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«Актуальні проблеми приватного та публічного права»

Матеріали IV Міжнародної науково-практичної конференції присвяченої 93-річчю з дня народження члена-кореспондента НАПрН України, академіка Міжнародної кадрової академії, Заслуженого діяча науки України, доктора юридичних наук, професора Процевського О.І.

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Актуальні проблеми приватного та публічного права : матеріали IV Міжнародної науково-практичної конференції присвяченої 93-річчю з дня народження члена-кореспондента НАПрН України, академіка Міжнародної кадрової академії, Заслуженого діяча науки України, доктора юридичних наук, професора Процевського О.І. (21 травня 2022 року). – Харків, 2022. – ТОВ «Видавництво Точка», віддруковано у ТОВ «Друкарня Мадрид» через ФОП Гобельовська Л. П.– 460 с.

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У матеріалах збірника представлені результати наукових досліджень вчених, присвячених актуальним проблемам приватного та публічного права.

Видання адресоване вченим, аспірантам, докторантам, викладачам закладів юридичної освіти, працівникам суду, адвокатури, органам юстиції, співробітникам Державної служби зайнятості України, практикуючим юристам, громадським діячам, профспілковим активістам, іншим особам, що цікавляться проблемами приватного та публічного права.

Матеріали конференції оприлюднені у електронному вигляді на сервері відкритого електронного архіву (репозитарію) Харківського національного педагогічного університету імені Г.С. Сковороди EKhNPUIR (електронний архів): http://dspace.hnpu.edu.ua/ та на сайті юридичного факультету: http://www.hnpu-laws.in.ua/ у розділі «Наука».

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Оргкомітет конференції не завжди поділяє думку учасників. У збірнику максимально точно збережена орфографія і пунктуація, які були запропоновані учасниками. Повну відповідальність за достовірну інформацію несуть учасники та їх наукові керівники.

workplace practice, and although a solution must be found according to the characteristics of the concrete case, according to the dominant view in the doctrine, for an application to turn into a workplace application, it must be repeated at least three times in a row. Official resources are the resources provided by the state, and "national resources" are divided into "international resources". National resources can be listed as laws, decree-laws, regulations, circulars. International resources are international agreements. Some of the international sources of Labor Law are generally bilateral agreements on labor sending and social security issues, and the other part is multilateral international agreements. An important part of the multilateral agreements are the international agreements prepared by the International Labor Organization, of which Turkey is a member in 1932, and entered into force after the ratification of the member states. The main purpose of the International Labor Organization is to establish a working norm in order to find solutions to international labor problems

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LABOR LAW TRANSFER
LABOR LAW FIELD OF APPLICATION

The scope of application of labor law in terms of subject is the previously mentioned distinction between individual labor law and collective labor law.

In the Labor Law, the worker; It is defined as a "natural person working on the basis of an employment contract" (art. 2/1). Working on the basis of an employment contract and being a natural person are the conditions sought together by the Law in order to be considered a worker.

Persons working on the basis of an employment contract; they work not only legally and economically, but also technically dependent on the employer. Due to these features, exception, power of attorney, transportation, publication etc. are separated from employees according to other contract types. For example; If a civil engineer has agreed to do any kind of construction with a homeowner, it is an exception contract, not an employment contract between the engineer and the building owner. Therefore, a civil engineer is not a worker. Again; If the same engineer works as a control engineer in someone else's construction business based on an employment contract, he is considered a worker according to the Labor Law.

According to Article 2 of the Labor Law; "Real or legal persons or unincorporated institutions and organizations that employ workers based on an

employment contract are called employers." As can be deduced from this expression, the Law has made the acquisition of the employer qualification conditional on employing workers.

Within the framework of this provision, the employer; It is the person who hires the worker by concluding an employment contract and is obliged to pay him a wage in return for fulfilling his obligation to work. The employer can be a natural person, for example, a private or public law legal entity such as a partnership, association, union, foundation, or institutions and organizations that do not have legal personality can gain the qualification of employer.

It is very difficult and even impossible for the employer to manage the workplace alone in large-scale enterprises, the number of which is increasing in the period we live in. Even in small-scale businesses, the employer cannot be expected to be constantly present at the workplace. However, businesses are constantly operating. For this reason, there must be people in the workplace who can exercise their management authority on behalf of the employer and fulfill their obligations. In labor law, these people are called "employer's representatives".

In Article 2 of the Labor Law, the provision "Persons who act on behalf of the employer and take part in the management of the business, workplace and enterprise are called employer's representative". The conditions of acting on behalf of the employer and taking part in the management of the business, workplace or enterprise must be fulfilled together. The feature that distinguishes employer representatives, also called managerial workers, from other workers is that employer representatives have the authority to represent the employer.

The employer's representative manages the business on behalf of the employer and fulfills the obligations of the employer within the limits of the authority given to him. Law; has held the employer directly responsible for all the decisions taken by the employer's representative on behalf of the employer within the scope of his authority, and for the practices he maintains towards the workers. Transactions made by the employer's representative exceeding his authority become binding for the employer only with the approval of the employer.

Employer representatives can take part in the management of the entire enterprise or workplace or a specific job within the workplace. Therefore, both the general manager of a factory and the foreman in the factory are the employer's representative. However, the responsibility of each employer's representative is limited to his own management authority and field of duty.

Workers may not have been employed directly by the employer or his representative, but through a third person employed in the same workplace or its annexes, and therefore may have entered into an employment contract with this third party. These third parties, called "subcontractor" in the text of the law, are also referred to as contractors or subcontractors in practice and doctrine. For example, if A Construction Company, which undertakes the construction of a building, gives the construction of the electrical installation of this building to B and B employs its own workers in the same building, A Construction Company will be the main employer and B will have the title of subcontractor.

The source of the principal employer-subcontractor relationship is not the employment contract, but generally the work, transportation or rental contract. The workers employed by the subcontractor are bound to the subcontractor, not the main employer, by employment contract.

The necessary conditions for the establishment of the principal employer-sub-employer relationship in accordance with the law are as follows:

The main employer must also have its own workers working in the production of goods or services at the workplace. Establishing a subcontractor relationship depends on the existence of a primary employer. In this relationship, the worker in the workplace, the person who employs the main employer, the person who undertakes some work and employs the worker in the same workplace becomes the sub-employer. A person who undertakes the whole work, for example the construction of a building, cannot be considered as a subcontractor. A person who does the work he receives from an employer himself, without employing workers, cannot be qualified as a subcontractor.

The work undertaken by the subcontractor must either be an auxiliary work in the production of goods or services carried out in the workplace or a part of the main work that requires expertise due to the requirements of the business and the work and technological reasons. Jobs such as cafeteria, security, garden maintenance and cleaning, which are in the nature of auxiliary work, can be given to the subcontractor without the condition of being a job that requires expertise due to the requirements of the business, the job and technological reasons. In the Subcontracting Regulation, auxiliary work is defined as “work that is related to the production of goods or services carried out in the workplace, but is not directly involved in the production organization, is not a mandatory element of production, but continues as long as the main work continues and is dependent on the main work”. Again in the same Regulation, the main job defined as "the work that forms the basis of the production of goods or services", in the division and giving to the subcontractor, must meet the criteria of being a job that requires expertise due to the requirements of the business and the job and technological reasons. After a main job with these qualifications is given to the subcontractor, the main employer has its own workers do the same job; in other words, it is not possible for the workers of the subcontractor and the main employer to work together in a part of the main work transferred to the subcontractor.

-The job given to the subcontractor must be a job related to the production of goods or services carried out in the workplace. In the event that an employer gives a construction or repair job to another person in the workplace, the principal employer-subcontractor relationship cannot be mentioned.

-The subcontractor must employ the workers assigned for the work it undertakes, only in the work they have taken in that workplace. For example, the relationship established with the company that cleans a different workplace with its five workers every day of the week is not the main employer-subcontractor relationship.

- The work must be carried out in the workplace of the principal employer. For example, a person who outsources orders received from another employer in his own workplace cannot qualify as a subcontractor.

-The subcontractor must not be someone who has been employed in that workplace before.

-The rights of the workers of the main employer should not be restricted by being recruited by the subcontractor and continuing to work.

In the main employer-sub-employer relationship that meets the above conditions, in other words, is in compliance with the Law and is not based on collusive transactions in general, the main employer does not subordinate its obligations to the workers of the sub-employer arising from this Law, the employment contract or the collective bargaining agreement to which the sub-employer is a party. responsible with the employer.

In the main employer-sub-employer relationship that does not comply with the above limitations or is based on collusion in general, the workers of the sub-employer are treated as the employees of the main employer from the beginning.

The provisions of the Law regarding the workplace were introduced in order to protect the workers in business life. For example; The opening, transfer, closure, control of a workplace, occupational health and safety measures to be taken at the workplace, strikes and lockout practices give a special importance to the concept of workplace. The Labor Law defines the workplace as "The unit in which the employee is organized together with the material and intangible elements in order to produce goods or services by the employer." defines as. (m.2/1). According to this expression, for example, a factory of an industrial establishment, a store engaged in commercial activities, a bank branch providing banking services, etc. places are workplaces. In order for the place of production of goods or services to be considered a workplace in terms of the Labor Law, workers must be employed there. It does not matter whether the work is done in an open or closed place, whether the employer is the owner of the workplace or not in gaining the qualification of a workplace. In this context, the workplace is the place where the work is actually done.

The Labor Law has included the places, attachments and vehicles attached to the workplace, apart from the main workplace, within the scope of the workplace. According to Article 2 of the Labor Law, the workplace is a whole within the scope of the work organization created with the places, attachments and tools attached to the workplace.

Main Workplace: It is the place where the technical purpose of the workplace is realized, the production of goods and services is carried out, and therefore the worker fulfills his work obligation arising from the employment contract.

Places Affiliated with the Workplace: Places that are affiliated with the goods or services produced by the employer in terms of quality and organized under the same management are considered as workplaces. Being organized under the same management with commitment in terms of quality are the conditions that must be met in order to be able to talk about the place attached to the workplace. Commitment in terms of quality means that one job complements another and is organized in such a

way that it can be carried out from a single source. In order to be able to talk about organizing under the same management, the place affiliated to the main workplace and the main workplace must be organized under the same management, in other words, the employers of these workplaces must be the same person.

For example, the cardboard box making unit that a confectionery factory owner has set up in the factory garden to put the candies produced will be considered a place connected to the workplace. However, even if they belong to the same employer, a cinema and a restaurant; Different workplaces that are not connected to each other will be considered as separate workplaces since activities that do not complement each other are carried out.

Additions: The Labor Law also counts "...other attachments such as resting, breastfeeding, eating, sleeping, bathing, examination and care, physical or vocational training and courtyard..." of the workplace. (m.2). Although add-ons that will be counted as workplaces in the law are exemplified, they are not limited to those counted as “other add-ons…”. For this reason, although it is not included in the text, for example, garage, parking lot, meeting room, etc. qualified places should also be considered within the scope of the add-on of the workplace.

Vehicles: All kinds of fixed or mobile vehicles, which are necessary for the execution of the work in the workplace, are also counted as part of the workplace. (m.2/2). For example, a shuttle bus carrying workers, trucks used for freight transport, a stationary crane, a grader used for excavation, a bulldozer, etc. as. In order for an intermediary to be considered as a workplace, that vehicle must be connected to the workplace in terms of the nature and management of the business. Ownership of the vehicle does not necessarily belong to the employer; however, the tool must serve the technical purpose of the workplace.

Transfer of a workplace or a part of it: A workplace can change hands for reasons such as sale or rental. In this case, the outcome of employment contracts in that workplace is important in terms of Labor Law.

Labor Law m. According to Article 6, "When the workplace or a part of the workplace is transferred to another person based on a legal transaction, the employment contracts existing in the workplace or a part of it on the date of transfer, together with all its rights and obligations, pass to the transferee." First of all, it should be noted that in the said regulation, it is stated that all or a part of the workplace can be transferred and that the workplace or a part of it must be transferred based on legal proceedings.

When the workplace or a part of it is transferred to another person based on a legal transaction, the existing workers on the date of transfer are transferred to the transferee employer with all their rights and debts.

The transferor or the transferee employer cannot terminate the employment contract just because of the transfer of the workplace or a part of the workplace, and the transfer does not constitute a just cause for the termination for the worker. The termination rights of the transferor or the transferee employer necessitated by economic and technological reasons or a change in the work organization, or the

immediate termination rights of the workers and employers for justified reasons are reserved. (art. 6/5).

Labor Law m. According to 6/2, the transferee employer is obliged to take action according to the date on which the employee started to work with the transferring employer, in the rights based on the employee's service period. For example, when calculating the seniority for the severance pay, the seniority of the worker and the date the worker started to work at the transferred workplace are taken into account.

In the case of the transfer of the workplace, the transferor and the transferee employer are jointly responsible for the debts that arose before the transfer and must be paid on the date of transfer. However, the responsibility of the transferor employer from these obligations is limited to two years from the date of transfer. (m. 6/3). The two-year time limit regarding the responsibility of the transferor employer is not applied to the severance pay. Likewise, in case of termination of the legal entity by merger or participation or a change in its type, the provisions of joint liability do not apply.

In case of merger and change of type of commercial companies, article 178 of the Turkish Commercial Code finds application area.