

Transfer of Employment Agreements in Privatization

Employment Rights on the Transfer of an Undertaking and the Case of Privatization under Turkish Law

by

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A public enterprise shall be transferred with all its assets, including the establishment itself and its employment matters such as employees and their employment agreements under Turkish law. In other words, during the privatization process, an enterprise shall entirely be transferred to a private organization.

In this article, first of all, transfer of employment agreements when privatization is not an issue is explained, and then the transfer due to the privatization is examined.

Transfer of Employment Agreements According to the Turkish Labor Law

According to Article 6 of the Turkish Labor Law, dated May 22, 2003 and numbered 4857 (“**Law No. 4857**”), it is possible to transfer an enterprise in whole or part to another employer with its assets including the employment matters. Workplace transfer is a transaction that changes the employer of the employees who are working in the relevant workplace. The transfer of an employment agreement is not specifically regulated under the Law No. 4857. Provisions of Article 6 of the Law No. 4857 shall be applicable on the transfer of the employment agreements in accordance with Turkish Supreme Court precedents and Turkish labor law practices.

In case of a workplace transfer; the employment agreements shall not be terminated on the date of the transfer, but they will be transferred to the transferee employer with all rights and obligations involved. That is to say that the rights and obligations of the transferor employer, arising from the aforesaid employment agreements will be transferred to the transferee employer under the same terms and conditions as of the transfer date. The consequences of the transfer shall be as follows: (i) As of the date of transfer, the transferee employer shall be liable to the rights and obligations arising from the transferred employment agreement. (ii) In order to calculate severance and/or notice payments which shall be paid by the transferee

employer, the service term of the transferred employee must be calculated starting from the date which the employee started to work with the transferor employer. In terms of severance pay, the transferor and the transferee employers are jointly and severally liable towards the transferred employees. Moreover, in case the transferee employer makes the entire severance payment, s/he has a right of recourse to the transferor employer for his/her part. (iii) Transfer of workplace (or one of its sections) on its own, cannot be counted as a just cause for termination. Therefore, workplace transfer will not give both parties -the transferee employer and the transferred employee- the right to terminate the employment agreement with a just cause unilaterally merely due to workplace transfer. (iv) The transferor employer and the transferee employer have a joint liability regarding the obligations arising from the employment agreement for a period of two years after the transfer date.

Additionally, transfer of an employment agreement shall be subject to the approval of the prospective transferred employee. In this respect, transfer of employment agreement executed without the approval of the employee will not be binding on behalf of the employee. Employment agreement shall be transferred by executing an agreement between all the parties: the Transferor, the Transferee and the employee/s concerned.

Transfer of Employment Agreements during the Privatization Process

Transfer of employment agreements during the privatization process is regulated under Article 22 of the “Law Concerning Arrangements for the Implementation of Privatization and Amending Certain Laws and Statutory Decrees” dated November 24, 1994 and numbered 4046 (“**Law No. 4046**”). This Article specifically regulates the transfer of employees from a privatized public enterprise to other public enterprises.

According to the mentioned article, employees in the public enterprises that are subject to the “Law numbered 657 on Public Servants” or the employees who work under the employment agreements as subject to the Law No. 4857 –but do not benefit from the collective employment agreement’s provisions- shall be notified by the administration to the State Personnel Administration in fifteen days:

- ✓ In case employment surplus is determined -by the relevant enterprise or by the administration- in the public enterprise which is in the privatization program, or,

- ✓ In case of an enterprise loses its public entity identity, or whose activities are ceased, or closed or liquidate or in case of a transfer, or down-sizing.

Employees, who have the right to be transferred, and accepted to be transferred to the positions which was offered by the administration and employees who are transferred while the public enterprise is in privatization process cannot benefit from the above-mentioned transfer right.

The administration is entitled to cancel the positions which are vacant or change the place or the positions in the same enterprise during the privatization process.

Any employee of any enterprise may be assigned to any enterprise which is in the privatization program by the administration

Within 45 days following the notification to State Personnel Administration the relevant employee, upon the proposal of Administration, shall be transferred to those appropriate positions in keeping with their status vacant in the public enterprises. Concerning the commencement date of employment of these employees who have been appointed and procedures to be taken in instances of failure of commencement work, provisions of Articles 62 and 63 of “Law No. 657 on Public Servants” shall be applied. In case no appropriate vacant position in line with their status exists in organizations subject to the “Statutory Decree No. 190 on General Posts and Employment Procedures” (“**Decree No. 190**”), Council of Ministers is authorized to change the class, title and degree of the existing posts.

In case of transfer or sale of the enterprise, appointment of the employees who are working in such enterprises and are subjected to transfer shall be concluded as above. Then the appointment shall be notified to the employees.

The administration which is entitled to appoint, will be responsible for the application of Articles 62 and 63 of “Law No. 657 on Public Officers” and in the event of the employee rejects to start to work.

The enterprises will notify the State Personnel Administration on results of appointments and inaugurations within fifteen days. The employee who starts to work in his/her new enterprise

may demand to be appointed to the same position that he/she was in his/her previous enterprise if the same position is vacant and the demand is complying with the regulations.

The posts and positions to become vacant due to transfers to other public organizations and institutions pursuant to Article 22 of the Law No. 4046, shall be deemed to have been canceled as of the vacancy date. Salaries, social rights and fringe benefits together with any and all kinds of personal rights of the employee appointed to other public enterprises and/or institutions, accruing during the period from the date of their appointments as stipulated in paragraphs (a) and (b) of the Article and the date of the severance of their relations with their former enterprises, shall be paid from the Privatization Fund, and those who are enrolled in the Turkish Pension Fund shall continue to remain under the Fund during this period.

If the present salary, including any kinds of payment such as; wage, bonus, raise, compensation etc. of such employee as of the notification date to the State Personnel Administration, is more than the total of salary to be accrued at the transferred enterprise, then, the difference shall be paid in the form of a compensation free from all deductions until the difference is eliminated.

In case an employee is transferred to another enterprise or a change in his/her title or position occurs upon his/her request, such compensation regarding the difference between his/her previous and recent salaries will not be paid.

Responsibility of the Enterprises Which Were Included in the Privatization Program

Employees who work in organizations which were included in the privatization program under Law No. 4046 (excluding their subsidiaries) pursuant to an employment agreement and whose agreements are terminated due to restructuring for privatization, privatization, downsizing, cessation of activities in full or in part, permanent or temporary closing or liquidation of such organizations and which are entitled to redundancy payments in accordance with relevant labor laws and their current collective bargaining agreements, will be paid a special job loss compensation under the Law No 4046 in addition to, and not in place of, the redundancy payment envisaged by laws and in their current collective bargaining agreement. Furthermore, these employees will be given priority in services for finding new employment opportunities with the support and financing of the Privatization Fund.

All transactions with respect to special job loss compensation and other services will be carried out by and under the direction and responsibility of the Turkish Employment Authority.

Employees who work in organizations which are included in the privatization program under Law No. 4046 and who are subject to relevant labor laws and whose contracts are terminated during restructuring for privatization, privatization, down-sizing, cessation of activities, closing or liquidation of the organizations by their employer without a just cause, or are terminated by the employees with a just cause within one year following the date when public shares in their capital falls below 50 %, or, for organizations not converted to joint-stock companies following their date of transfer and delivery, are entitled to the redundancy payments and other services foreseen by the Law No. 4046.

Privatization proceeds collected in the Privatization Fund for the purpose of the special job loss compensation and other services mentioned in the Law No. 4046 shall first be applied to meet special job loss compensation payments.