

Re: Legal Opinion Regarding to Occupational Health and Safety Precautions and Rules for Covid-19.

A. LEGAL ASSIGNMENT

Preparation of Legal Note regarding to the Precautions and Rules in terms of Occupational Health and Safety during covid-19 pandemic period.

B. DOCUMENTATION/CORRESPONDENCE PROVIDED BY THE CLIENT

The Client hadn't provided any documents.

C. LEGISLATION REVIEWED

- Occupational Health and Safety Law numbered as 6331 dated as 20/6/2012,
- Turkish Obligation Code numbered as 6098 dated as 11/1/2011,
- Turkish Labor Law as numbered 4857 and dated 22.5.2003.
- Turkish Penal Code as numbered 5237 and dated 26.9.2004.
- Regulation on Occupational Health and Safety Risk Assessment numbered 28512 and dated 29.12.2012

has been reviewed for the legal opinion.

D. EVALUATIONS

I. COVID-19 IN TERMS OF OCCUPATIONAL HEALTH AND SAFETY

Coronavirus disease (COVID-19) is an infectious disease caused by a newly discovered coronavirus¹. The Covid-19 pandemic has had a great impact on business life. The issue of occupational health and safety against the pandemic in workplaces has come to the fore.

In Turkish legislation, the legal basis of the occupational health and safety measures that the employer should take is regulated in Turkish Obligation Code (TOC) numbered 6098. According to Turkish Obligation Code article 417 *“The employer is obliged to take any kind of measures and to keep tools and vehicles available required to ensure occupational health and safety in the worksite; workers as well are obliged to observe any kind of measures taken regarding occupational health and safety”*.

The obligation of the employer to take measures regarding occupational health and safety is specifically specified in Occupational Health and Safety (OHS) Law. Object of this law is to regulate duties, authority, responsibility, rights and obligations of employers and workers in order to ensure occupational health and safety at workplaces and to improve existing health and safety conditions (article 1). This Law shall apply to all works and workplaces in both public and private sector, employers of these workplaces and their representatives, all workers including apprentices and interns regardless of their field of activity (article 2).

Within this frame, general responsibility of the employer is regulated in article 4 of OHS Law as following:

(1)The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work. In this respect, the employer shall;

a) take the measures necessary for the safety and health protection of workers, including prevention of occupational risks and provision of information and training, as well as provision of the necessary organization and means and shall ensure that these measures are adjusted taking account of changing circumstances and aim to improve existing situations.

b) monitor and check whether occupational health and safety measures that have been taken in the workplace are followed and ensure that nonconforming situations are eliminated.

c) carry out a risk assessment or get one carried out;

d) take into consideration the worker's capabilities as regards health and safety where he entrusts tasks to a worker;

¹ For detailed information see also: https://www.who.int/health-topics/coronavirus#tab=tab_1

e) take appropriate measures to ensure that workers other than those who have received adequate information and instructions are denied access to areas where there is life-threatening and special hazard.

(2) In case an employer enlists competent external services or persons, this shall not discharge him from his responsibilities in this area.

(3) The workers' obligations in the field of safety and health at work shall not affect the principle of the responsibility of the employer.

(4) Measures related to health and safety at work may in no circumstances involve the workers in financial cost.

The concept of "risk assessment" specified in paragraph (c) of paragraph 1 of this article is defined as follows in paragraph (ö) of Article 3 of the same law:

“activities required for identifying hazards which are existing in or may arise from outside the workplace, analyzing and rating the factors causing these hazards to turn into risks and the risks caused by hazards and determining control measures”.

Procedures and principles of risk assessment to be made in terms of occupational health and safety is regulated under the Regulation on Occupational Health and Safety Risk Assessment numbered 28512 and dated 29.12.2012. The provisions of OHS Law and Regulation are executed by Ministry of Family, Labor and Social Services of the Republic of Turkey.

On the official website of the On the official website of the Ministry of Family, Labor and Social Services of the Republic of Turkey², the legal obligations that workplaces should do due to Covid-19 are regulated within the context of OHS Law.

II. OCCUPATIONAL HEALTH AND SAFETY MEASURES THAT MUST BE TAKEN BY THE EMPLOYER DURING THE COVID-19 PANDEMIC PERIOD

It has been published for each sector by the Ministry of Health Science Board regarding the precautions to be taken at workplaces³.

A separate risk assessment should be carried out or the existing risk assessment should be updated by identifying the workplace-specific hazards associated with COVID-19.

² <https://ailevecalisma.gov.tr/covid19/sikca-sorulan-sorular>

³ <https://ailevecalisma.gov.tr/covid19>

The general provision for Risk Assessment is regulated under article 10 of OHS Law:

(1) The employer shall conduct an assessment of risks to health and safety of workers or get one carried out, taking account the following points:

a) The situation of workers who might be affected by certain risks.

b) Choice of work equipment, the chemical substances or preparations used.

c) Workplace organization and housekeeping.

d) The situation of female workers and other workers such as young workers, older workers, disabled, pregnant or breastfeeding workers who need specific policies.

(2) The employer shall identify the occupational health and safety measures to be taken as well as the protective gear or equipment to be used as a consequence of the risk assessment.

(3) Measures to be taken for the safety and health protection of workers and the working and production methods implemented by the employer must assure an improvement in the level of protection afforded to workers with regard to safety and health and be practicable at all hierarchical level within the undertaking and/or enterprise.

(4) The employer shall ensure that controls, measurements, examinations and research are carried out to identify the risks which are linked to the working environment and to which the workers are exposed.

According to the statement issued on the official website of the Ministry of Family, Labor and Social Services of the Republic of Turkey it will be appropriate to consider the following basic principles in determining the dangers, risks and measures to be taken while making Risk Assessment;

- Evaluating where and how employees may be exposed to the COVID-19 virus in the workplace, determining employees at high risk due to the nature of the work, rescheduling business processes and working patterns as a result of evaluations,
- Planning such as remote working, rotational work, organization of working time in order to keep the number of employees at the same time to a minimum,
- Determining measures to increase social distance, especially in dining halls and rest areas, in order to reduce exposure,

- Determining the individual risk factors of the employees (e.g. employees with chronic illnesses, pregnant workers, etc.) and evaluating the necessary measures to protect these employees,
- Determining the basic measures to be taken to prevent infection,
- Determining policies and procedures for the identification and isolation of sick people,
- Planning a sufficient number of personal protective equipment (PPE) to be given to employees in the workplace, which are suitable for protection against COVID-19 virus.

According to the statement issued on the official website of the Ministry of Family, Labor and Social Services of the Republic of Turkey, the following measures should be taken to reduce the risk of exposure to Covid-19:

- Current emergency plans and risk assessments should be updated, and an action plan against the epidemic should be developed.
- -Visitor entry and exit to the workplace should be restricted.
- Activities that are not urgent should be canceled.
- Meetings should be limited.
- Employees' clothes should be washed and ventilated according to hygiene rules, work clothes should be kept separate from daily clothes.
- The number of employees should be kept as low as possible to maintain social distance.
- Staff who can work from home should be directed to work from home.
- Employees' breaks and meal breaks should be arranged in a way to maintain social distance.
- It is important to organize large work teams into smaller groups. In this context, it is recommended to start working in shifts or to increase the number of shifts.
- Hygiene measures should be taken in the workplace, sufficient and necessary materials and equipment should be provided for employees to ensure their personal hygiene.
- All employees must be immediately informed of the COVID-19 infection outbreak and the measures taken and to be taken against the risks arising from it.
- Visitors should also be informed about the rules taken and must be followed regarding the COVID-19 infection outbreak in the workplace.
- Employees should be informed about the collection, storage and removal of wastes from the workplace.

III. EMPLOYER'S SUPERVISION RESPONSIBILITY REGARDING TO THE MEASURES and THE CONSEQUENCES OF THE EMPLOYER'S FAILURE TO COMPLY WITH THE OCCUPATIONAL HEALTH AND SAFETY OBLIGATIONS

1. EMPLOYER'S SUPERVISION RESPONSIBILITY REGARDING TO THE MEASURES

Certain orders have been arranged for the employer with the Occupational Health and Safety Law. With these regulations, the provisions regulated in the Labor Law on occupational health and safety have been abolished. Whether the employer is clearly stated in the legislation or not, to take the necessary measures for the health and safety of the workers.⁴

In accordance with Article 4 of the Occupational Health and Safety Law No. 6331 employer;

- To prevent occupational risks, taking all kinds of measures, including training and information, organizing, providing the necessary tools and equipment, adapting health and safety measures to changing conditions and working to improve the current situation,
- To monitor and audit whether the occupational health and safety measures taken in the workplace are followed, and to ensure that nonconformities are eliminated,
- Making or having a risk assessment done,
- Considering the employee's suitability for the job in terms of health and safety while assigning tasks,
- It is obliged to take the necessary precautions to prevent employees other than those given sufficient information and instructions from entering places with life and special danger.⁵
- Obligation to Organize Occupational Health and Safety in the Workplace.⁶

2. PREDICTION OF THE OUTCOME

As a result of the new type of corona virus (Covid-19) epidemic disease, it is an issue that should be discussed in this context. In terms of our subject, it should be stated that if the employer does not take the necessary precautions against the corona virus while employing his worker and if the worker is proven to have this disease while working, the employer's responsibility will arise.⁷

⁴ İŞ KAZASINDAN DOĞAN TAKSİRLE YARALAMA SUÇUNDA ASIL İŞVERENİN CEZAI SORUMLULUĞU, TBB DERGİSİ, 2020, Asım KAYA, sf.211

⁵ COVID – 19'UN İŞ SAĞLIĞI VE GÜVENLİĞİ KAPSAMINDA İŞLETMELER ÜZERİNE ETKİLERİ, Dr. Cihandar HASANHANOĞLU, Haziran 2020, sf. 13.

⁶ İŞ SAĞLIĞI VE GÜVENLİĞİ KANUNU'NA GÖRE GENEL HİZMET SÖZLEŞMESİNDE İŞVERENİN İŞÇİYİ KORUMA BORCU, Prof. Dr. Mustafa TİFTİK, Öğr. Gör. Ayşe ADIGÜZEL, 2016, sf. 339

⁷ İŞ KAZASINDAN DOĞAN TAKSİRLE YARALAMA SUÇUNDA ASIL İŞVERENİN CEZAI SORUMLULUĞU, TBB DERGİSİ, 2020, Asım KAYA, sf.218

3. THE CONSEQUENCES OF THE EMPLOYER'S FAILURE TO COMPLY WITH THE OCCUPATIONAL HEALTH AND SAFETY OBLIGATIONS

If the employer does not fulfill its obligations arising from the occupational health and safety legislation, it will have to endure both the exercise of the rights granted to the employees and the implementation of public sanctions within the framework of the provisions of İSGK. In addition, if the violation of the aforementioned obligations has caused unwanted consequences such as work accident or occupational disease, the legal responsibility of the employer can be applied.

3.1. EMPLOYEE'S RIGHTS

a. Employer in Default of the Creditor

Failure to take the aforementioned measures will prevent the employee from fulfilling his obligation to work; Here, the employer will have caused this by failing to fulfill its occupational health and safety obligations. This situation is described as "the default of the creditor" in the doctrine. Failure of the employee to perform his job due to reasons arising from the employer despite being ready to perform, TBK art. 408, it was decided that he was obliged to pay the worker who could not perform his duty to work.

b. Right to Avoid Working

İSGK art. 13 gives the right to refrain from working for employees who face serious and imminent danger due to failure to fulfill their occupational health and safety obligations. The existence of a serious and imminent danger is necessary for the employee to use this right.

c. Right of Immediate Termination

İSGK art. 13 / f. According to 4; Employees working on an employment contract may terminate their employment contracts in accordance with the provisions of the law they are subject to, in cases where necessary measures are not taken despite their request.

Workers within the scope of the Turkish Code of Obligations, TBK art. In accordance with 435, they can terminate the contract immediately by stating the reason for termination in writing. Workers working subject to the Labor Law, Labor Law m. 24 / I (a) because the work subject to the employment contract is dangerous for the health or life of the worker due to the nature of the work or Labor Law m. They can terminate immediately based on the reason for not applying the working conditions specified in 24 / II (f).⁸

3.2. PUBLIC SANCTIONS

1. Suspension of Work

In accordance with İSGK art. 25; When a life-threatening matter is detected in the buildings and extensions, working methods and forms or work equipment in the workplace; Until this

⁸ İŞ SAĞLIĞI VE GÜVENLİĞİ KANUNU'NA GÖRE GENEL HİZMET SÖZLEŞMESİNDE İŞVERENİN İŞÇİYİ KORUMA BORCU, Prof. Dr. Mustafa TİFTİK, Öğr. Gör. Ayşe ADIGÜZEL, 2016, sf. 343-345

danger is eliminated, the work is stopped in a part or all of the workplace, taking into account the nature of the life-threatening danger and the area that may affect the risk that may arise from this danger and the employees. Unlike the Labor Law, the ISGK does not foreseeing the closure of the workplace sanctions.

The employer is obliged to pay the wages of the employees who are unemployed due to the cessation of their work or to give another job according to their profession or status without any decrease in their wages (İSGK Art.25 / 6). Suspension of work does not give the employer the right to terminate.

İSGK m. In accordance with 25 /8; Employer or employer representatives who work without permission in the workplaces where the work is stopped, is sentenced from three to five years.

2. Ban from Public Tender

The law stipulates a two-year ban for employers who are found to be at fault in fatal occupational accidents in mining enterprises from participating in public tenders. It is clear that such a ban will be effective for employers to take necessary measures for occupational health and safety. However, since fatal occupational accidents are not only happening in mining enterprises, it was not appropriate to limit the regulation to mining.

3. Administrative Fine

İSGK m. In accordance with İSGK art. 26; Taking into account the nature of the obligation violated by the employer, different fines were imposed. Administrative fines to be applied to those who do not fulfill the obligation to report work accidents and occupational diseases are imposed by the Social Security Institution, and administrative fines related to other liabilities are imposed by the provincial director of the Labor and Employment Agency. The penalty must be paid within 30 days. It is open to appeal to the criminal judge of peace against administrative fines.

3.3. EMPLOYER'S PENAL LIABILITY

As a result, criminal liability of the "main employer" can be taken in work accidents that result in negligent injury. The theory of predictability from theories of negligence can often be applied to resolve disputes. Elements of negligence; the act is a crime that can be committed by negligence, the act is voluntary, the result is not voluntary, the obligation of attention and care is not fulfilled, the result is predictable and there is a causal link between the action and the result. After examining all the elements mentioned in the incident, it should be determined whether the main employer is responsible or not. In this determination, contractual provisions regarding liability should also be examined. In our opinion, in the period of the new type of corona virus epidemic, it is important which employer will be responsible for taking measures regarding corona virus protection. If these precautions are not taken, if the worker is caught in this epidemic, the main employer may be responsible if the conditions for negligent injury occur.

In some cases, where the main employer may be criminally liable, the fault of the victim or another person may also have caused negligent injury. In this case, each perpetrator will be

responsible for the offense of negligent injury at the rate of his fault. It is not possible to participate in the crime of negligent injury. In cases where more than one person is injured, the special provision in the 89th article of the Turkish Penal Code that regulates the crime of negligent injury should be applied.⁹

E. RESERVATIONS

This legal opinion is prepared only with respect to circumstances existing on the date hereof.

This legal opinion is not to be relied upon by anybody for any purpose without our consent.

Please do not hesitate to contact if you have any questions or comments on this legal opinion or need any further clarifications in regard to the subject matter of this legal opinion.

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⁹ İŞ KAZASINDAN DOĞAN TAKSİRLE YARALAMA SUÇUNDA ASIL İŞVERENİN CEZAI SORUMLULUĞU, TBB DERGİSİ, 2020, Asım KAYA, sf.239