of repeated unauthorised work, administrative fines are applied by a onefold increase.

Resident labour market test

18 | Is a labour market test required as a precursor to a short or long-term visa?

No. A labour market test is not considered to be an application requirement. A work permit application is evaluated according to international workforce policy.

TERMS OF EMPLOYMENT

Working hours

19 | Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

According to the Labour Law, the maximum working time is 45 hours per week. Unless otherwise agreed, this period is applied by dividing the working days of the week equally. Upon agreement of the parties, the weekly working period can be redistributed over the working days of the week, provided that the limit of 11 hours for a day is not exceeded. According to the Labour Law, overtime work can amount to a maximum of 270 hours a year. Employees cannot opt out of these restrictions.

Overtime pay

20 | What categories of workers are entitled to overtime pay and how is it calculated?

Under the Labour Law, all employees are entitled to overtime pay except for employees who are:

- at the executive level and determine and adjust their own working time;
- under 18 years;
- deemed to be of unsuitable health for overtime work by a doctor's examination report;
- pregnant;
- breastfeeding; and
- employed by part-time contracts.

Overtime work is defined as the work that exceeds the weekly 45 hours. If the weekly working hours are stipulated as less than 45 hours in the contract, the work up to 45 hours will be considered as overtime work, and the work exceeding 45 hours will be considered as extra hours work.

The fee to be paid for each hour of overtime work is paid by increasing the amount of the normal working salary per hour by 50 per cent. For extra hours work, which is the work in excess of 45 hours where working time is arranged below 45 hours, the fee to be paid for each hour of extra work is paid by increasing the amount of the normal working wage per hour by 25 per cent.

Instead of overtime and extra hours pay, the employee may claim one hour 30 minutes compensatory time for each hour of overtime work and one hour 15 minutes for each extra hour.

21 | Can employees contractually waive the right to overtime pay?

It is possible to agree that the salary of an employee includes overtime of up to 270 hours per year without additional pay provided that the salary of the employee is higher than the minimum wage. However, there must be an explicit provision in the contract that the overtime pay is included in the salary.

Vacation and holidays

22 | Is there any legislation establishing the right to annual vacation and holidays?

Article 53 of the Labour Law regulates the annual vacation and holidays, and employees who have worked for at least one year, including the probationary period, are granted annual paid leave.

The length of annual paid leave must not be less than:

- 14 days if the length of service is between one years and five year (including the fifth year);
- 20 days if the length of service is more than five years and less than 15 years; or
- 26 days if the length of service is over 15 years (including the 15th year).

These periods can be extended by the mutual agreement of the parties. Annual paid leave of employees who are 18 years old or younger and 50 years old or older cannot be less than 20 days.

Sick leave and sick pay

23 | Is there any legislation establishing the right to sick leave or sick pay?

In the event of illness, the employee notifies the employer and submits the relevant medical report and is deemed to be on sick leave. The Social Security Institution pays the employee's salary during the sick leave instead of the employer.

Leave of absence

24 | In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

There are several cases defined in the Labour Law where an employee may take a leave of absence.

Maternity leave

Female employees are granted with paid maternity leave for a total of 16 weeks, eight weeks before and eight weeks after birth. In the case of multiple pregnancies, an extra two-week period will be added to the eight-week period before giving birth.

Breastfeeding Leave

Female employees are allowed to breastfeed her children who are under the age of one for one-and-a-half hours every day. The employee adjusts the time and duration herself, and this is a paid leave.

Compassionate Leave

Employees can take up to three days' paid leave in the event of marriage, adoption or the death of their mother, father, spouse, sibling or child, and they can take five days' paid leave in the event of their spouse giving birth.

Mandatory employee benefits

25 | What employee benefits are prescribed by law?

Salary, general health insurance, social security contributions, annual leave, sick leave, official holiday and weekend salaries, overtime pay and maternity and paternity leave is prescribed by law. The employer may also provide employees with additional benefits, such as private health insurance, a private pension scheme, stock options and bonuses.

Part-time and fixed-term employees

26 | Are there any special rules relating to part-time or fixed-term employees?

If the weekly working time of the employee is arranged to be significantly less than an employee working with a full-time employment contract (45 hours), the contract is a part-time employment contract. Part-time work cannot exceed 30 hours a week, and if it exceeds 30 hours, it is considered as a full-time employment contract. Unless there is a valid reason, part-time employees cannot be treated differently than full-time employees.

Public disclosures

27 | Must employers publish information on pay or other details about employees or the general workforce?

Pursuant to the Corporate Governance Communiqué of the Capital Markets Board of Turkey (II.17.1), publicly traded companies are required to prepare a remuneration policy and submit it for the approval of the shareholders in a general assembly meeting. These policies must be published on the Public Disclosure Platform (PDP) and the company's website. Further, publicly traded companies are required to disclose the amount of remuneration and the benefits provided to board members and senior executives to the public through annual financial reports published on the PDP. There are also non-mandatory provisions for companies to form a policy on compensation towards their employees and to disclose the policy via their corporate website, or to determine a target rate, being not less than 25 per cent, and a target time for the membership of women in the board of directors and to form a policy for it. Other than that, there is no such requirement for private companies.

POST-EMPLOYMENT RESTRICTIVE COVENANTS

Validity and enforceability

28 | To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

According to the Code of Obligations, an employee may undertake to refrain from competing with the employer (eg, through establishing a competing enterprise in its own account, working in a competing enterprise or engaging in a beneficial relationship with a competing enterprise) upon the termination of the employment contract. Non-competition agreements must be made in writing.

A non-competition agreement is only valid if the employment relationship provides the employee with access to the customer portfolio, production secrets or the works carried out by the employer and also on the condition of a risk that use of the information may result in significant damage to the employer. Non- competition obligations of an employee cannot contain restrictions that are not appropriate in terms of the place, time and the subject of work or in a way that may endanger the economic future of the employee unfairly, and its duration cannot exceed two years except for in special circumstances.

Post-employment payments

29 | Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

No, the employer does not need to continue to pay the former employee.

LIABILITY FOR ACTS OF EMPLOYEES

Extent of liability

30 | In which circumstances may an employer be held liable for the acts or conduct of its employees?

Under the Code of Obligations, employer liability is based on an objective duty of care. The employer is obliged to remedy the damage caused to others by its employee while performing the work assigned to him or her. The employer will not be held liable if the employer proves that it showed the necessary care in the selection of the employee and instructed, supervised and inspected him or her. The employer is obliged to remedy the damage resulting from the activities of its enterprise unless it proves that the organisation of the enterprise is suitable for preventing the occurrence of the damage. The employer is entitled to revoke the indemnity it has paid against the employee who caused the damage to the extent of the personal liability of the employee.

TAXATION OF EMPLOYEES

Applicable taxes

31 | What employment-related taxes are prescribed by law?

Stamp tax and income tax (where applicable) are applicable on the salary and other benefits of the employer.

EMPLOYEE-CREATED IP

Ownership rights

32 | Is there any legislation addressing the parties' rights with respect to employee inventions?

Yes. The Industrial Property Law (Law No. 6769) (IPL) contains specific regulations for employee inventions. Furthermore, detailed regulations regarding the employee's inventions are in the Regulation on Inventions of Employees, Inventions Realised in Higher Education Institutions and in Publicly Supported Projects dated 29 September 2017 (the Regulation).

Service invention is defined in the IPL as an invention made by the employee during the course of his or her employment that is either based on an employee's work that he or she undertakes to perform in a facility or a public institution or essentially based on the experience or activities of the facility or public institution. The remaining inventions are deemed independent inventions. The Regulation includes the same definitions for service and independent inventions.

In addition to this, the Regulation foresees three groups of service inventions: the first group comprises inventions arising from the assignment given by the facility, and the facility has no contribution in the realisation of the invention. The second group includes inventions that do not directly arise from assignment in the facility, but are realised for the fulfilment of the needs determined by the facility or for the solution of problems identified by the facility or from some contribution by the facility. The third group comprises inventions that directly arise from the assignment given by the facility and that involve the full contribution of the facility.

Trade secrets and confidential information

33 | Is there any legislation protecting trade secrets and other confidential business information?

As a general principle, the employees are bound by the loyalty duty. Furthermore, in accordance with the Code of Obligations, employees have a confidentiality obligation during the term of employment and post-employment period so long as it is required to protect the rightful interests of the employers. The Criminal Code also sets forth criminal sanctions for the illegal obtainment and illegal disclosure of confidential information and trade secrets.

DATA PROTECTION

Rules and obligations

34 | Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

There are no specific laws governing the protection of employee privacy or personnel data. However, there is a particular provision imposing certain obligations on employers with respect to their employees' personal information. Pursuant to article 75 of Labour Law, employers are under the obligation to use the information they have obtained about the employee in good faith and not to disclose the information that the employee has a justifiable interest in keeping secret.

Furthermore, the Law on Protection of Personal Data (LPPD) regulates the protection of personal data in general. Under the LPPD, a data controller is a real person or legal entity that determines the objectives and tools of the processing of personal data. Thus, employers are qualified as data controllers and have responsibilities towards their employees as data subjects.

During the collection of personal data, the data controller or any other person authorised by the data controller is obliged to provide data subjects with certain information, such as the identity of the data controller and of his or her representative, the purposes of the processing, to whom and with what purpose the processed personal data can be transferred, the method and legal basis of collection and other rights specified in article 11 of LPPD. The data controller is required to take all necessary technical and administrative measures to provide an appropriate level of security to prevent the unlawful processing of personal data and the unlawful access to personal data, as well as to ensure the retention of personal data.

In the case of the processing of personal data by a third party on behalf of the controller, the data controller is jointly liable with any third party that processes the personal data on its behalf. The data controller is obliged to conduct necessary inspections or to have them conducted in its own institution or organisation.

Moreover, upon the disappearance of the reasons for processing, the personal data must be erased, destroyed or anonymised by the data controller ex officio or upon the request of the data subject. The data controller is obliged to conclude the applications of the data subjects within a maximum period of 30 days, prepare a personal data inventory and register with the Registry of Data Controllers and notify unlawful data processing activities of the data subjects and the Personal Data Protection Board.

The processing activities of the data controller must comply with principles such as 'being in conformity with the law and good faith', 'being accurate and up to date', 'processing the data for specific, clear and legitimate purposes', 'being relevant, limited and proportionate to the purposes for which data are processed', and 'being stored only for the time specified in the relevant legislation or the time required for the purpose for which the personal data is collected'.

35 Do employers need to provide privacy notices or similar information notices to employees and candidates?

While collecting personal data, the employers, as data controllers, are obliged to provide data subjects with certain information, such as the identity of the data controller and of his or her representative (if any), the purposes of the processing, to whom and with what purpose the processed personal data can be transferred, the method and legal basis of collection and other rights specified in article 11 of LPPD.

36 What data privacy rights can employees exercise against employers?

Upon the disappearance of the reasons for processing, employees may request from employers that their personal data be erased, destroyed or anonymised.

Moreover, under article 11 of the LPPD, every data subject (including employees) has the right to contact the data controller (employer) and:

- learn whether their personal data is being processed;
- request information if their personal data is being processed;
- learn the purpose of the data processing and whether the data is being used for the intended purposes;
- obtain knowledge of the third parties to whom their personal data is transferred at home or abroad;
- request rectification of incomplete or inaccurate data, if any;
- request the erasure or destruction of their personal data within the framework of the conditions set forth in article 7 of LPPD;
- request notification of the operations carried out in compliance with their request to rectify, erase or destroy their personal data to third parties to whom their personal data has been transferred;
- object to the processing, exclusively by automatic means, of their personal data that leads to an unfavourable consequence for the data subject; and
- request compensation for the damage arising from the unlawful processing of their personal data.

The rules and processes for data subjects to exercise their rights regarding personal data are defined in detail in the Communiqué on Principles and Procedures for Application to Data Controller, which was published in Official Gazette No. 30356 on 10 March 2018.

BUSINESS TRANSFERS

Employee protections

37 Is there any legislation to protect employees in the event of a business transfer?

Pursuant to the Labour Law, in the event of a transfer of a business, either as a whole or the transfer of a specific section of the business, to a transferee, the employment contracts that already validly exist in the transferred business (or in the transferred section of the business, as the case may be) will automatically pass to the transferee by application of law, together with all the rights and liabilities under those contracts. Furthermore, according to the Labour Law, both the transferee and the transferor are jointly liable for any obligations accrued under the employment contracts at the date of the transfer. The joint liability of the transferor ceases after two years of the date of the transfer of the business.

Pursuant to the Commercial Code, in the event of the merger or demerger of a business, the employment contracts that validly exist at the date of the transaction will, together with all the rights and liabilities under those contracts, automatically pass to the new employer, should the employee not object to the transfer of the employment relationship. The Code provides for a right of objection for employees who are not willing for their employment contracts to be transferred to a new employer. Similarly, the Code of Obligations addresses in article 429 that any service agreement (ie, employment contract) can only be transferred to a new employer if the employee grants his or her consent to the transfer.

TERMINATION OF EMPLOYMENT

Grounds for termination

38 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

In accordance with the provisions of the Labour Law, an employment contract (which qualifies as an indefinite-term employment contract) can be terminated either through the service of a prior termination notice (the notice period changes according to the term of office of the employee) or by immediate termination in the case of a just cause.

The Labour Law provides specific protection to employees who have worked for more than six months in a workplace with at least 30 employees: employment security. In this case, in the event of the absence of a just cause for the termination of the employment contract, the employer can terminate the employment contract through service of a prior notice only if there are valid reasons stipulated under the Law. In accordance with article 18, valid reasons can be related to the capability or the behaviour of the employee, or the requirements of the workplace or the business. However, if the employer relies on a valid reason concerning the performance or behaviour of an employee, the employer must first obtain a written defence from the employee.

The Labour Law includes three categories of just cause for the termination of employment contracts, namely health issues, circumstances incompatible with morals and good faith, and force majeure. In the event of one or more just causes, the employer may terminate the employment contract with immediate effect. However, in the event that the employer relies on a just cause related to circumstances incompatible with morals or good faith, then it must exercise its right to terminate within six business days of it becoming aware of the event and, in any case, within one year of the occurrence of the event.

Notice

39 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

In the event that the employer does not rely on a just cause, then the employment contract can only be terminated through service of a prior written termination notice. However, instead of providing the employee with such notice period, the employer may choose to terminate the employment contract by providing pay in lieu of notice.

Minimum notice periods are regulated under the Labour Law. If the term of office of an employee is:

- less than six months, the notice period must be at least two weeks;
- between six months and 18 months, the notice period must be at least four weeks;
- 18 months to three years, the notice period must be at least six weeks; and
- more than three years, the notice period must be at least eight weeks.

It is possible for the parties to agree on a longer period, but any agreement for a lesser term would be invalid.

40 | In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

In the event of a just cause, the employer may terminate the employment contract with immediate effect, not having to make any *payment in lieu of notice*. Moreover, if there is a probationary period in the employment contract, the employee can terminate the agreement without notice or payment in lieu of notice.

Severance pay

41 | Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Yes. Severance payment should be made in the event that the employment is terminated within the scope of the following reasons, and the employee has been employed for a minimum of one year:

- by the employer for reasons other than those stated in article 25(II) of the Labour Law;
- by the employee pursuant to article 24 of Labour Law;
- owing to active and regular military service;
- to receive an old age pension, pension fund, disability pension or to receive a lump sum payment from statutory institutions or retirement funds with which they are affiliated;
- by the employee upon completing the insurance period and the number of premium days required for the retirement pension;
- by a female employee within one year following the date of marriage; or
- owing to employee's death

Severance pay is calculated according to each full year that has passed since the beginning of the employment agreement until the termination date, and 30-day salary is paid for each full year. Pro-rata payment should be made at the same rate for the period exceeding one year. Calculation of severance pay is made on the employee's final salary, and the maximum amount of severance pay cannot exceed the pension amount paid to the highest ranking civil servant for one year of service, which is 6,730.15 Turkish lira for the first half of 2020.

Procedure

42 | Are there any procedural requirements for dismissing an employee?

Yes, certain procedures should be followed. First, notices of termination should be made in writing and include the termination reason. In addition, if the termination of a permanent contract is made owing to performance or behavioural reasons, the employee should be given the opportunity to defend him or herself before termination.

In the event of a collective dismissal, the dismissal must be notified to Turkish Employment Agency at least 30 days before termination.

Employee protections

43 | In what circumstances are employees protected from dismissal?

The employment agreement of an employee who has been working for at least six months at a workplace that has 30 or more employees may only be terminated for a valid cause or just cause. Otherwise, the employee can file a re-employment claim before the court. Certain provisions also apply according to the principle of equal treatment.

Mass terminations and collective dismissals

44 | Are there special rules for mass terminations or collective dismissals?

Yes, those dismissals should be notified to Turkish Employment Agency, the District Labour Office and, if applicable, to the union representative at least 30 days before the termination. The notice should include the reason for the collective dismissal, the number and groups to be affected and the date of the terminations.

A collective dismissal may occur for reasons of an economic, technological, structural or similar nature required by the enterprise, the establishment or the activity and occurs when at the same date or within the same month a minimum of:

- 10 employees are dismissed in an establishment employing between 20 and 100 employees;
- 10 per cent of employees are dismissed in an establishment employing between 101 and 300 employees; and
- 30 employees are dismissed in an establishment with over 301 employees.

If the employer wishes to recruit workers for the same qualification within six months of the conclusion of the dismissal, it should preferably invite the dismissed employees whose qualifications are eligible for the work.

Class and collective actions

45 | Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Employees can file labour and employment claims on an individual basis; however, several employees may petition the court and join their claims into one sole claim.

Mandatory retirement age

46 | Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

In principle, retirement ages are defined by law, and as long as the employee's health status allows him or her to work, the employment agreement cannot be terminated because of reaching a certain age except for in the case of civil servants. However, imposing a mandatory retirement age through workplace policies and regulations is discussed in Turkish law, and there are some Supreme Court decisions where the mandatory retirement age is deemed valid provided that it was expressly defined under the regulations agreed by the employee and is applied equally to all applicable employees.

DISPUTE RESOLUTION

Arbitration

47 | May the parties agree to private arbitration of employment disputes?

No, they cannot. The mandatory arbitration procedures apply.

Employee waiver of rights

48 | May an employee agree to waive statutory and contractual rights to potential employment claims?

No. The only valid way to waive rights or receivables is to enter into a settlement agreement after the termination of employment or an official claim is made before the court or mandatory mediator. In those cases,

it is recommended to sign the settlement agreement through voluntary or mandatory mediation to avoid any validity discussions around the employee's non-voluntary approval or the employer's exploitation of the employee's situation.

Limitation period

49 What are the limitation periods for bringing employment claims?

The re-employment claim should be filed within one month of the delivery of the termination notice. All salary-related claims and claims regarding severance pay, notice pay, bad faith compensation and compensation for breach of equal treatment principle are subject to five-year statute of limitation.

UPDATE AND TRENDS

Key developments of the past year

50 Are there any emerging trends or hot topics in labour and employment regulation in your jurisdiction? Are there current proposals to change the legislation?

Agile working, remote working, automation in recruitment processes and increased social media communication are emerging trends in Turkey's human resources environment, which will require amending employment regulations. In addition, owing to the covid-19 pandemic, there have been changes to short-term working allowance regulations, and the government has announced that there will be additional changes to labour legislation, particularly with regard to remote working provisions.

İNANICI TEKCAN
AVUKATLIK BÜROSU
LAW OFFICE

Sinem Birsin
sinembirsin@inanici-tekcan.av.tr

Beril Çelebi Cem
berilcelebi@inanici-tekcan.av.tr

Mahmut Yesari Sokak
No:47, 34718 Koşuyolu, Kadıköy
Istanbul
Turkey
Tel: +90 216 340 82 15
http://en.inanici-tekcan.av.tr

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Business & Human Rights
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
Drone Regulation
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
Healthcare M&A
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
Luxury & Fashion
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Partnerships
Patents
Pensions & Retirement Plans
Pharma & Medical Device Regulation
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

an LBR business

ISBN 978-1-83862-357-9