

## Covid-19 As an Occupational Accident: What If the Employee Is Infected with the Virus?

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Turkey has already taken several measures against the Covid-19 outbreak that has taken hold of the entire world and classified as a pandemic by the World Health Organization. As part of the measures taken by the government, certain workplaces' activities were compulsorily stopped, while some others were ceased voluntarily. However, in some industries, employees have to keep working despite the pandemic in order to meet the basic needs, keep the production going and provide health care without disruption.

So, how should the case of employees who are infected with the virus as they have to continue working during the outbreak be interpreted from a labor law perspective?

### What is an occupational accident?

In Turkey, occupational accidents are regulated in several pieces of legislation. This is because occupational accidents concern different fields of law such as social security law, occupational health and safety law, law of obligations and criminal law. [1] In this regard, occupational accidents and diseases are regulated under the Occupational Health and Safety Law No. 6331, which entered into force in 2012, and for the first time found themselves a separate place rather than the Labor Law No. 4857 ["Labor Law"], under which they were regulated previously. [2]

Under the Occupational Health and Safety Law, an occupational accident is defined as "*an event that takes place in the workplace or due to the execution of the work which causes death or disability in the body integrity mentally or physically.*" Also, Article 13 of the Social Insurance and General Health Insurance Law No. 5510 includes a similar, but a little bit more extensive definition of occupational accident.

### Employer's Responsibility Arises from The Duty of Care

As per the recent jurisprudence of the Court of Cassation, the liability of the employer in occupational accidents is based on the deliberate or negligent failure of the employer to fulfill the responsibilities imposed by contract or legislations [3], while his/her contractual responsibility arises from the duty to take care of the employee. This duty of employer derives from Article 417 of the Turkish Code of Obligations No. 6098, the Occupational Health and Safety Law No. 6331 and relevant legislation, as well as the employment contracts.

According to these regulations, the elements to define employer's liability under employment contract are breach of contract, fault, damage and causal connection between the act and the damage. Should all these elements exist in the case concerned, the employer would then be liable for the occupational accident.

### What are the Employer's Obligations in terms of Occupational Health and Safety?

The Occupational Health and Safety Law and the Regulation on the Occupational Health and Safety Services set out the obligations of employer in detail. As per Articles 4 and 5 of the Occupational Health and Safety Law, employer's obligations are as follows:

1. Preventing occupational risks, taking all kinds of measures including educating and giving necessary instructions to employees, establishing a work organization, providing the necessary tools and equipment, adapting the health and safety measures to changing conditions and improving existing conditions;
2. Monitoring and inspecting whether occupational health and safety measures taken in the workplace are followed, and resolving incompatibilities;
3. Making risk assessment or outsourcing it;
4. Considering employee's abilities for the task in terms of health and safety when making an assignment;
5. Taking necessary measures to keep employees, who have not been duly informed and instructed, from entering hazardous areas.

At this point, it should be noted that neither receiving services from third parties such as experts and organizations, nor the employees' obligations in terms of occupational health and safety limits or eliminates employer's respective liabilities. Furthermore, employers are not allowed to reflect the cost of occupational health safety measures to employees.

### **Employer Should Avoid Risks**

Another liability of employers is to avoid risks. Accordingly, employers should:

1. Analyze the risks that cannot be avoided,
2. Eliminate risks at the source,
3. Be attentive to the design of the workplace and the choice of equipment, working and production methods in order to make the task suitable for the employee, especially to prevent or at least minimize the negative effects of monotonous work and production conditions on health and safety,
4. Adapt to technical developments,
5. Replace the dangerous matters with the safe or less-dangerous ones,
6. Develop a coherent and general risk prevention policy covering the effects of factors related to technology, work organization, working conditions, social relations, and work environment,
7. Provide proper instructions and training to employees.

### **Can Being Infected with Coronavirus be Considered an Occupational Accident?**

The question whether coronavirus is an occupational accident or not should be evaluated within the scope of the regulations summarized above. First of all, since Covid-19 is a viral disease, it should be considered as an external factor.

During the pandemic period, employees have to share the same environment with many other people while using public transportation and taxi to reach to their workplace, or when they attend meetings upon the employer's instructions. Should an employee is infected with the coronavirus while performing employer's instructions, an occupational accident claim may be brought, provided that other conditions required by laws are also met.

In terms of Covid-19, another condition for an accident to be considered as an "occupational" accident is the incurrence of a bodily damage causing a loss of work capacity. The coronavirus has been proven to have the capacity to cause great damage on the lungs by scientists. For instance, if an employee's pulmonary capacity decreases as a result of an illness, this may cause a loss of work capacity and may be considered as an occupational accident. The same can, a fortiori, be said in the case of fatality.

### **The Most Asked Question: How Will the Courts Rule on the Matter?**

There is no judicial decision specifically on the coronavirus yet. [Future] approach of the Court of Cassation to the issue is thus a matter of curiosity. On the other hand, there is a ruling of the Court of Cassation relating to a similar case of social disaster, even though it concerned a situation which was relevantly less substantial in terms its consequences.

In an incident where an employee died due to swine flu [H1N1], the Court of Cassation held the employer responsible. The relevant part of the decision is as follows:

**"It is clear that the plaintiff's testator, who was a truck driver, was sent to Ukraine on 26.11.2009 by the defendant employer, he returned to Turkey on 11.12.2009, he went to hospital on 13.12.2009, in the Forensic Medicine Institute report incubation period of the H1N1 virus was stated to vary between 1-4 days, and if the testator's complaints were the initial symptoms of the disease, he must have contracted the virus 1-4 days before 13.12.2009, accordingly, the testator must have infected during the expedition to Ukraine which he made for business purposes, and therefore, the death of the testator should be considered as an occupational accident."** [the Supreme Court, Civil Chamber No.21, Decision No. 2019/2931, Decision Date: 15.04.2019]

In this respect, it may be possible to argue existence of an occupational accident if the employee contracts coronavirus while performing his/her duties as per the instructions of the employer.

### **Conclusion: Employers Should Take All Measures to Protect Their Employees**

Even though various kinds of precautions were taken by employers and employees during the Covid-19 pandemic, an absolute control may not be possible. Because while the treatment and the mode of transmission of the virus are not yet

known exactly, the ways of protection from it remains as a question. However, the employer must take all necessary measures, distribute masks to employees, regularly disinfect the workplace or have it disinfected, and inform/instruct employees related to the virus.

Otherwise, the employer, who has an objective diligence and fault liability, may be responsible from the consequences of the infection.

[1] KARAKAŞ İsa, "İş Kazası, Meslek Hastalığı Uygulaması, İhtilafları ile Çözüm Yolları", 3. Edition, İstanbul, 2017, p. 7.

[2] GÜNAY Cevdet İlhan, "İş ve Sosyal Güvenlik Hukuku Dersleri", 5. Edition, Ankara 2015, p. 201.

[3] İNCİRLİOĞLU Lütfi, "İş Sağlığı ve Güvenliğinde İşçi ve İşverenin Hukuki ve Cezai Sorumlulukları", İstanbul, 2008, s. 92. [ÖZEN Mustafa, "İş Kazalarında Hukuki, İdari ve Cezai Sorumluluk", Journal of Ankara Bar Association, 2015/2, p. 218] <https://dergipark.org.tr/tr/download/article-file/398263>

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