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## TRANSFER OF WORKPLACE

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### Abstract

*The definition of workplace must be made at first while examining the transfer of a workplace and its results. The term of “workplace” takes place in article 2 of Labour Law and it is explained as “an organization where an employer organizes tangible and intangible assets with employees with the purpose of producing goods and services”. A workplace is deemed to be an organization in which tangible and intangible assets are organized with the employees with technical purposes. It is accepted that a workplace is not limited only with its place but it is a unit that comprises its extensions and other places that is managed by that workplace organization in accordance with the “unity principle” that is adopted in workplace law.*

Keywords: definition of workplace

## I. THE CONCEPTS OF WORKPLACE AND BUSINESS

### A. WORKPLACE

#### 1. In General

The definition of workplace must be made at first while examining the transfer of a workplace and its results. The term of “workplace” takes place in article 2 of Labour Law and it is explained as “an organization where an employer organizes tangible and intangible assets with employees with the purpose of producing goods and services”. A workplace is deemed to be an organization in which tangible and intangible assets are organized with the employees with technical purposes<sup>1</sup>. It is accepted that a workplace is not limited only with its place but it is a unit that comprises its extensions and other places that is managed by that workplace organization in accordance with the “unity principle” that is adopted in workplace law<sup>2</sup>.

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<sup>1</sup> SÜZEK Sarper, İşyerinin Devri ve Hukuki Sonuçları, Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi Skin:15, Special Issue 2013, p. 311-330 (Year of Publication: 2014) (SÜZEK İşyeri Devri); AYKAN Ömer Yiğit, Avrupa Birliği ve Türk Hukukunda İşyerinin Devri Halinde İşçilerin Kazanılmış Haklarının Korunması, Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi, S. 3, I. 12, October 2006, p. 1259; EYRENCİ Öner/TAŞKENT Savaş, ULUCAN Devrim, Bireysel İş Hukuku, 7. Edition, İstanbul 2016, p. 43.

<sup>2</sup> SÜZEK Sarper, İş Hukuku, Renovated 10. Edition, Beta, İstanbul 2014, p. 174; ÇELİK Nuri/CANİKLİOĞLU Nurşen/CANBOLAT Talat, İş Hukuku Dersleri, Renovated 27. Edition, Beta, İstanbul, October 2014, p. 74 vd.; SÖNMEZ TATAR, İşyeri Devrinin Kazanılmış Haklara Etkisi, TÜHİS, November 2011, Ankara, p. 8.

The places, extensions, and equipments that are connected to the same employer under a workplace organization are deemed to be a unit as per provision of Workplace Law that regulates “the places qualitatively connected to the goods or services produced by that employer at the workplace and organized under the same management (places connected to the workplace) and other extensions such as rest rooms, day nurseries, dining rooms, dormitories, washing rooms, medical examination and care offices, physical and vocational training locations and courtyards and equipment are also considered within that workplace.” (Labour Law 2/III)<sup>3</sup>.

As per definition made within the provisions of that law, an organizational unit under which goods and/or services are produced by the employees who are organized under that organization with technical purposes with its tangible or intangible assets is called workplace<sup>4</sup>. Hence, we can categorize the elements of a workplace as tangible assets, intangible assets, labor force, technical purpose and organization<sup>5</sup>.

## 2. Department of Workplace

The place that functions while the workplace is conducting its workplace on the way to its technical targets and that can operate by it when it is separated from that workplace is called a workplace<sup>6</sup>. If a division in that workplace continues to function as before, even if it is transferred to another person, then it is said that there is a partial transfer<sup>7</sup>.

## B. BUSINESS

The term business is used a few times in Labour Law No.4857 but there is no definition for that term in the same law. The term business is defined in doctrine as an organization or more than one organization owned by the same employer with the purpose of reaching a financial target<sup>8</sup>. The term business has a much wider meaning with respect to the workplace and a financial target is aimed within it. On the contrary, a workplace has a technical target<sup>9</sup>.

### I. TRANSFER OF WORKPLACE

#### A. IN GENERAL

If a workplace is partially or wholly transferred to an another person, it is a fact that the employer will automatically change and in such a circumstance, it is a requisite to preserve the

<sup>3</sup> SÜZEK, 175; SÖNMEZ TATAR, 6; BİRİNCİ UZUN Tuba, İşyerinin Devri Halinde İşçilerin Haklarının Korunması Bakımından 2001/23EC Sayılı Avrupa Birliği Yönergesi ile 4857 Sayılı İş Kanunu'nun Karşılaştırılması, TBB Dergisi I. 115, 2014, p. 363.

<sup>4</sup> ÖZKARACA Ercüment, İşyeri Devrinin İş Sözleşmelerine Etkisi ve İşverenlerin Hukuki Sorumluluğu, İstanbul, 2008, p. 1.

<sup>5</sup> DOĞAN YENİSEY Kübra, İş Hukukunda İşyeri ve İşletme, İstanbul, Legal Yayıncılık, February 2007, p. 17 vd.; SÖNMEZ TATAR, p. 6.

<sup>6</sup> UZUN Pınar, İşyerinin veya Bir Bölümünün Devri, Sonuçları ve Diğer Üçlü İş İlişkileriyle Karşılaştırılması, EÜHFD, S. XVII, I.1-2 (2013), p. 287. Centel, a part of the law in the workplace can not be divided and transferred to "the transfer of a part of the work" the phrase "transfer of part of the workplace" should be understood as suggesting that. About this subject you can examine CENTEL Tankut, İşyerinin Bir Bölümünün Devrinde Fiziki Mekan, Sicil İş Hukuku Dergisi, I. 9, March 2008, p. 6.

<sup>7</sup> UZUN, p. 287.

<sup>8</sup> BİRİNCİ UZUN, p. 368; SÜZEK, p. 179; DOĞAN YENİSEY, p. 33; ÖZKARACA, p. 19.

<sup>9</sup> SÜZEK, p. 179-180; ÇELİK/CANIKLIÖĞLU/CANBOLAT; p. 74-75.

rights of employees arising from that workplace relation to be able to take care of safeguarding of their jobs.

While such a regulation is being made with Labour Law, EU Law was taken into consideration. As per European Union Directive 2001/23 that had been taken into consideration, a transfer is defined as “a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary”<sup>10</sup>. In Labour Law, there is no definition for a workplace transfer although a few elements and results of such a transfer is explained. From the point of view of Labour Law, we can define the workplace transfer as the transfer of a workplace in whole or in part with all legal undertakings and liabilities from one employer to the other who are the parties of a transfer contract under a legal procedure and pursuing of that workplace under the management of the transferee<sup>11</sup>. In accordance with that definition, to be able to say that there is a transfer of workplace, first of all the management authority of the transferor must be transferred into the transferee and as a result of this situation the transferor must lost its capacity of being a party to the labour contracts of employers<sup>12</sup>. Besides that, the transfer of a workplace must be conducted under legal procedures. This condition of conducting a legal procedure for a transfer shall be interpreted as the whole change of employers out of the transfers of complete succession and/or the obligations ordered by provisions of law<sup>13</sup>. Lastly, the operations of that workplace shall pursue after that transfer<sup>14</sup>.

## **B. TRANSFER OF A DEPARTMENT OF WORKPLACE**

In accordance with the article 6/1 of Labour Law no.4857, it is possible to transfer a workplace partially instead of as a whole. If a workplace is transferred in parts instead of in whole then this transfer is called a partial workplace transfer. Even in a partial workplace transfer, all current contracts of that part of the workplace will be transferred to the transferee with all its rights and liabilities<sup>15</sup>.

A workplace division is a part of that workplace that functions as to reach to the technical target of this workplace and that can conduct its functions individually even it is seperated from its main workplace<sup>16</sup>. To be able to consider that a partial transfer is affected, all present elements of that division shall be used with the same technical targets of the transferee<sup>17</sup>.

In the grounds of article 6 of Labour Law no.4857 that had been accepted by the Scientific Commission but not written in the Ministerial Bill, the workplace part was explained by providing samples. The said grounds adjudge that a workplace can be transferred “in parts” as well as “in whole”. Partial transfer of a workplace that has already taken part in our workplace life lets an employer to transfer the “Marketing Department”, and/or “Information Technologies Department” and/or any one of four production departments of a cement plant with all

<sup>10</sup> UZUN, p. 289; BİRİNCİ UZUN, p. 371.

<sup>11</sup> ALPAGUT Gülsevil, İşyerinin Devri ve İş Sözleşmesinin Fesih Hakkı, İstanbul 2010, p. 2.

<sup>12</sup> UZUN, p. 290; AYKAN, p. 1254.

<sup>13</sup> SÖNMEZ TATAR, p. 158; SÜZEK, p. 184.

<sup>14</sup> ÖZDEMİR, p. 9.

<sup>15</sup> SÜZEK, p. 183; ÖZDEMİR, p. 10.

<sup>16</sup> SÖNMEZ TATAR, p. 41; DULAY Dilek, İşyerinin veya Bir Bölümünün Devri, Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi, S. 8, I. 32, Y. 2011, p. 1376.

<sup>17</sup> SÜZEK, p. 185.

machinery, equipment, vehicles, and hardware together with the employees to any other employer<sup>18</sup>.

### C. TERMS FOR TRANSFER OF WORKPLACE

In accordance with the European Union's Directive no 2001/23, there are some terms and conditions of the transfer of a workplace including the presence of an economic unit (workplace), transfer of it to an another employer (changing of the employer), a legal procedure for this transfer, and preservation of the financial identity of the unit with respect to the transfer procedure<sup>19</sup>.

In accordance with the article 6 of Labour Law no 4857, to be able to say that a workplace transfer safeguarding the employee's jobs have been accomplished, the fundamental elements that provide the continuity of that workplace must also be transferred<sup>20</sup>. When the article 6 of Labour Law is taken into consideration, it is understood in paralel with the EU Directive that the transfer terms consist of the presence of a workplace, the transfer of that workplace, and conducting the transfer based on a legal procedure<sup>21</sup>. In another words, to be able to say that a workplace is transferred, first of all the transferor must lost his capacity of management in lieu of an another employer with that transfer and as a result of this transfer, he must lost his authority to become a part of that contract. It is impossible to say that a transfer is conducted if the employer is the same and no change occurred to his employer attribute es per article 6 of Labour Law<sup>22</sup>. The transfer of workplace must be executed based on a legal procedure and finally, the operation of workplace must assure.

It is indicated in the law and in the grounds of it that the whole or partial transfer of a workplace must be based on a legal procedure and all workplace transfers out of the death of a real person employer and the transfer of the workplace to his successors must be based on a legal procedure<sup>23</sup>.

### D. THE RESULTS OF TRANSFER OF WORKPLACE

#### 1. The Transfer of Labour Contracts to the Transferee with all Rights and Liabilities

The effect of a workplace transfer to the labour contracts of the employees is regulated in article 6 of Labour Law under the caption "Transfer of a workplace or a part thereof". Said article regulates that if whole or a part of a workplace is conducted under legal procedures then all current labour contracts of the employees will also be transferred to the transferee with all their liabilities and rights. In another words, the labour contracts of the employees are also transferred to the transferee with all their legal rights and liabilities without any need to do something to

<sup>18</sup> ŞAKAR Müjdat, İşyerinin veya Bir Bölümünün Devri Halinde İşçi Alacaklarından İşverenin Sorumluluğu, Yaklaşım, Year: 18, C. 212, August 2010, p. 186.

<sup>19</sup> SÜZEK, p. 184-185; UZUN, p. 291; SÖNMEZ TATAR, p. 33; SÜMER Haluk Hadi, İş Hukuku Uygulamaları, 5. Edition, Mimoza, Konya 2015, p. 69.

<sup>20</sup> SÜZEK, İş Hukuku, p. 192-193.

<sup>21</sup> ALPAGUT, p. 28; UZUN, p. 292.

<sup>22</sup> KILIÇOĞLU Mustafa/ŞENOCAK Kemal, İş Kanunu Şerhi, S. 1, 2. Edition, İstanbul, Legal, July 2008, p. 194; SÖNMEZ TATAR, p. 40.

<sup>23</sup> SÖNMEZ TATAR, p. 39.

transfer them due to the mandatory provision of the law<sup>24</sup>. With the transfer of the workplace, the transferee gets the capacity of “employer”<sup>25</sup>.

The rights and liabilities arising from the transfer of a workplace comprise also the personel regulations, internal regulations, workplace practices and all directions put into effect by the employer. The transferee will be liable for all working conditions that are related with this workplace<sup>26</sup>.

## 2. The Situation of the Employee Receivables

The article 6 of Labour Law assures all receivables of the employees that have been assessed before workplace transfer by adjudging that all rights and liabilities related with the labour contracts will also transferred with the transfer of workplace. Although this is the natural result of the principle that all labour contracts will be transferred to the transferee with all rights and liabilities, it also complies with the provision of the transferor and the transferee are jointly liable for those rights explained in article 3 of the said law<sup>27</sup>. In accordance with the article 6/3 of Labour law, if the workplace is transferred then the transferor and the transferee are jointly liable for the receivables and for the due debts that have been assessed before this transfer procedure. But the liability of the transferring employer is limited with two years beginning from the date of transfer.

The liability of the transferee employer arisis with the provisions of law and hence there is no need for him to make a commitment for such liability to the transferring employer or to the employees<sup>28</sup>. But the transferee does not have any liability for the labour contracts that had beer terminated before the date of transfer.

The severance payment of an employee has a serious prominence as per labour law. The rights and the contents of such rights of an employee increases with the labour contract period of that employee. While transferring the workplace, the rights of employee must also be preserved. Hence, any transferee that transferred a workplace in whole or in part is kept liable for the rights of an employee arising from his service periods and he must take into consideration the commencement date of that employee with the transferor employer. In another words, the service period of an employee is protected based on labour contracts mobilized to the transferee with the transfer of workplace<sup>29</sup>. As a result of this regulation, the service periods of an employee with the transferor must be considered as passed with the transferee employer<sup>30</sup>.

<sup>24</sup> ÇELİK/CANİKLİOĞLU/CANBOLAT, p. 79; MOLLAMAHMUTOĞLU Hamdi/ASTARLI Muhittin/ BAYSAL Ulaş, İş Hukuku, Revised and Renovated 6. Edition, Turhan Kitabevi, Ankara, 2014, p. 272; SÜMER Haluk Hadi, İş Hukuku, 20. Edition, Mimoza, Konya 2015, p. 25; ÖZDEMİR, Cumhuriyet, Alt İşverenlerin Değişmesine Karşın İşçinin İşyerinde Çalışmaya Devam Etmesi, Terazi, S. 10, I. 103, March, 2015, p. 76; AYKAN, p. 1270; DULAY, p. 1380.

<sup>25</sup> KILIÇOĞLU/ŞENOCAK, p. 182; SÜZEK, p. 187; ÇANKAYA Osman Güven/ÇİL Şahin, İş Hukukunda Üçlü İlişkiler, Ankara 2011, p. 375; SÖNMEZ TATAR, p. 32.

<sup>26</sup> UZUN, p. 298; BİRİNCİ UZUN, p. 386.

<sup>27</sup> ÖZDEMİR, p. 11-12; DULAY, p. 1380; ÖZKARACA Ercüment, İşyeri Devri Devirden Önce Doğan Borçlardan Sorumluluk Karar İncelemesi, Çalışma ve Toplum, 2009/1 (ÖZKARACA Karar İncelemesi), p. 142.

<sup>28</sup> ÖZDEMİR, p. 12.

<sup>29</sup> ÇELİK/CANİKLİOĞLU/CANBOLAT, p. 80; SÜMER, p. 26; UZUN, p. 300; ULUCAN Devrim, İşyeri Devrinin İş İlişkilerine Etkisi ve Devir Nedeni ile Yapılan Fesihlerin Hukuki Sonuçları, Sicil İş Hukuku Dergisi, I.14, June

Hence, the calculation of payments that must be based on service period of that employee like severance and notice pays and annual vacational payments must be made by taking into consideration the commencement date of that employee with the transferor employer. The regulation that regulates the liability of employer with reference to the severance payment of an employee orders that the calculation must be made by taking into consideration the service periods with the prior employers and the transferor or the transferee employers cannot make any agreement between them on the contrary to that provision<sup>31</sup>.

The article 14 of the Law no.1475 that regulates the severance payments is currently in effect. As per article 14/II of the Law no 1475, liability of the transferor employers are limited with service periods and payments made to that employee at the date of transfer in case any transfer of workplace is conducted.

The severance of an employee can be demanded from the transferee employer by making a calculation based on the last payment and based on the periods with the transferor and transferee employers. The transferee employer is liable for the whole severance payment of an employee by taking into consideration the service periods spent with the transferor employers and the transferee and by taking into consideration the latest salary payment and cannot claim that the employee must refer to prior employers for the severance amounts of the service periods spent with them<sup>32</sup>. But the transferee employer can recourse to the previous employers for the severance amounts based on the periods related with them. On the other hand, it must be noted that the employee does not need to apply to the transferee employer for all of his severance payments. If the employee wants, he can apply for the payment to the prior employers for the amounts related with the service made with them<sup>33</sup>. Such a request made by the employee to the transferor employer is subject to a lapse of time for ten years and this request must start after the date he gains his right for severance payment by not taking into consideration whoever he works for.

Another prominent detail that must be noted on this subject is two years of liability limitation expressed in article 6 of Labour Law will not take any effect since there is no limitation with regard to the liabilities of a transferor employer as per article 14/2 of the Law no.1475<sup>34</sup>.

The other right of an employee that requires the service period must be taken into consideration is the notice pay. In article 6/3 of Labour Law that regulates the joint liability of employers when they transferred their workplace, the receivables of workers that accrued before the date of transfer and due on the transfer date consist of salary, bonus, premium, week-end wage, national holiday premium, vacation-pay, and over-time pay. Since the current labour contracts do not terminate at the date of transfer, the abrogation term for notice pay will not be effected as is for severance payment<sup>35</sup>. Hence, the employee cannot demand the notice pay due to

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2009, p. 36; ESEN Bünyamin/DEKDAŞ Fikret, Türkiye Sosyal Güvenlik Hukukunda İşyerinin Devri Halinde Prim Borçlarından Doğan Hukuki Sorumluluk, Terazi, S. 9, I. 94, June 2014, p. 47.

<sup>30</sup> BİRİNCİ UZUN, p. 387; DULAY, p. 1384.

<sup>31</sup> ÖZKARACA, p. 372; TOPCU, p. 279.

<sup>32</sup> ÖZKARACA, p. 369; TOPCU, p. 278; ÖZDEMİR, Cumhuriyet, İşyeri Devrinin İş Kanunu Yönünden Hukuki Sonuçları, Terazi, Year: 7, I. 70, June, 2012, p. 111; ÖZDEMİR, Alt İşveren, p. 77; Y9HD., 11.10.2010, 33353/28589 January, p. 1681.

<sup>33</sup> SÜZEK, p. 189; TOPCU, p. 278.

<sup>34</sup> SÜZEK, p. 189; SÜMER, p. 26.

<sup>35</sup> TOPCU, p. 279.

transfer of workplace. One of Supreme Court decision adjudges that “...the transfer of the workplace shall not terminate the labour contract. The defendant employer’s claim that he paid for severance shall no effect the result. It is concluded that the claimant worker continued to do his work without any interrupt during transfer. Hence, the claimant’s demands for severance and notice pays shall be rejected.”<sup>36</sup>

On the other hand, in accordance with the article 6/2 of Labour Law, the transferee employer is liable to do his worker’s procedures with respect to the date of commencement of work with the transferor employer. Since the amount of notice pay is calculated based on the service period plus the notification of termination period that has not been used, the notice pay receivable of an employee is one of the rights of an employee that is based on his/her service period. Hence, the transferee employer is liable to pay the severance payment of an employee by taking into consideration the service periods spent with the transferor employer and then calculate this amount based on whole service period of that employee with all previous employers.

The transferee employer is liable to make the notice payment of an employee which is different from the severance payment. The transferee employer has no right to recourse to the transferor employer for the amounts spent with the transferor employer<sup>37</sup>. The Supreme Court’s adjudgements are on the same direction with this principle<sup>38</sup>.

Any labour contract shall not terminate with the transfer of workplace due to the fact that the same employee continues to work with the new employer under the same conditions. Accordingly, an employee cannot claim any rights with respect to termination, and severance (and notice) pays by asserting that the workplace has been transferred. The Supreme Court also adjudges that “The labour contract of the employee is transferred to the transferee with the transfer of workplace. Hence, the employee cannot claim for severance and notice pays. Any transferor that transferred his workplace without taking into consideration this principle cannot be liable for severance and notice pays”<sup>39</sup>.

On the other hand, if the labour contract of an employee has been terminated before the date of transfer by giving the right of severance payment on behalf of that employee, the transferee employer is in no way liable for that severance payment<sup>40</sup>.

### **3. The Limitation of the Liabilities of Transferor Employer**

In accordance with the article 6/3 of Labour Law, the transferor and the transferee employers are jointly liable for two years for the employee receivables that accrued before the date of transfer and due on the date of transfer. Due to this provision, two points must be clarified while determining the liabilities of any transferor employer. First of all, the receivable must be accrued before the date of transfer. Besides that, this receivable must be due on the date of transfer. If both of those two conditions are present then the liability belongs to the transferor employer. On the contrary situation, that is, the receivable accrued after the date of transfer or

<sup>36</sup> Y9HD. 6.2.2001, 18288/1817 OCAK Uğur, 4857 Sayılı İş Kanunu’na Göre 9. Hukuk Dairesinin Emsal İçtihatlarıyla İşçilik Alacakları, S. 2, Ankara 2013, p. 280.

<sup>37</sup> TOPCU, p. 280.

<sup>38</sup> Y9HD., 10.5.2012, 7933/16614 OCAK Uğur, p. 1668.

<sup>39</sup> Y9HD., 17.1.1991, 9163/195 SÜMER, Uygulamalar, p. 72.

<sup>40</sup> ÖZKARACA, p. 360; TOPCU, p. 277.

the receivable is not due on the date of transfer then the transferor employer has no liability for those receivables<sup>41</sup>.

With reference to the enforcement of article 6/3 of Labour Law, the date of transfer is important while determining the liabilities of the transferor employer. The period of two years cannot be deemed to be under the concept of period of limitation and it is only a foreclosure period. Hence, the termination of two years of period or any interruption thereto is not possible and the judge must take this period into consideration *ex officio*<sup>42</sup>. Although it is considered to be possible to extend the two years of period that is regulated by article 6/3 of Labour Law on behalf of any employee, it is not possible to deduce this period against the benefits of any employee<sup>43</sup>.

With reference to this provision of law, the joint liability of two employers must be deemed to be joint and several liabilities. Although any other different arrangement between them under the contract of transfer is possible and in effect between them, this arrangement shall not have any effect against the rights of an employee.

If the employer is a legal entity then the joint liability provisions cannot be exerted upon the employer in case the qualitative or quantitative characteristics of this legal entity like merging, joining, and etc changes (Article 6/4 Labour Law). Accordingly, the new entity after merging or joining or in case the type of company changes then the new legal entity has its liabilities.

#### **4.The Effect of Workplace Transfer with Respect to the Notice Period**

The effect of a workplace transfer to the right of parties' notice period is regulated under article 6/5 of Labour Law. According to this article, it is ensured that an employer cannot terminate any of its employees' labour contracts due to whole or partial workplace transfer and such a transfer does never constitute a valid reason for any employee to terminate his/her labour contract. This provision complies with the union *acquis*. In fact, the provision expressed in article 6 of Labour Law stating that if a workplace is transferred, all current labour contracts shall be transferred with all their rights and debts to the new employer brings the natural result of no labour contract can be terminated due to workplace transfer<sup>44</sup>.

The law ensures that the employers and the employees reserve the right of terminating their labour contracts in case any workplace transfer is made. The transfer of workplace does not constitute a substantial alteration at the working conditions and does not allow any termination to the labour contracts. The terminations based on workplace transfer and the terminations based on term are prohibited in article 6/5 of Labour Law under the provision of "*Neither the transferor nor the transferee employers can terminate the labour contracts due to the transfer of workplace in whole or in part*". As a result of this provision, it is not possible for the transferor and for the transferee employers to transfer the workplace without any employees as is observed in practice. On the contrary situation, the terminations based on such a transfer will be cancelled<sup>45</sup>. But it is

<sup>41</sup> SÜZEK, p. 188-189; ÇELİK/CANIKLIOĞLU/CANBOLAT, p. 80; ÖZDEMİR, p. 14; MOLLAMAHMUTOĞLU/ASTARLI/BAYSAL, p. 278; SÜMER, p. 26; ULUCAN, p. 37; ESEN/DEKDAŞ, p. 46; KILIÇOĞLU/ŞENOCAK, p. 199.

<sup>42</sup> MOLLAMAHMUTOĞLU/ASTARLI/BAYSAL, p. 281.

<sup>43</sup> ÇELİK/CANIKLIOĞLU/CANBOLAT, p. 80; ÖZDEMİR, p. 15.

<sup>44</sup> MOLLAMAHMUTOĞLU/ASTARLI/BAYSAL, p. 274; SÜMER, p. 26; ULUCAN, p. 38; BİRİNCİ UZUN, p. 386; AYKAN, p. 1275; DULAY, p. 1384; KILIÇOĞLU/ŞENOCAK, p. 199-200.

<sup>45</sup> SÜZEK, p. 190; UZUN, p. 301.

possible to terminate the labour contracts based on substantial alteration at the working conditions in accordance with the article 22 of Labour Contract only after the transfer of workplace and while working with the new employer.

On the other hand, in article 6/5 of Labour Law it is regulated that “*The termination rights of transferor or the transferee are reserved with regard to the financial or technological grounds of the employer*”. Hence, the time-bound termination right can be used in case there is a valid ground out of transfer. In such a case, if the transferor or the transferee is in need of reorganizational or technological valid grounds then those employers can use their time-bound termination rights<sup>46</sup>.

The transfer of workplace never constitutes a valid ground for termination in favour of an employee but there is no obstacle to use the right of time-bound termination as per article 17 of Labour Law. On the other hand, if an employee terminates his labour contract as per article 17 of Labour Law then since this does not constitute a valid ground for termination he cannot demand severance payment (article 14 of Law No.1475)<sup>47</sup>.

### **III. COMPARISON OF THE TRANSFER OF WORKPLACE WITH THE OTHER THREE-WAY BUSINESS RELATIONS**

#### **A. IN GENERAL**

Attributing the liability of an employee’s rights to more than one employer is only possible when there is a three-way workplace relation in the meaning of law. Three-way workplace relation is a legal relation that results in being effected with all or some of the rights and liabilities of labour contracts without any need to a new contract although not being a party to the contract. Some of the following three-way workplace relations like principal-sub contractor, temporary workplace relation, and workplace transfer or labour contract transfer is needed to be able to attribute the liability of rights of an employee to more than one employer<sup>48</sup>.

Indeed, it is a necessity to determine who is responsible for the rights of an employee in case there are three-way workplace relations. The need for comparing the transfer of workplace with the other three-way workplace relations arises at this point.

#### **B. PRINCIPAL-SUB CONTRACTOR RELATION AND THE TRANSFER OF WORKPLACE**

The relation between the principal and the sub-contractor is defined in article 2/6 of Labour Law no. 4857. According to this definition, “The relation established between an employer who assumes work from another employer in auxiliary works regarding the good or service production or in some part of the main works requiring expertise due to technological reasons as a requirement of the business and the work and employs its workers assigned for his work only in the work assumed in that workplace and the employer from which it assumes the work is called principal-sub-contractor relation”.

<sup>46</sup> SÜZEK, p. 190; AYKAN, p. 1275.

<sup>47</sup> SÜZEK, p. 191.

<sup>48</sup> UZUN, p. 303; SÖNMEZ TATAR, p. 43.

Sub-contracting is a three-way workplace relation whose parts are the employees, principal and the sub-contractor. In this relation, the employees are the employees of sub-contractor and there is no contractual relation with the principal<sup>49</sup>.

The relation between sub-contractor and the principal with the transfer of workplace is one of the discussed subjects under labour law. There are some opposing views in doctrine whether those two employers exclude each other during this relationship or not<sup>50</sup>.

The dominant view is that there is no exclusion between those two employers. The two employers serve to different targets<sup>51</sup>. At the partial transfer of a workplace, the transferred part is completely transferred to the transferee but in a sub-contractual relation there is a temporary relationship<sup>52</sup>.

Sometimes it is possible to have the employee work for consistently changing sub-contractors. In such a case, it is a problem whether those sub-contractor alterations will constitute a workplace transfer. If this is the situation, the doctrine and the Supreme Court orders that this is a workplace transfer and the latest sub-contractor is liable for the periods spent with the other sub-contractors before them<sup>53</sup>. The Supreme Court adjudges that if the materials in the workplace has been being procured by the principal and they remain constant but the employees continue to work for the new sub-contractor in each time then one part of that work continues to operate although there is no direct relation between the sub-contractors<sup>54</sup>. Also the relation between the principal and the sub-contractor should be checked if it is fictitious. If there is a fictitious situation then it is impossible to attribute the situation as the transfer of one part of workplace as it is deemed there is no transfer of workplace between the sub-contractors<sup>55</sup>.

### C. TEMPORARY EMPLOYMENT RELATIONSHIP AND TRANSFER OF WORKPLACE

The temporary employment relationship that is also expressed as indentured relation is regulated in Labour Law No.857. As per article 7 of Labour Law it is expressed as follows: "Temporary employment relationship occurs when the employer temporarily transfers a worker for employment on the condition that it is within the holding or in another workplace subsidiary to the same group of companies or in works similar to the worker's current work, provided that he/she receives the written consent of the worker at the time of transfer."

The term "transfer" stated in this article must be considered as the transfer of employer's demand from employee to work and not as the transfer of labour contract.

<sup>49</sup> SÖNMEZ TATAR, p. 45.

<sup>50</sup> SÜZEK, p. 192.

<sup>51</sup> DOĞAN YENİSEY, p. 245; MOLLAMAHMUTOĞLU/ASTARLI/BAYSAL, p. 241.

<sup>52</sup> ÇANKAYA/ÇİL, p. 41; AYKAN, p. 1267.

<sup>53</sup> SÜZEK, İşyeri Devri, p. 325; SÖNMEZ TATAR, p. 49; DULAY, p. 1389. The Supreme Court's decision in this direction for examine Y9HD., 12.6.2006, 37343/16607; Y9HD., 10.7.2006, 16499/20608 ([www.legalbank.net](http://www.legalbank.net) date of access: 11.4.2016). Y9HD., 22.7.2008, 20491/21645 ÇİL Şahin, İş Hukuku Yargıtay İlke Kararları, Ankara 2011, p. 133; ÖZKARACA Ercüment, İşyeri Devri Devirden Önce Doğan Borçlardan Sorumluluk Karar İncelemesi, Çalışma ve Toplum, 2009/1 (ÖZKARACA Karar İncelemesi), p. 140.

<sup>54</sup> SÖNMEZ TATAR, p. 49.

<sup>55</sup> UZUN, ÇANKAYA/ÇİL, p. 382.

The temporary workplace relation can be defined as the demand of employer from his employee to do the works defined in the labour contract made between them for another employer for a definite period of time by taking approval of the employee<sup>56</sup>.

The temporary workplace relation is a three-way relation that is established between the employer, the temporary employee, and the temporary employer. There are prominent differences between temporary workplace relation and the transfer of workplace. As it is clearly stated in the law, it is a must to provide the written will of employee during transfer to be able to establish a temporary workplace relation<sup>57</sup>. The written will is a term for validity and the oral will will not be valid. In case the temporary workplace relation is to be renewed then the written will of employee must also be provided. But while transferring the workplace, there is no need to look for the will of employee to be able to transfer the labour contract<sup>58</sup>.

There is another difference between workplace transfer and the temporary workplace relation and it is the continuity of capacity of employer. In a temporary workplace relationship, the employer transfers his right of demanding the works arising from labour contract made between them to an another employer but still keeps the capacity of being an employer during all times of this process<sup>59</sup>. In case the workplace is transferred, the transferor employer loses his capacity of being an employer and terminates the relation with the employee<sup>60</sup>. Since the capacity of being an employer is lost with the transfer, the transferor employer has no liability after the transfer for the receivables of employees<sup>61</sup>.

In a temporary workplace relation, the employee must execute the jobs undertook with the contract for principal against the temporary employer although the labor contract is in effect with the principal. In accordance with the article 7 of Labour Law, the temporary employer with the principal is liable for the salaries, social security premiums, and surveillance of the employee during he period the employee provided service to him.

#### **D. THE TRANSFER OF WORKPLACE WITH THE TRANSFER OF LABOUR CONTRACT**

The transfer of a labour contract is a new regulation under Turkish Code of Obligations Law No 6098. This regulation was designed to take place in Labour Law no.4857 before but it was cancelled during enacting in Grand Assembly<sup>62</sup>. A new provision that set forth the transfer of labour contract is put in effect under Turkish Code of Obligations Law No 6098. In article 429 under the paragraph with caption "The transfer of labour contracts" it is regulated that "a labour contract can be transferred to an another employer on the conditio that the approval of the employee is provided. With this transfer, the transfere becomes the new employer with all rights

<sup>56</sup> ÇANKAYA/ÇİL, p. 305; SÖNMEZ TATAR, p. 51; DULAY, p. 1388.

<sup>57</sup> SÖNMEZ TATAR, p. 51; UZUN, p. 306.

<sup>58</sup> UZUN, p. 306.

<sup>59</sup> SÖNMEZ TATAR, p. 54.

<sup>60</sup> UZUN, p. 306.

<sup>61</sup> ÖZKARACA, p. 112.

<sup>62</sup> SÖNMEZ TATAR, p. 55. Labour Law No. 4857 of the Scientific Committee draft text of the " transfer of the employment contract ". According to article m.7 provision, "employers who are part of an employment contract, the right to demand the appearance of the work with the consent of workers may permanently transfer to another employer. The business relationship between workers and employers with the transferor and the transferee employer transfer transaction ends all rights and employers' side won the title of an employment contract with debts. Labour Law 6/2, also applies to the transfer of the employment contract.

and liabilities of the labour contract. In such a circumstance, the commencement dates with the transferor is taken into consideration with regard to the service periods of that employee”.

The transfer of a labour contract is under the concept of three-way workplace relation and the employee, the employer and the transferee employers are parties to this relation. This is a unique structure that borrows the uninterrupted execution of service task of the employee against the transferee and also results in the transfer of all rights and liabilities of the transferor employer to the transferee employer with their capacity of being a party to the the transfer of workplace<sup>63</sup>.

The difference between the transfer of a labour contract and the transfer of a workplace is that the transfer is based on will and not on law whereas the difference between the temporary labour relations is that all rights and liabilities are also transferred with the capacity of being a party to the contract<sup>64</sup>. With the transfer based on will, the employer party is changed but the transferred labour contract is in effect with all of its provisions. Hence the transfer of contract results in *successio singularis*<sup>65</sup>.

Getting the approval of an employee is the main difference between the voluntary transfer and legal transfer of a labour contract. To be able to transfer a labour contract, the wills of employee, transferor, and the transferee employers must coincide.

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<sup>63</sup> ÇANKAYA/ÇİL, p. 521; SÖNMEZ TATAR, p. 56; SÜMER, Uygulama, p. 76-77; DULAY, p. 1387.

<sup>64</sup> ALPAGUT, Gülsevil, Türk Borçlar Kanununun Hizmet Sözleşmesinin Devri, Sona Ermesi, Rekabet Yasası, Cezai Şart ve İbranameye İlişkin Hükümleri, Legal İSGHD, I. 31, 2011, p. 920.

<sup>65</sup> ARSLANOĞLU M. Anıl, İş Sözleşmesinin İradi Devri ile İşverenin Değişmesi, Legal İSGHD, I.2006/10, p. 543.

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