

## LEGAL MEMORANDUM

**Subject:** Protective Measures Taken in Turkey against Covid-19 and Their Effects on Employment Contracts

### INTRODUCTION

Coronavirus (“Covid-19”) which was declared as a pandemic by World Health Organization on 11.03.2020 and became a global health issue, has reached to our country too, and certain protective measures were taken in every area. This exceptional situation and measures taken to deal with it have their effects on business life. Employers feel the necessity to adopt temporary measures to ensure the continuity of work, as well as to protect the health of their employees. This memorandum is prepared to inform our clients and those who are concerned about the effects of the exceptional conditions that arise due to the Covid-19 pandemic on employment contracts that are subject to Labor Law numbered 4857 (“Labor Law”) and our proposed solutions to ensure the continuity of those contracts.

#### I. Employer’s Obligation to Provide Occupational Health and Safety in the Workplace

According to the Occupational Health and Safety Law numbered 6331, employer shall take the necessary actions to adapt health and safety measures to changing conditions in line with the obligation to provide occupational health and safety. Again, according to the Occupational Health and Safety Law numbered 6331, employees are under the obligation not to endanger themselves or other employees that may be affected by their work, in the line with their training on occupational health and security and the instructions of the employer.

The Employer’s decision to continue working from home may be considered as a moderate and reasonable measure regarding occupational health and safety, since continuity of collective working in the workplace increases the risk of further spread of the pandemic and employees’ chance of being affected by this pandemic.

##### a. Application of Remote Work

Remote work is not a practice that is regulated in detail under Turkish Legislation. The President of the Turkish Republic stated in his speech, dated 18.03.2020 concerning Coronavirus, that the flexible and remote working models will become more effective in our labor legislation through the new measures taken.

According to article 14/4 ff. of the Labor Law, employment contracts shall be made in writing to include certain conditions in remote working models. In case of switching to remote working model with the employees that have their employment contracts and who are currently working from a workplace, the remote work, including the changes in the current working conditions, shall be announced to the employees in writing. Following points shall be included in detail in the relevant announcement **(i)** working hours from home, **(ii)** the way the work is to be conducted, **(iii)** the equipment to be provided by the employer for the work and **(iv)** the obligations for the preservation of such equipment, **(v)** communication with the employer and superiors. Additionally, necessary training and information regarding occupational health and security in accordance with the method of working from home must be provided to the employees.

## **b. Nature of The Accident Occurred During Remote Work**

As explained above, the employer which temporarily switched to application of remote work because of the Covid-19 pandemic must provide their employees with required information and training regarding occupational health and security within the scope of duty of care. However, the training and information provided to the employees does not guarantee an occupational accident will not occur while the employee is working from home. While the employee is working, any accident that may occur, even outside of the workplace may be regarded as occupational accident because the employee is tasked to work from home. In order for the employer to be excluded from liability for any occupational accidents, the employer must fully and properly satisfy the duty of care in addition to the presence of the fault of the employee or fault of a third party. As a result, employers practicing remote work should ensure that employees are provided with the necessary information and equipment for remote working and employees' security.

## **II. Cessation of Work for More Than a Week Because of Compelling Reasons**

Compelling reason is an unavoidable, unforeseeable and external event. As per article 24/III of the Labor Law, in the event of compelling reasons (force majeure) that would require the cessation of work for more than a week, the impossibility of acceptance of performance and suspension of the employment contract may be in question. According to article 40 of the Labor Law, employees that cannot work or cannot be called to work is paid half of their daily wage every day for up to a week in this waiting period.

The reasons preventing employee to work must occur around the employee. Reasons arising from the workplace and preventing work are not regarded as compelling reasons. For instance, closure of the workplace is not regarded as a compelling reason<sup>1</sup>. However, reasons such as disconnections due to floods, snow, earthquake or quarantine due to a pandemic/epidemic are regarded as compelling reasons<sup>2</sup>.

Covid-19 pandemic and risk of rapid transmission caused measures to be taken like closure of the schools for a certain period of time, postponing judicial affairs and cancellation of the events where crowded groups come together such as social and cultural events, sports competitions, conferences in Turkey as well as in the world. The cessation of activity of public and private institutions and cancellation of organizations due to the measures has also affected the business life. Considering the length of this duration in countries where virus started spreading and countries starting reporting cases prior to Turkey, this exceptional situation can be considered as a compelling reason that is requiring the cessation of work in the workplace for more than a week.

## **III. Application of Short Work**

In times of economic crisis, especially companies with high employment costs go for collective dismissals. As a result of the principle of termination as a last resort and the aim to prevent an increase in unemployment rate, our legislation provides the employer with the opportunity to reduce costs and provide employees with income security by reducing working hours.

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<sup>1</sup> High Court of Appeals Decision - 9.HD., E. 2007/16205 K. 2008/10253 dated 25.4.2008.

<sup>2</sup> High Court of Appeals Decision - 9. HD., E. 2016/7091 K. 2019/14564 dated 1.7.2019, Supreme Court Decision - 9. HD., E. 2016/13839 K. 2016/18605 dated 25.10.2016.

According to Additional article 2 of the Unemployment Insurance Law numbered 4447, the application of short work can be conducted in the workplace for a duration of three months at most, if the weekly working hours are temporarily reduced by at least a third or if the activity in the workplace is stopped completely or partially for at least four weeks due to the general economic, sectoral or regional crisis, and compelling reasons. This period can be extended up to six months by the decision of the President.

The employer that has taken the decision to apply short work should immediately send a notification to the Turkish Employment Agency and the union party to the collective labor contract (if available) with the reasons of such decision. The request will be firstly evaluated by the Turkish Employment Agency and a decision will be given by the Executive Board of the Agency. If the short work request is accepted, the short work allowance will be paid to the employees from the Unemployment Insurance Fund. In order for the employee to be entitled to short work allowance, they must fulfill the conditions for entitlement to the unemployment allowance, excluding the termination of the contract.

Daily unemployment payment equals to 60% of the average daily gross earnings calculated by taking into consideration the gross earnings of the insured in the last twelve months. The short work allowance that is calculated as such shall not exceed the 150% of the minimum gross wage of the employees older than 16 according to article 39 of the Labor Law. Insurance premiums of the employee receiving short work allowance are paid to Social Security Agency by the Unemployment Insurance Fund.

In the event of short work due to the compelling reasons, short work allowances start after 1-week period determined under articles 24/III and 40 of the Labor Law. Since employees' obligation to work and employer's obligation to payment are suspended in the short work period and only the agency is making a payment due to law, it is not possible to benefit from the social assistance arising from the collective labor contracts<sup>3</sup>.

The President of the Turkish Republic emphasized in his speech, dated 18.03.2020 concerning Coronavirus, that the short work allowance will be enabled and the processes to benefit from the said allowance will be made easier.

#### **IV. Compensatory Work**

According to article 64 of the Labor Law, the employer may call upon compensatory work within two months in order to compensate for the time lost due to unworked periods in cases where **(i)** time worked has been considerably lower than the normal working time or work is suspended entirely due suspension of work because of the compelling reasons or on the days before or after the national and public holidays or similar reasons, or **(ii)** where the employee is granted time off upon his request. Compensatory work cannot exceed 3 hours a day, provided that it does not exceed 11 hours of daily working time. Compensatory work shall not be carried out on holidays.

In the event of work hours being considerably lower than normal working hours because of the measures taken due to the Covid-19 pandemic, the employees may be called to compensatory work following the end of this exceptional situation. In his speech evaluating Coronavirus on 18.03.2020, the President stated that in order to ensure the continuity in employment, the period for compensatory work is increased from 2 months to 4 months, as one of the measures.

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<sup>3</sup> High Court of Appeals Decision - 9. HD., E. 2018/9973 K. 2018/22978 dated 12.12.2018.

## V. Suspension of the Employment Contract

The suspension of the employment contract is not regulated separately and clearly in the Turkish Labor Law. However, the parties can freely determine the duration, the subject of the contract, duties and obligations of the parties, receivables and debts by remaining within the limits of law, within the scope of freedom of contract. As parties have their say in the establishment and continuation of the contract, same is the case for the suspension of the employment contract<sup>4</sup>.

The employment contract will be suspended during the duration of the compelling reason as long as it is not terminated due to the compelling reasons stated above. The result of the suspension is the temporary nonperformance of the main deeds of the employment contract namely obligation to pay wage and the obligation to work. However, deeds other than the main ones, such as loyalty obligation, obligation of care, non-competition, privacy will continue during the period of suspension. Besides that, suspension period will not be taken into account in calculation of the severance term<sup>5</sup>.

The following is required for the suspension of the employment contract: **(i)** impossibility to perform for the employee or to accept such performance by the employer, **(ii)** temporary non-performance and non-acceptance of the deeds, **(iii)** non-performance should not arise from parties' fault and **(iv)** consent of the parties. As long as the presence of the compelling reason, the employer has to pay half of the wages only for one week. After one week the employer is not obliged to pay the wages.

The suspension of the employment contract is regarded as a substantial change in working conditions for employees, thus, employee's written consent is required. The effects and the application of the suspension of the employment contract and the unpaid leave are the same. Because the employee is being proposed to accept an unpaid leave for a certain period of time under both situations, as detailed below, under the relevant title. In this context, in the event of temporary cessation of work because of compelling reasons, the employer must notify the employees in writing, including the reasons of the suspension and must take written consent of the employees within 6 business days. Hence, even in the presence of the reasons for suspension of the employment contract, the employee shall not be forced to accept the suspension.

Legal doctrine states that the duration of the suspension must be determined. If the duration of the suspension as accepted by the parties extends beyond the reasonable duration, employee may be entitled to terminate the employment contract with a valid reason<sup>6</sup>. Again, if the duration of suspension as determined by the parties has ended and the employee is still not called for work, there is a risk that for this employment contract to be deemed as terminated by the employer with an invalid reason<sup>7</sup>.

## VI. The Conditions of Employees Being Sent to Leave by the Employer

### a. Annual Paid Leave

According to the Labor Law, any employee working for one year including the trial period in the same workplace or in other workplaces owned by the same employer, is entitled to the right to use annual paid leave. The employer has the authority to determine the leave periods of their employees

<sup>4</sup> High Court of Appeals Decision - 7. HD., E. 2015/28095 K. 2015/15036 dated 15.9.2015.

<sup>5</sup> High Court of Appeals Decision -22. HD., E. 2015/16706 K. 2017/17208 dated 11.9.2017.

<sup>6</sup> High Court of Appeals Decision - 22. HD., E. 2017/13711 K. 2018/16737 dated 4.7.2018.

<sup>7</sup> High Court of Appeals Decision - 9. HD. E. 2017/7395 K. 2017/19154 dated 29.11.2017.

considering the conditions and the intensity of the work. This authority is based on the employer’s right of management and employer can determine the dates in which the employees are using their paid leave. This is also regulated in the Regulation on Annual Paid Leave (“**Regulation**”). According to the article 15 of the Regulation, the employer can determine that the annual paid leave will be granted at a certain time or a period of each year by consulting the annual paid leave council which consist of three members; one member representing the employer or the employer’s representative and two members representing the employees.

According to the article 10 of the Regulation; the employer can send all or a part of the employees to annual paid leave between the period starting from the beginning of April until the end of October, in case the employer wishes that all of his/her employees to use their annual paid leave collectively at the same time. In the event that such an application is decided, the employer may exclude sufficient number of employees from the collective leave for compulsory situations such as protection of the workplace, maintenance, preparation, cleaning or safety of the tools and equipment in the workplace. The employees excluded in this situation should be allowed to use their annual paid leave before or after the period of collective annual paid leave.

The Regulation does not regulate a scenario in which the employer wants to send their employees to collective annual paid leave in a different time period than the period determined under the Regulation. In case the employer sends their employees to collective annual paid leave in a different time period than April-October, sanctions under article 103 of the Labor Law may be in question. On the other hand, as the reason behind the collective paid leave is Covid-19 pandemic and measures against the pandemic requires isolation, employees wanting to spend their annual paid leave by going on holiday will not be able to do so due to the travel restrictions. The right to use annual paid leave cannot be waived as per article 53/2 of the Labor Law. The main reasoning for article 53/2 is to ensure use of the annual paid leave by the employees and that the employees are able to rest. It is open for discussion that whether collective annual paid leave can be decided by the employer under the current circumstances. Providing the conditions for the employees to rest by the employer may be adequate for the “employees to rest”. We are of the opinion that the fact that employees are not able to leave the house within the scope of the measures taken will not prevent the use of collective annual paid leave since the aim is to keep the employment contract alive and pay the wages by considering the interests of the employee.

## **b. Unpaid Leave**

The stagnation in the global economy and the anticipation of a possible economic crisis due to Covid-19 pandemic have forced employers to take some measures to reduce costs. The employer, who is concerned both for the duty of protecting the health of employees and reducing the operating costs, may apply unpaid leave within the scope of the principle of termination being the last resort for the employees who benefit from job security.

Unpaid leave, which is a type of suspension of contract, is regarded as a substantial change for the employee as employee and the employer are not able to perform their main deeds arising from employment contract. For this substantial change in the working conditions to be valid, the change must be notified to the employee in writing and 6 days as a period for approval must be provided. In case employee does not approve the proposal, employer can terminate the employment contract by explaining to employee in writing that the change in the contract is based on a valid reason or there is another valid reason for termination provided that the employer complies with the notice period. Even if the employee is not obliged to accept the unpaid leave application, there are High Court of Appeals decisions that if the application of unpaid leave has been proven to be decided in order to overcome

the economic problems and to maintain the business relationship in this way, contract of the employee who does not accept the unpaid leave application may be terminated with a valid reason<sup>8</sup>. However, considering the current situation of Covid-19 pandemic and other measures mentioned above, we believe evaluating other measures first, then applying to unpaid leave in case other measures are not resulted in positive outcomes would be more accurate.

Although it is not a legal obligation to specify the duration of the unpaid leave in the offer, the obligation to present any change in the work conditions in clear and unambiguous terms makes the unpaid leave period an essential point of the offer. For this reason, the employee must be informed about the duration of the unpaid leave.

During the unpaid leave, the employer is not obliged to pay either the wages to the employees or the premiums to the Social Security Institution. Additionally, the time passed during the unpaid leave are not taken into account when calculating the severance term<sup>9</sup>.

## CONCLUSION

As explained above, the measures and procedures that can be taken during the Covid-19 pandemic both to protect employees' health and to maintain their business contracts while keeping the benefits of the employee in mind, can be summarized as in the table below. We would like to underline that while applying these procedures, employer must consider the principle of termination being the last resort for employees subject to job security, and that the method that will be in the best interest of the employee should be applied first and other procedures should be applied gradually according to the needs of the business.

Measure	Explanation	Method	Payment
<b>Remote Work i.e. Working from Home</b>	Remote work may be applied if the nature of the work allows the work to be conducted remotely to ensure health and safety in the workplace. The trainings and necessary equipment must be provided to the employees during the process.	The employees must be notified of the change in the working conditions.	Monthly wages and benefits will be paid. <sup>10</sup>
<b>Short Work</b>	In cases where the weekly working hours in the workplace are temporarily reduced by at least a third or if the operation in the workplace is stopped completely or partially for at least four weeks, short work can be done in the workplace for time a period up to three months.	Employer notifies Turkish Labor Agency and union party to the collective labor contract, if available, in writing.	Short work payment and insurance premiums are paid from the Unemployment Insurance Fund. Other benefits are suspended.

<sup>8</sup> High Court of Appeals Decision - 22. HD., E. 2011/3323 K. 2011/4275 dated 14.11.2011.

<sup>9</sup> High Court of Appeals Decision - 22. HD., E. 2017/18670 K. 2018/26219 dated 4.12.2018.

<sup>10</sup> Considering that the employee will not be paying for any travel expenses to come to the workplace during remote working, we believe any payment for road expenses will not be necessary, but the meal fee should be paid while remote working.

# Bozođlu İzgi

<b>Annual Paid Leave</b>	If the nature of the work does not allow work to be conducted remotely, the employees can be sent to annual paid leave in the first stage.	Employees can be collectively sent to annual paid leave at the same time within the period starting from the beginning of the April until the end of October. Employees must be notified of this.	Monthly wages and benefits will be paid.
<b>Unpaid Leave</b>	In case of absence or exhaustion of the paid leave, employees can be sent to unpaid leave, upon consent of the employees.	The employee must be notified of the duration and the reasons for the unpaid leave and a duration of 6 days must be provided for employee's approval.	No wages or benefits will be paid.
<b>Half Wage Due to Compelling Reason</b>	In the case of cessation of work due to compelling reason, employees are paid half wage for every day for up to one week.	Employees must be notified of the payment of half wage due to compelling reason.	Half wage for every day, up to one week.
<b>Suspension</b>	The employment contract can be suspended, only if the performance of the employee's obligation to work or the acceptance of this performance by the employer is not possible for a temporary period and that this impossibility does not arise from the fault of the parties.	The consent of the parties is required.	No wages or benefits will be paid.

Best Regards,  
**Bozođlu İzgi Attorney Partnership**