

The Southeast Europe ESG in Employment 2022/2023

Chapter II: Workplace Discrimination





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PREFACE

Dear Partners and Friends of SEE Legal Group,

Starting last November, our Employment & Immigration Practice Group embarked on creating a series of publications focused on the regulatory status of the ESG's social element in Southeast Europe. We believe this is an important and timely topic, and are confident that it will be a valuable resource for those interested in this area. We also appreciate the positive feedback and are delighted that the interest in the first chapter, discussing Work Flexibility and Work-Life Balance, exceeded our expectations.

We are now pleased to introduce our second chapter in the series, the topic of which is *Workplace Discrimination*. As its name reveals, this is the form of discrimination which primarily occurs in the workplace setting. It, generally, includes any type of discrimination based on an individual's race, gender, age, disability, religion, sexual orientation, or any other protected characteristic, and can manifest itself in many different shapes, from unequal pay or unequal access to promotions and job opportunities, to unfair treatment in the workplace.

As much as it is reassuring that most of the jurisdictions in our region have taken somewhat similar approach to regulating this particular area, the challenges of one's equal access to employment opportunities, regardless of one's differences, continue to be present. Furthermore, workplace discrimination can have a major impact on individuals and organizations, creating an environment that is not conducive to success. Depending on the severity of the violation, the impacts can be long-lasting and far-reaching on those involved. It is, therefore, important to understand the legal implications of this type of discrimination and how to properly handle it when it occurs.

This publication is part of the various initiatives undertaken by our Employment and Immigration Practice Group to promote the member firms' capacity and profile in the region, and maintain SEE Legal Group's strong presence in the legal market. It also serves as our statement of the continuing commitment to further assist you in your legal and business matters in the Southeast Europe region.

Should you have any specific questions regarding employment and immigration matters in Southeast Europe, we would be pleased to hear from you.

Sincerely,

Maral Minasyan

Head of the SEE Legal Employment and Immigration
Practice Group



Borislav Boyanov

Co-Chair of SEE Legal Group



Disclaimer

This publication is intended to provide a general guide to the Workplace Discrimination regulations in Southeast Europe. Each section has been prepared by the relevant SEE Legal Group member law firm covering the particular jurisdiction(s). This publication is not meant to be a treatise on any particular legislation and is not exhaustive but is meant to assist the reader in identifying the main principles governing the subject matter in the various jurisdictions in Southeast Europe, and to provide helpful guidance in this respect. Legal advice should always be sought before taking any action based on the information provided herein. The information contained in this publication is based on the respective legislation as of 28 February 2023. No part of the publication may be reproduced in any form without our prior written consent.

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TÜRKİYE

1. Legislation

The Turkish Constitution lays the foundation for the prevention of discrimination by setting forth that all individuals are equal before the law without being subject to any discrimination due to their language, race, colour, sex, political opinion, philosophical belief, religion and sect, or similar reasons.

Law on the Human Rights and Equality Institution of Türkiye details the lawmaker's approach on discrimination both in general terms and from the employment perspective. It sets forth that all are equal in the exercise of legally recognized rights and freedoms. It also prohibits discrimination against persons based on the grounds of sex, race, colour, language, religion, belief, sect, philosophical or political opinion, ethnical origin, wealth, birth, marital status, health status, disability and age. It makes a categorization for the types of discrimination as follows: segregation, instruction to discriminate and implementing such instructions, multiple discrimination, direct discrimination, indirect discrimination, mobbing, failure to make reasonable accommodations, harassment and discrimination based on an assumed ground. It further states that unfavourable treatments sustained by persons who launch administrative or judicial proceedings, or take part in such proceedings, in order to ensure the respect of the principle of equal treatment and prevent discrimination, as well as by the representatives of such persons on account of such proceedings also constitute a discrimination. From an employment point of view, it mainly stipulates that an employer cannot make a discrimination against an employee or an employee candidate, in any of the work-related processes. These include but are not limited to the knowledge acquisition, application, selection criteria, employment conditions, and employment and termination processes. It further ensures that employers cannot reject employment applications on the grounds of pregnancy, maternity or childcare. Lastly, where the principle of non-discrimination is violated, it requires relevant competent and responsible public institutions and agencies, and public professional organizations with a public institution status to take necessary actions with a view to putting an end to the violation, remedying its consequences, preventing its repetition and ensuring the launch of administrative and judicial proceedings into it.

The Turkish Labour Law repeats the same rules with a specific focus on employment relationships. It ensures that an employer complies with an equal treatment principle and does not make a discrimination in the employment relationship based on language, race, skin colour, sex, disability status, political opinion, philosophical belief, religion and sect, or similar reasons. The reference to similar reasons is deliberately made to cover different criteria that are not listed in the law yet as they may constitute discrimination. It is worth noting that there may be cases where the Turkish Labour Law dedicates the provision of a job to a specific sex. For example, works to be provided underground or underwater, such as mining and cable laying as well as sewerage and tunnel construction, may only be carried out by men over 18 years old. Women may not carry out such works. In this regard, as it is regulated under the legislation, non-hiring of a woman to such jobs would not be considered as a violation of the equal treatment principle. The Turkish Labour Law further ensures, unless there are substantial reasons to do so, that an employer may not treat its full-time employees and part-time employees, as well as its definite-term employees and indefinite-term employees, differently. Likewise, it puts forth that an employer may not treat its employees differently while drafting, concluding, executing and terminating employment contracts, either directly or indirectly, due to relevant employees' sex or maternity status, save for the cases where it is necessary due to biological reasons or reasons related to the nature of the job. Lastly, it adopts the principle of equal pay for equal work, by stating that an employer and an employee may not agree on a lower salary for the same work only due to such employee's gender. It provides that if an employer violates the principle of equal treatment, either during or while terminating the employment relationship, the employee subject to discrimination may demand compensation.

That being said, the Turkish Labour Law does not explicitly regulate mobbing, which may be deemed as a type of workplace discrimination. That is why the general provisions of the Turkish Code of Obligation apply for mobbing claims. For clarification purposes, the Turkish Code of Obligation sets forth that an employer is obligated to:

- preserve the personal rights of its employees,
- maintain reliable and fair order within the workplace,
- preserve the employees from psychological and sexual harassment, and
- take any necessary precautions to preserve employees who have been subject to such harassment from further damages.

It further sets forth that that, if an employee's personal rights are violated or his/her physical or mental integrity is harmed due to the employer's failure to fulfil the above-listed obligations, the employer will be obligated to compensate the employee's pecuniary and non-pecuniary damages. Turkish courts assess the mobbing claims from the above perspective. In this regard, mobbing is defined by Turkish courts as a psychological terror appearing at the workplace due to systematically exposing someone to a hostile and immoral communication (such as humiliation, belittlement, exclusion, damage to the personality and dignity, maltreatment, intimidation), for a period. The most significant elements of mobbing are as follows:

- The person accused of mobbing shall be knowingly and intentionally engaged in the mobbing.
- The behaviour that is deemed mobbing shall be repeated systematically and practiced for a certain period of time (this period is examined on a case-by-case basis by relevant courts but, practically, the behaviour constituting mobbing during a relevant period must be continuous and not incidental).
- The intention of the mobbing shall be intimidating, excluding, pacifying the employee or forcing him/her to resign from his/her job.
- The mobbing shall harm the personality values, professional status, social relations and especially the mental health of the victims. It shall have an unbearable weight and intensity in terms of its impact on the victim's life.

Providing the employee with tasks more than they can carry out (i.e. overburdening the employee), cutting off communication with the employee, constantly criticizing the employee, scolding the employee, ignoring the employee's position or field of expertise while assigning him/her the tasks, and avoiding granting the rights and powers the employee deserves may be given as examples for mobbing. Law on Trade Unions and Collective Labour Agreements adopts a more specific approach focusing on union relations. It provides prevention of discrimination for both the pre-hiring term as well as the employment term. For the pre-hiring term, it puts forth that hiring an employee cannot be conditional on being or not being a member of any union, joining or not joining a specific union, maintaining a membership in or withdrawing such membership from a specific union. It provides more detailed regulations for the employment term. It stipulates as a rule that an employer cannot make a distinction between its employees, based on their membership in a union, in terms of working conditions or termination of employment. It further designates that employees cannot be dismissed or subjected to a different treatment because they are union members or because they participate in the activities of employee organizations within working hours with the employer's permission or outside working hours, or because they engage in union activities. Employees may otherwise demand compensation on the basis of discrimination.

The Turkish Penal Code regulates the outcomes of discrimination from a criminal perspective. It explicitly states that a person who hinders another person from (i) the sale, transfer or lease of a movable or immovable property, (ii) benefiting from a specific service, (iii) being hired or (iv) carrying out an ordinary economic transaction because of hatred arising from the differences in language, race, nationality, skin colour, sex, disability, political opinion, philosophical belief, religion and sect, such person shall be sentenced from one to three years of imprisonment.

The above legislation sets forth the general framework for workplace discrimination. There have been no recent changes in this regard. Yet, the perception on the scope of workplace discrimination slightly changes over time, as the Court of Cassation precedent is reformed based on the recent changes in our daily lives and moral values.

In general, the legislation on workplace discrimination does not provide a limitation on its applicability to different categories of employers, per se. The Turkish Labour Law, on the other hand, sets forth that its provisions would not apply to certain employee groups. For clarification purposes, as a rule, the following employee groups are exempt from the scope of the Turkish Labour Law: employees working in sea and air transport activities, employees working in establishments or enterprises with at most 50 employees where agricultural and forestry work is carried out, people working for any construction work related to agriculture which falls within the scope of family economy, people carrying out works and making handicrafts in home with members of their family or close relatives (up to a third degree) without any outside help, employees working in domestic services, apprentices, sportsmen, people undergoing rehabilitation, employees working in establishments employing three employees within the scope of legislation applicable to merchants and craftsmen, and employees in public institutions and organizations.

2. Enforcement Authority

As a rule, the Ministry of Labour and Social Security is the main government agency which is authorised to oversee the implementation and compliance with the legislation on workplace discrimination; however, there may be subject-specific matters in which an authorised government agency is determined otherwise. On the other hand, it is worth noting that employees who experience workplace discrimination may always refer the issue to labour courts, according to the relevant procedure. Besides, each person who claims to have suffered from violations of non-discrimination can apply to the Human Rights and Equality Institution of Türkiye, provided as a rule that the employee first demanded that the relevant party remedy the practice alleged as discriminatory, but such demand has been turned down or not responded to within thirty days.

3. Prohibited Practices

Different legislation provides similar provisions against workplace discrimination. The Turkish Constitution sets forth the main principle for the prevention of workplace discrimination due to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or similar reasons. Likewise, the Law on the Human Rights and Equality Institution of Türkiye aims to mitigate against workplace discrimination based on the grounds of sex, race, colour, language, religion, belief, sect, philosophical or political opinion, ethnical origin, wealth, birth, marital status, health status, disability and age. Additionally, the Turkish Labour Law lays the foundation for the protection against workplace discrimination based on a great variety of reasons, including, but not limited to, language, race, skin colour, sex, disability status, political opinion, philosophical belief, religion and sect, as well as being a part-time employee against a full-time employee, or being a definite-term employee against an indefinite-term employee. Law on Trade Unions and Collective Labour Agreements details the scope of protection against workplace discrimination based on union related matters. Lastly, the Turkish Penal Code provides protection against workplace discrimination at hiring due to language, race, nationality, skin colour, sex, disability, political opinion, philosophical belief, religion and sect.

There is no specific regulation explicitly setting forth the requirement for employers to adopt and implement internal policies, or conduct training or periodical assessments with respect to workplace discrimination matters. Nevertheless, as explained above, the Turkish Code of Obligation sets forth that an employer is obligated to:

- preserve the personal rights of its employees,
- maintain reliable and fair order within the workplace,
- preserve the employees from psychological and sexual harassment and
- take any necessary precautions to preserve employees who have been subject to such harassment from further damages.

Accordingly, in practice, employers tend to adopt and implement internal policies and guidelines on preventing workplace discrimination. It is something that is usually encountered at foreign employers. Such internal policies and guidelines mainly include the definition and conditions of workplace discrimination, actions to be taken to prevent workplace discrimination and rights of the employees in this regard. However, the adoption of such internal policies and guidelines is not obligatory. Similarly, conducting training or periodical assessment with respect to workplace discrimination is discretionary for the employer.

4. Employee Rights

Right to Termination with Just Cause: An employee being subject to workplace discrimination may claim that such situation constitutes a just cause for termination and thus terminate his/her employment contract accordingly. In such case, the discriminated employee would be entitled to the statutory severance pay, in addition to the other termination payables.

Discrimination Compensation: An employee being subject to workplace discrimination during the employment or at the termination of employment may demand a discrimination compensation in addition to the rights the employee was deprived of. The upper limit for such discrimination compensation is set to a four months' salary. On the other hand, in a possible dispute, the court will determine the applicable amount of the discrimination compensation, taking into account the variables, such as the relevant employee's seniority, job, title and the degree of the violation. It is worth noting that, as a rule, the burden of proof to claim this type of compensation rests with the employee. However, if the employee presents the case which strongly indicates a possible workplace discrimination, the burden of proof will shift to the employer.

Union Compensation: If an employer makes a discrimination based on the abovementioned union related matters such as an employee's freedom to unionization, the relevant employee may claim a union compensation, the amount of which will not be less than one year's salary of such employee.

5. Sanctions for Non-Compliance

Administrative Fines:

- The Human Rights and Equality Institution of Türkiye stipulates an administrative fine for the violation of the non-discrimination obligation. Such administrative fine ranges from TRY 5,958 to TRY 89,571 (approximately from EUR 291.15 to EUR 4,376.90)¹ (depending on the gravity of the effects and consequences of such violation, financial situation of the perpetrator and aggravating effect of the multiple discrimination).
- The Turkish Labour Law stipulates an administrative fine of TRY 885 (in 2023) (approximately EUR 43.25)² for each employee subject to workplace discrimination by means of an employer's non-compliance with the equal treatment principle.

¹ As of 25 January 2023.

² As of 25 January 2023.

Imprisonment: Article 122 of the Turkish Penal Code stipulates that a person who hinders another person from being hired because of hatred arising from the differences in language, race, nationality, skin colour, sex, disability, political opinion, philosophical belief, religion and sect, such person shall be sentenced from one to three years of imprisonment.

Workplace discrimination is a regulated concept under Turkish legislation. The legislation is deterrent; however, it does not prevent workplace discrimination completely. In practice, several non-governmental organizations and associations adopt organizational strategies to prevent workplace discrimination. The aim is to change male-dominated organizational culture as well as to embrace flexible working hours harmonious with individuals' physical ability and family life. Such organizational strategies may result in positive discrimination; however, they are safeguards against discrimination based primarily on gender and disability. For example, within the scope of the "Disabled Discrimination Monitoring and Prevention Platform Project", non-governmental organizations operating in various regions of Türkiye unite around a platform. One of the aims of the project is to prevent discriminatory behaviours towards disabled people who are employed within the scope of the obligation to employ people with disabilities.

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The South East Europe Legal Group (“**SEE Legal**”) is a unique regional group of 10 leading independent law firms covering each of the 12 jurisdictions in Southeast Europe.

Over the course of the last 20 years, SEE Legal has become the preferred choice of multinational corporations, financial institutions and governmental bodies looking for the top quality local legal support. As a result, it has been continuously ranked as the only Band 1 legal group in Central and Eastern Europe by Chambers & Partners.

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