

Occupational Health and Safety Measures to Be Taken Regarding Wind Farm Projects under Turkish Law

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Occupational health and safety may basically be defined as the measures to be taken regarding health problems and vocational risks emerging from the physical environmental conditions that employees, temporary employees, visitors or even customers may encounter during the implementation of the work at a workplace and the ways to prevent or at least minimize, if it is not possible to prevent, such possible problems.

According to labor law legislation, employers are obliged to take all necessary measures and make available all equipment required to ensure occupational health and safety at workplaces, whereas employees are obliged to comply with such measures taken for occupational health and safety. In order to ensure compliance with and supervision of the measures taken for occupational health and work safety at the workplace, the employer must (a) keep the employees informed regarding occupational risks they are exposed to and measures to be taken, and (b) inform the employees of their legal rights and obligations and (c) provide training to the employees on issues related to occupational health and safety.

Since the employee is the weaker party in the employment agreement, the legislature regulated the relationship between the employer and the employee with imperative provisions, most of which are in favor of the employee, under Labor Law no. 4857 ("Labor Law") ("İş Kanunu"). Law of Obligations no. 818 ("Law of Obligations") ("Borçlar Kanunu") also burdens the employer with strict liability which provides that even if the employer fulfills all the necessary requirements regarding occupational health and safety, he/she shall be liable to compensate all possible damages of an employee or third person in case of an occupational accident unless he/she proves that damage would have happened even if all necessary measures were taken. On the other hand, the employer reserves the right of reimbursement from the employee if that is found.

Turkish Law of Obligations no. 6098 ("New Law of Obligations") ("Türk Borçlar Kanunu") shall be in force as of July 1, 2012. It appears from the provisions of the New Law of Obligations regarding employers' liability that the applicable principles remain unchanged.

Wind Farm Projects

Recently, the importance of renewable energy has increased in Turkey as well as all around the world. According to Turkey's Wind Power Potential Atlas ("Türkiye Rüzgar Enerjisi Potansiyeli Atlası"), Turkey is one of the European countries with significant wind power potential, approximately 114,363.20 MW.

Construction and implementation of wind farms in Turkey has started with the ratification of Electricity Market Law no. 4628 ("Energy Market Law") ("Elektrik Piyasası Kanunu"). Following the ratification of Usage of Renewable Energy Sources with in the Scope of Electric Power Generation Law no. 5346 ("Yenilenebilir Enerji Kaynaklarının Elektrik Enerjisi Üretimi Amaçlı Kullanımına İlişkin Kanun") wind farms have become one of the most crucial instruments for energy generation, since the government of Turkey provides certain incentives to investors in wind power and has signed and ratified the Kyoto Protocol, under which additional financing sources may be available through the development and sale of Certified Emission Reductions.

Since energy generation, transmission, distribution

and construction work both under and above ground are considered heavy and dangerous work according to the Regulation on Heavy and Dangerous Work ("Regulation on Heavy Work") ("Ağır ve Tehlikeli İşler Yönetmeliği"), additional measures shall be taken regarding the workplaces in which such heavy and dangerous work is conducted.

Among these additional measures, first, the employer should make an assessment at the workplace to determine the possible risks which may cause danger to the employees. The employer shall take all the preventive measures against such risks found in the assessment. Since the employee is the weaker party in the employment agreement, the employer has a duty to take care of the employees. As per the Law of Obligations, even if all the necessary measures are taken, the employer shall be liable for all damages in any occupational accidents. Consequently, such provisions burden the employer with strict liability.

If construction takes more than thirty (30) working days and twenty (20) employees will work permanently at that construction site, then at least one (1) coordinator who will manage the occupational health and safety issues shall be assigned by the employer. As per the Regulation on Health and Safety Regarding Construction Work ("Yapı İşlerinde Sağlık ve Güvenlik Yönetmeliği"), the coordinator shall prepare and supervise the project. Notwithstanding, even if the employer had assigned a coordinator, he/she shall be liable to compensate all damages to an employee in case of an occupational accident.

One of the most crucial duties of the employer is to provide all the necessary safety equipment to the employees such as helmet, safety goggles, protective clothing, gloves, safety belt, safety rope etc. Moreover, such equipment shall be designed and produced in compliance with the Regulation on Personal Safety Equipment ("Kişisel Koruyucu Donanım Yönetmeliği").

For work conducted a certain height above the ground, like wind farm construction work, the employees are at a great risk of injury due to falls. Within the context of such work, the Regulation on Health and Safety Regarding Construction Work states that the employer is obliged to provide a secure barrier, platform safety nets and a scaffold built by authorized technical personnel.

Pursuant to Article 60 of the Regulation on High Current Plants ("Elektrik Kuvvetli Akım Yönetmeliği"), one electrical engineer must be assigned by the em-

ployer if the current of the electric plant is higher than 154 KV. Furthermore, the equipment provided by the employer must be suitable for the nature of the work and shall not jeopardize the employee's health and safety. If it is not possible to provide totally safe equipment, the employer shall take all necessary measures to minimize the risk which may arise from such equipment. Even if the risk is minimized, the employer will not be cleared of liability in case of an occupational accident.

As mentioned above, the employers should also take the required measures for customers, visitors and other people who may be around the construction site. In order to protect such people, the employer should fence off the construction site and place caution signs that indicate the borders of the construction area and possible risks.

Occupational Health and Safety Training

In addition to taking all necessary measures to protect employees, employers should also provide training to the employees regarding their legal rights/liabilities and risks which they may encounter at the workplace and possible ways to handle such risks.

As per Article 15 of the Regulation on the Procedure and Principles of Employees' Occupational Health and Safety Training ("Çalışanların İş Sağlığı ve Güvenliği Eğitimleri Hakkında Yönetmelik"), training must be given by qualified instructors such as occupational health and safety engineers, instructors or on-site doctors, depending on the subject of the training. Moreover, the employer may also provide such training from corporations which are authorized to provide occupational health and safety training. For the avoidance of doubt, such outsourcing does not clear the employer of liability. Following the completion of the trainings, the instructor or corporation shall issue a certificate indicating that the employee has attended the training. In addition, such certificates must be added to the employee's personnel file since these certificates may be used as evidence to minimize the compensation amount in case of an occupational accident.

Since energy generation, transmission, distribution and both under and above ground construction are considered heavy and dangerous work according to the Regulation on Heavy and Dangerous Work, every single employee must have at least one document such as a diploma, certificate or license which proves that necessary training or education has been taken and the employee is proficient to conduct

heavy and dangerous work according to the Communiqué on the Vocational Training of the Employees in Heavy and Dangerous Jobs (“Ağır ve Tehlikeli İşlerde Çalıştırılacak İşçilerin Mesleki Eğitimlerine Dair Tebliğ”).

Measures to Be Taken Regarding Health Issues

Pursuant to the Labor Law, a Workplace Health and Safety Unit (“WHSU”) (“İşyeri Sağlık ve Güvenlik Birimi”) shall be established for workplaces where fifty (50) or more employees work permanently. At least one (1) on-site doctor and one (1) occupational safety specialist shall be appointed by the employers to work in the WHSU.

There is no regulation requiring a WHSU be established in the workplace, so the employer may choose to acquire such services externally from professional health and safety units. However, even though such services may be acquired from external professionals, the employer shall be solely liable for any problems regarding occupational health and safety. On the other hand, the obligation of the employer to establish a WHSU arises when fifty (50) or more employees are employed by the employer personally. For example, if there are seventy (70) employees working in a workplace but forty (40) of them are the employees of the subcontractor then establishment of a WHSU is not required.

As per the Regulation on Heavy and Dangerous Work, health certificates shall be issued for employees who work at heavy and dangerous jobs such as the construction work of a wind farm. Moreover, as a general rule, working hours shall not exceed forty-five (45) hours in a week and eleven (11) hours in a day. Working hours are limited to seven and a half hours (7.5) per day, according to the Regulation on Working Hours Regarding the Labor Law (“İş Kanununa İlişkin Çalışma Süreleri Yönetmeliği”) for work which requires more effort and is more dangerous than other types of work.

Supervision Duty of the Employer

In addition to providing the abovementioned measures, pursuant to the Terms on Health and Safety Regulations Regarding Work Equipment Use (“İş Ekipmanlarının Kullanımında Sağlık ve Güvenlik Şartları Yönetmeliği”) the employer must also super-

vised employees while following the measures taken and check the work equipment for safety. Following the inspection of the work equipment, certificates indicating that such equipment is working properly shall be issued.

The Principal Employer-Subcontractor Relationship under Turkish Law

A subcontractor is a party who undertakes to carry out work in auxiliary tasks related to the production of goods and services or in a certain section of the main activity due to operational requirements or for reasons of technological expertise within the establishment of the main employer. Since construction work for a wind farm project requires the involvement of different professions, employers may decide to contract with subcontractors. If the principal employer decides to work with a subcontractor, as per the Labor Law he shall be jointly liable with the subcontractor for the obligations ensuing from the Labor Law, employment agreements of the subcontractor's employees or collective agreements to which the subcontractor is a signatory.

Moreover, if an employer contracts with a subcontractor to execute a certain section of the main activity which does not require technological expertise, he shall be solely responsible to take all necessary measures regarding occupational health and safety for the subcontractor's employees. However, the principal employer shall not be responsible for the subcontractor's employees if the contracted work is a “turn-key” project, according to the decisions of the Supreme Court of the Republic of Turkey.

Conclusion

As a result, employers at wind farm projects shall take all the abovementioned measures in order to prevent accidents which may arise at the workplace. Since the employee is the weaker party of the employment agreement, the relationship between the employer and the employee is regulated with imperative provisions, most of which are in favor of the employee and the decisions given by the courts regarding occupational accidents mostly support this fact. Even though both the relevant legislation and related decisions aim to protect the employee, it should be noted that the courts take the implementation of the abovementioned measures into consideration in determining liability or the compensation amount.