

Garden Leave under Turkish Labor Law

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1. Introduction

The concept of garden leave is not a familiar concept to Turkish labor law as the legislation does not regulate this concept explicitly. The employers however in practice might have the need to make use of this concept for various reasons. Below we first introduce the concept of garden leave in general and then examine this concept under Turkish labor law.

2. The Concept of Garden Leave

The garden leave is a debated matter under labor law. By rule employment agreements executed between the employer and the employee can be terminated with a notice given to the other party. On the other hand there are certain distinct situations where the employee spends the notice away from work, though by rule employee is supposed to be working during notice period. So the concept of the garden leave pertains to notice period practices.

The garden leave refers to the period during which employees spend their notice period away from the workplace, despite the employment relationship still being alive (i.e. there is no resignation or dismissal or mutual separation). During that period employees are not required to be present and working in the workplace, but still remain on the payroll. So instead of working in an active way, the employees remain passive and only receive salary for that period.

The concept of garden leave is developed further to the need that arises in certain situations for keeping employees away from workplace due to a myriad of reasons. For instance the employer resorts to garden leave when there is a legitimate concern that the employee who has been or has given notice might disrupt the peace in the workplace. In the same vein employer might have doubts about receiving due performance from the employee who has been or has given notice and therefore prefers to just keep that employee away from work stream.

Garden leave is frequently exercised as a part of internal investigations as well. Indeed the subject of the investigation could be put on garden leave during the course of the investigation with a view to ensure that the investigation proceeds in an effective and uninterrupted way. In such cases the main concern is that the subject of the investigation could get in the way of the investigators or even endeavors to destroy evidence of wrongdoing.

So in general garden leave is a precaution that is taken to eliminate various undesired possibilities that might realize if employee is allowed in the workplace and allowed to keep working.

3. *The Notion of Garden Leave under Turkish Labor Law*

Below we examine the notion of garden leave under Turkish labor law. We will start with examining the notion of garden leave in terms of present Turkish labor law legislation and then elaborate on practices that can be adopted as alternatives to garden leave under Turkish law. Lastly, we will explain the possible consequences of imposing garden leave under Turkish law.

3.1. *In Terms of Present Legislation*

The concept of garden leave is not regulated under Turkish Labor Law No. 4857 and under any other labor law legislation. In other words, Turkish labor law does not grant an explicit right on the employers to exercise garden leave. Therefore, suspending the employee by granting garden leave would mean creating a whole new labor law practice that cannot be deduced from any labor law regulations even by making far-fetched interpretations.

That being said, there is no explicit rule under Turkish law that prohibits use of the notion of garden leave if both parties, i.e. the employer and the employee, agree on this notion. This agreement can be executed as part of the employment agreement or a separate agreement. However, for evidentiary purposes, such agreement must be in writing; otherwise, it would be difficult to prove existence of the agreement on garden leave in a possible dispute.

Consequently, although Turkish law does not explicitly regulate the notion of garden leave, it does not explicitly restrict its use if both parties agree on it.

3.2. *Practices as an Alternative to Garden Leave under Turkish Law*

As explained above, Turkish law does not explicitly restrict use of the concept of garden leave if both parties agree on it. Therefore, it is possible to provide a provision in the employment agreement or execute a stand-alone agreement regarding the garden leave. In certain cases the company directives positively regulates the concept of garden leave and this could entitle the employer to use the concept of garden leave in certain cases.

That being said, there is an alternative practice that can be used, instead of garden leave under Turkish law. If the concept of garden leave is not regulated under the company directives and/or the employee's employment agreement, but the employer still wishes to cut the employee's ties with the company for a certain period of time, the employer could consider offering the employee to grant paid leave during this process without deducting these "used leave days" from the employee's annual paid leave entitlements. It must be noted that the employee's consent to such practice is a must. Because without the consent, it could be seen as executing "garden leave" under the guise of "granting leave", which could, as explained below, expose the employer to unilateral termination of the employee along with compensation claims connected thereto.

3.3. Consequences of Imposing Garden Leave under Turkish Law

There might be severe consequences of imposing garden leave on an employee despite the concept of garden leave not being regulated in the company directives and the employment agreement under Turkish law.

Considering the Turkish labor courts' tendency to favor the employee vis-à-vis the employer, due to Turkish labor law's motto to protect the weak, imposing garden leave on an employee could be labeled as an unfair and unwarranted treatment and also as violation of the employee's constitutional freedom of work due to having no legal ground in the legislation and case law, as explained above. This could give way to the interpretation that the employer *de facto* terminated employment under the guise of garden leave.

Besides that such a practice of the employer could justify "for cause unilateral termination" of the relevant employee due to being "scapegoated" with no concrete proof, especially in cases where this practice is done due to an ongoing internal investigation. This could bring a non-pecuniary compensation claim based on the distress suffered. Therefore it is advisable for the employers not to take the risk of facing these chain reactions.

4. Conclusion

As explained above, although Turkish law does not explicitly regulate the notion of garden leave, it does not explicitly restrict its use if both parties agree on it. Moreover, the company directives may provide certain provisions regarding the concept of garden leave. But if the company directives and employment agreement does not regulate the concept of garden leave at all, the employer could consider offering the employee to grant paid leave during this process without deducting these "used leave days" from the employee's annual paid leave entitlements, provided that the employee has consented so. Imposition of garden leave on an employee has severe consequences under Turkish law such as unilateral termination of the employment agreement by the employee and claims for compensation of non-pecuniary damages, etc.

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