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«Актуальні проблеми приватного та публічного права»

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DEFINITION ELEMENTS AND LEGAL NATURE OF EMPLOYMENT CONTRACT

Definition and Elements of the Employment Contract Until the adoption of the Labor Law No. 4857, there was no article explaining the employment contract in any of the Labor Laws, only the definition of the service contract was included in the Code of Obligations.

In the Code of Obligations, the service contract is a contract in which the worker undertakes to serve at certain or unspecified times and to pay a wage to the worker, even the employer (BK.m.313). This definition made in the Code of Obligations did not specify all the elements of the employment contract, and it was insufficient to make the full definition of the employment contract. As can be seen in the definition of the Code of Obligations we have written above, the elements of performing a job and paying a wage in return are included, but it does not include the element of dependency that distinguishes the employment contract from other contract types.

Article 8 of the Law No. 4857 defines the employment contract. According to this definition: “The employment contract is defined as the contract established with the undertaking of the dependent operation of the work and the employer's undertaking to pay wages. As can be understood from this definition, the employment contract consists of three basic elements.

These elements are employment, dependency and wages.

According to the definition of service contract in the Code of Obligations, the contract in which the employee undertakes to work for a certain or indefinite period depending on the employer and the employer undertakes to pay the employee a wage equal to the work done according to time is a service contract.

When we look at the two different definitions of employment contracts in the Labor Law and the Code of Obligations, there are some differences, although the regulations show parallelism. Because the "dependency" element was not included in the regulation in the Code of Obligations, but the "time" element was included in the regulation.

The first element in the employment contract is the element of employment. Therefore, for the existence of the contract, the act of working must be undertaken by a worker. Labor Law m. According to 2, the worker is the real person who is obliged to work for the employer. As a matter of fact, in the employment contract, the person rents his labor in a sense.

Another element in employment contracts is wages. The worker is paid for the work he does. Since the employment contract is a contract that creates a mutual debt, the employer's wage payment obligation is against the employee's obligation to perform the work.

The dependency element is another element of employment contracts. As a matter of fact, in employment contracts, the worker is more or less dependent on the employer. In a different way, the worker is obliged to fulfill his obligation to work under the supervision and control of the employer. The Supreme Court also states in many of its decisions that the element of dependency is a mandatory element of the employment contract in its settled decisions.

He argues that the dependency between the worker and the employer is the work contract if it is tight, and the service contract if it is loose. In this view, there is no qualitative difference between the employment contract and the service contract; However, according to the provisions of the Labor Law, it is stated that the dependency factor should be more stringent between the employee and the employer.

One of the mandatory elements of the employment contract is the existence of a working relationship between the parties. The fact that one of the parties undertakes the act of doing business with the contract forms the basis of the employment contract. However, although employment is the basic element of the employment contract, it is not the distinguishing element of the contract. Because the act of doing business also constitutes the subject of contracts such as mandate contracts and contracts of work.

In order for an employment contract to be mentioned, an act of doing business must have been undertaken. In this sense, work is expressed as any kind of work of a real person that can be considered as a business in economic terms. It is an activity that provides a material or intellectual need of the employer and that has a value for the employer. This activity includes both material and intellectual work. The act of doing business can be defined as any physical or mental activity that is regularly performed for the other party of the contract. The issue of what this activity is is not important for the determination of the existence of the act of working, any physical or mental activity may be undertaken as an act of working. Because there is no legal restriction on the type of act of doing business with the Labor Law or the Code of Obligations. However, in order for an activity to be legally qualified as a business, it must not be contrary to law or morality.

Since the employment contract is a contract based on voluntary work, if the employment is based on a legal obligation, it is out of question to talk about the employment contract.

In addition, the act of doing business, which will constitute the subject of the employment contract, must also have a personal character. In other words, the person who is a party to the employment contract and who will perform the work must do the work himself. Therefore, the employment contract is a personal contract. Because the quality, qualification and personality of the person who will do the work is important in the establishment and continuation of the contract. For this reason, as a rule, he has to perform the act of performing the undertaking himself (TBK m.395). If the worker

who is a party to the contract has committed the labor of another person, not his own, it is not possible to accept the contract as an employment contract.

In addition to being the main debt of the employer arising from the employment contract, the wage is the founding element of the employment contract as it can be understood from the definition of the employment contract. Therefore, the establishment of the employment contract depends on the agreed wage. As a rule, although there is a relationship that imposes debts on both parties in the employment contract, in terms of the order of performance, after the employee fulfills his/her job debt, the employer must pay the amount corresponding to this debt as wages.

Although the performance of a certain job is dependent on the payment of a fee by the other party of the contract, a legal presumption is included in BK m.394/2. According to this presumption, if a person sees a job that can only be done for a fee for a certain period of time and this job is accepted by the employer, an employment contract is deemed to have been concluded between them. As it can be understood from this situation, even if the wage point has not been agreed yet, the employment contract will be deemed to have been established in cases where this presumption finds an application area.

Wages are defined as the amount paid to a person by the employer or third parties in return for performing a job, in paragraph I of Article 32 of the Labor Law. In accordance with this definition introduced by the law, as a rule, wages will be paid in money for a job. The actual wage, which is included in the Labor Law and paid in return for the work performed, refers to the wage in the narrow sense. However, in a broad sense, the wage is perceived as the amount that is taken as the basis for the calculation of certain compensations or other payments made in the event of termination of the work, apart from the original wage. In addition to the main wage given to the definition in Article 32 of the Labor Law, in addition to the main wage in many articles such as Article 14 of the Labor Law No. based interests. The definitions in these articles express the concept of wage in a broad sense.

Wage is the most important debt of the employer regarding the employment contract and the main reason for the employee to work based on this contract. An unpaid work cannot be the subject of an employment contract. Since the wage is an essential element of the employment contract, even if the wage is not mentioned at all, it is assumed that the employee will receive wages implicitly.

In practice, it is stated that the fee does not necessarily have to be clearly defined. In cases where it is necessary and usual to pay a fee, it is accepted that the fee has been agreed as a rule.

As a rule, the fee must be paid periodically in certain time periods. It should be paid according to the fixed intervals determined by the contract within the limits determined by the law. According to Articles 32 and 55 of the Labor Law, this period is foreseen as one month at the most. In the employment contract, the employee and the employer can freely decide on the amount of the wage in the context of freedom of contract, provided that it is not below the minimum wage. However, the fact that the wage amount is not clearly stipulated in the employment contract does not mean that an employment contract has not been established between the parties.

The fee can be agreed between the parties in cash or in kind. According to İK article 32/1, wage in general terms is defined as the amount provided to a person by the employer or third parties in return for a job and paid in money. What the fee is essentially depends on the agreement of the parties. In that case, the fee may be in cash or in kind or partially in kind and partially in cash.

In Article 8 of Law No. 4857, an employment contract is a contract in which the worker undertakes to work as a dependent and the employer undertakes to pay wages. Wages, employment and dependency are the determining elements of the employment contract. In the employment contract, the worker is under the obligation to work for the employer for a certain or indefinite period.

The worker fulfills his obligation to work within the scope of the employment contract under the supervision and control of the employer. TBK m. According to 399, the employer can make arrangements regarding the conduct of the work and the behavior of the workers. In addition, the employer can instruct the workers. Workers are obliged to comply with these instructions given by the employer within the framework of honesty rules. Accordingly, the worker is bound by the instructions of the employer during the execution of the work and is supervised by the employer. The employer's right to give instructions is manifested by the worker as a duty to comply with the instructions. This situation clearly indicates the dependency element of the employment contract.

The worker does not make the program of the work to be done, this program is planned by the employer. As a result of this situation, addiction; It can be expressed as the performance of the employee's duty of employment under the employer's management, supervision and control, in line with the employer's orders and instructions. In the justification part of the Turkish Code of Obligations No. 6098, it is stated that "working dependent on the employer means doing business in accordance with his orders and instructions ...".

The element of dependency is seen as a reward for the employer's putting it at risk. The dependency element is the element that distinguishes the employment contract from other employment contracts; It is also a determining factor in working independently. Working according to an employment contract is defined as dependent work, and working according to a different contract is called independent work. Independent work is expressed as work done by anyone who is not considered a worker in terms of labor legislation.

Another criterion that separates the employment contract from the mandate contract is legal and individual dependency. Legal dependency is formed when the worker assumes the responsibility of complying with the rules regarding the conduct of the work and the behavior in the workplace. The worker is obliged to fulfill his obligation in accordance with the orders and instructions of the employer.

The basis of the dependency element in employment contracts; acting according to the instructions of the employer and supervision of the work process by the employer. The work to be done is carried out in the employer's workplace, the material is supplied by the employer, the employee receives instructions from the employer during the execution of the work, the work is controlled by the employer or an

assistant, the employee works without a capital investment and without a work organization of his own, the way and time of payment of the wage is personal factors to be taken into account in the determination of addiction.

None of these factors can be considered as an absolute measure by itself. The worker's use of his own imagination while working under the conditions set by the employer, and his free movement to get the job done in line with the employer's wishes, does not remove this dependency of the worker. Whether the employee owns the tools used in the workplace, whether the employee participates in profit and loss, whether he has the freedom to decide is very important in terms of the dependency factor.

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THE INFLUENCE OF TRADITIONS AND CUSTOMS ON THE ORGANIZATION OF WORKING TIME IN TURKEY

Changes observed in the working life cannot be adapted to the provisions of the legislation rapidly and continuously, and this situation leads to the emergence of unique sources of labor law. Before moving on to the subject of special resources of the Labor Law, it is necessary to mention the nature of the mandatory legal rules in the Labor Law. Mandatory law rules in Labor Law, unlike other branches of law, are subject to the distinction of "absolute and relative imperative rules". On the condition that it is in favor of the worker, the opposite of the relative imperative rules may be decided. For example, a working time cannot be determined above the mandatory working time. However, a working period can be determined below this period, which is in favor of the worker. Absolute imperative rules cannot be decided otherwise under any circumstances. For example, it is not possible to increase the amount of job security compensation and payments for idle time. It is understood from the wording of the provisions that which rules are absolute imperative and which are relative imperative in Labor Law, and the works in the doctrine also help in this regard.

The specific sources of labor and social security law are:

Collective bargaining agreements are a type of bilateral contract (contract) concluded (concluded) between labor unions and employers' unions.

The parties may, by mutual agreement, include provisions in their collective labor agreements that do not contradict the provisions of the current legislation regarding working life. If there is a collective bargaining agreement in a workplace,