



## POINTS TO CONSIDER IN SUB-EMPLOYING PRACTICE

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### ABSTRACT

**Purpose-** This work focuses on both the legal limitations of the sub-employing practice and joint responsibility, which is one of the most important elements of the relationship between the primary employer and sub-employer; and also, the obligations deriving from crossing the limits in the sub-employing practice.

**Methodology-** In order to achieve this purpose, regulations regarding the implementation of Labor Law no. 4857 and Sub-Contracting Regulations were examined and legal limitations on the implementation were evaluated.

**Findings-** It was observed in the literature review and the evaluation of related judicial decisions that the legal regulation aimed to propose a solution for the issue but there were still some gabs in the implementation.

**Conclusion-** It was identified that only legal regulations would not be enough to solve the problems in subcontracting practices, that the authorities both in public sphere and in business managements were required to audit the practices in order to prevent the practices which would cause unfair competition and to perform the legal liabilities.

**Keywords:** Primary employer, sub-employer, joint responsibility, collusion

**JEL Codes:** L23, L24, L29

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## 1. INTRODUCTION

The concept of sub-employing appeared when other employers are tasked with works outside of the areas that business focus, invest in and create job opportunities, deriving from the increase in diversity of production and the flexibility in the working life and the efforts of the businesses to produce the highest quality products for the lowest cost. Laws regulate the sub-contracting practices and other atypical working models as well as protecting the rights of the workers by issuing certain guarantees and restrictions in legal regulations. However, the protective measures taken in the legal regulations are not enough by themselves to satisfy the need for supervision of this practice.

In the business management, sub-employing practice especially gives a considerable advantage in terms of competition and makes it easier to transfer and management of the work, thus, the employers tend to use it and sometimes may cross the legal limitations. Furthermore, subcontractor practice considerably releases the employers from the liabilities provided in individual and collective Labor law. For example, issues such as dismissal and therefore the severance pay, raise due to collective labor contracts, strike pressure in collective labor dispute the Labor peace and social peace and to gradually decrease the productivity in long-term (Okcan and Bakır, 2010: 68).

One of the biggest changes of the Labor Law numbered 4857 is to the sub-employer concept. There are regulations that narrow the relationship between the employer and the sub-employer in the new law.

## 2. THE CONCEPT OF SUB-EMPLOYER AND THE CONDITIONS OF THE RELATIONSHIP BETWEEN THE PRIMARY EMPLOYER AND SUB-EMPLOYER

Sub-employer is a typical example to externalizing the production of goods and services in a business. Because, the employers facilitate their own workplace to another employers and their employees while they can complete the work themselves. The employees of the sub-employer work in the facilities of the primary employer to produce goods and there is no legal relationship between the sub-employer and the primary employer. Thus, while the Labor Law allows the production over sub-employer, this situation is perceived as an exception. Because, the Labor Law emphasizes the production to be carried out by the primary employers and their workers (Güzel, 2004: 38).

Labor Law numbered 4857 elaborately regulated the conditions of the relationship between the primary employer and sub-employer as an answer to the widespread abuse of this practice; and, introduced certain limits and prohibitions.

Article 2 Paragraph 6 of the Labor Law defines the concept of sub-employer as, "Other employer that is contracted by an employer to assist in the areas of producing goods and services and requiring technological expertise with the hired employees to only work in these areas" and defines this relationship as "the relationship between the primary employer and sub-employer.

### 3. THE CONDITIONS OF THE RELATIONSHIP BETWEEN THE PRIMARY EMPLOYER AND SUB-EMPLOYER

In order to discuss the concept of sub-employer and the relationship between the primary employer and sub-employer, the following conditions need to occur (Tashkent; 2004:363):

- a. First, a primary employer with hired employees must exist. For example, if the employer transferred the construction of a building to another with the promise of turn-key, a primary employer and sub-employer relationship would not be possible.
- b. The sub-employer must have his employees work in the workplace of the primary employer. In this regard, if the employees worked in the workplace of the sub-employer, this would be contract manufacturing and a relationship between the primary employer and sub-employer would not be possible.
- c. The employees hired by the sub-employer must work in the workplace of the primary employer for the contracted work. If the employees of the sub-employer worked in the workplaces of different primary employers in jobs such as burner and elevator maintenance, a relationship between the primary employer and sub-employer would not be possible.
- d. The sub-employer must have his employees work in the workplace of the primary employer to assist or work in a main part of the works such as the production of goods and services. Thus, if the employees of the sub-employer worked in an irrelevant job to the production of goods and services, a relationship between the primary and sub-employer would not be possible. It is a good example when the primary employer tasks his employees to construct in the yard of a textile factory in that business.

### 4. THE LIMITATIONS TO THE RELATIONSHIP BETWEEN THE PRIMARY EMPLOYER AND SUB-EMPLOYER

In order to prevent the abuse of the relationship between the primary employer and sub-employer, Labor Law numbered 4857 introduced certain limitations. The following is an explanation of these limitations:

- a. In accordance with the article consisting regulations to the sub-employer, the primary employer cannot transfer the main (core) work to another employer. However, in certain situations sub-employer can carry out a part of the main work. The law requires the condition to occur as "a work requiring technological expertise as the nature of the business and the work". Therefore, the sub-employer can carry out a work requiring technological expertise as the nature of the business and the work. Constructing bridge or viaduct in highway construction; nursing care or laboratory services in a private hospital or painting works and services in a textile factory are good examples to this (Günay, 2003: 271). The law clearly states that "The sub-employer cannot carry out a part of the main work aside from works requiring technological expertise and the nature of the business and the work". When the aim of this article is considered, "and" word should be changed with "as". Thus, according to this sentence of the article, for the sub-employer to carry out a part of the main work, the work needs to require the technological expertise as the nature of the business and the work. For instance, the primary employer cannot show economic reasons as the "nature of the business and the work" to task the sub-employer for the main work. When the contrary is accepted, there will be no meaning to the limitation of "the works requiring technological expertise". Because, in accordance with this interpretation, the primary employer can show the nature of the business and the work as a reason and can divide the work (Tashkent, 2004: 365). On the other hand, when the sub-employer signs a contract for a part of the main work, the primary employer cannot task his employees to that work (Çelik et. al, 2016: 63). However, in order to form this kind of relationship regarding the ancillary work of producing goods and services, the above-mentioned standard is not required. The primary employer can task the sub-employer for ancillary work on the condition of conforming to following limitations; for example, this relationship can be formed on works such as technical service, cleaning, catering, transportation of the employees (Ekonomi, 2008:18-20)
- b. The sub-employer cannot limit the rights of the employees of the primary employer by hiring them to work on the mentioned jobs. The important thing is to protect the rights of the employees (Çelik et. al 2016: 64; Uçtum, 2003: 23). With these regulations, the law aimed to protect the rights of the employees that earn a certain amount of wage by preventing their dismissal from their job under the primary employer; and recruitment under the sub-employer for a lower wage.
- c. A relationship of the sub-employer cannot be formed with anyone that worked in that business before. The lawmakers cannot aim to hinder the workers to have the title of the employer. This limitation does not collide with the law which allows relationship between the primary employer and sub-employer with the workers that quit their job a long time ago (10-15 years ago) and started a business with serious commercial activities. Once again, the sub-employer relationship formed with experienced workers that quit their job due to retirement is valid unless a collusion can be proved with tangible evidence. This regulation aims to prevent the abuse of the sub-employer relationship and to prevent dismissing employees and using them as cheap non-union workforce under the sub-employer (Eyrenci, 2004: 22).

### 5. THE JOINT RESPONSIBILITY OF THE PRIMARY EMPLOYER AND SUB-EMPLOYER

The lawmakers evaluated the relationship between primary and sub-employer for the benefit of the employers and aimed to protect the rights of the employees by making both the primary and sub-employer responsible for the wages and other rights of the employees.

In accordance with the article 2 paragraph 6 of the Labor Law, primary employer is responsible for the obligations deriving from labor contracts or collective labor contracts that the sub-employer is a party of (Ünsal, 2005: 541).

Therefore, the employees can demand the wages or other rights, deriving from the labor contract or collective labor contract, from both the primary and sub-employer. The primary employer's right to recourse to the sub-employer is reserved.

This "joint responsibility" principle of the law is a heavy responsibility for the primary employer. Thus, the primary employers should add provisions to the contracts signed with the sub-employers that clearly state the right to supervise the sub-employer and right to recourse to the obligations and charges caused by the sub-employer. In accordance with these provisions, the primary employers can supervise the sub-employers on whether they fulfill their obligations towards the employees, demand the submittal of the documents regarding the insurance premiums and other payments of the employees (Şen, 2006:90).

## 6. THE PRACTICES CONSIDERED AS COLLUSION

Collusion is the definition of the agreement made between the parties to create a false appearance that does not reflect their true intentions to deceive the third parties. The Sub Employing Regulation dated 27 September 2008 defines the collusion (m. 3/g) as activities to hide the true intentions of the parties such as,

- ✓ Tasking a sub-employer with a part of the main work regarding the goods and services that does not require expertise,
- ✓ Forming a sub-employing relationship with someone that worked before in that business,
- ✓ Hiring the employees of the primary employer under the sub-employer by restricting their rights,
- ✓ Avoiding public obligations or restricting or eliminating the rights of the employees deriving from the labor contract, collective labor contract or labor legislation.

Court of Cassation also ruled the activities that does not reflect the truth as collusion. The examples are as follows:

- ✓ If the employees stay the same but the sub-employer constantly change even though the sub-employing relationship is formed through tender,
- ✓ If there are provisions in the contract such as that the sub-employer hires the workers that the primary employer approves,
- ✓ If there are provisions in the contract such as that the primary employer or his representatives can give instructions to the employees of the sub-employer (except Occupational Health and Safety),
- ✓ If the primary employer issues the payrolls of the employees of the sub-employer,
- ✓ If the sub-employer dismisses the employees determined by the primary employer,
- ✓ If the primary employer organizes the rights of the employees of the sub-employer such as leave and wages,
- ✓ If the primary employer has the authorization on the execution of the sub-employer's works,
- ✓ If the primary employer is the sole supervisor of the employees and the workplaces,
- ✓ If the employees of the primary and sub-employer work in the same place, the Court of Cassation considers these practices as collusion.

## 7. LAW ENFORCEMENT DUE TO NONCONFORMITY TO THE LEGAL LIMITATIONS

The laws clearly states the enforcement due to nonconformity to the legal limitations.

The Article 2 paragraph seven of the Labor Law clearly states the enforcement of this nonconformity if the relationship between the primary and sub-employer is against the provisions of the applicable law. The paragraph states that "in cases of collusion, the employees of the sub-employer are treated as the employees of the primary employer" (Ünsal, 2005: 541). Therefore, the aforementioned employees can demand the same rights and payments of the primary employer's employees (Demir, 2003: 14).

## 8. POINTS TO SUPERVISE IN THE RELATIONSHIP BETWEEN PRIMARY AND SUB-EMPLOYER

- ✓ It will be beneficial and essential to supervise these points in the relationship between the primary and sub-employer:
- ✓ Is there a contract signed with the sub-employer?
- ✓ Are the commitments of the parties stated clearly in the contract signed with the sub-employer?
- ✓ Are the work procedures of the sub-employer issued in the annex of the contract?
- ✓ Is the sub-employer systematically supervised to see if he fulfills the obligations that the primary employer may be responsible due to joint responsibility?
- ✓ Has the SSI number of the sub-employer been taken?
- ✓ Does the sub-employer submit the statement of employment to the SSI during the legal period?
- ✓ Does the sub-employer pay the taxes regarding the employee wages?
- ✓ Are the legal obligations followed during employment, continuity of the work and the termination of the employee contracts?
- ✓ Are the occupational health and safety measures taken by the sub-employer?
- ✓ Have the penalties been provisioned in the contract in case of the nonconformity of the sub-employer to the commitments?

- ✓ Has enough assurance been taken from the sub-employer for possible damages resulting from the sub-employer or his employees?

## 9. EVALUATION AND RESULTS

The sub-employing practices that appeared as a necessity for the businesses to be competitive in the globalizing world are still the top subject in the work life.

The Labor Law numbered 4857 aimed to introduce limitations and prohibitions to prevent negative results deriving from the abuse of business and this practice.

However, the legal regulations are not enough by themselves to eliminate these negative results, both the relevant legal institutions and the responsables of the business must supervise this practice. Because, detecting business that use this practice against the law can lead to heavy obligations.

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