

COMPASSIONATE LEAVE

Dr. Ulaş BAYSAL & Dr. Muhittin ASTARLI

The term “compassionate leave” is used to refer to two matters under Turkish employment law. The first one is the leave with pay that is regulated under Labor Law Additional Article 2. The second one is the leave that, despite not being regulated in the law, the employer is obliged to allow according to the principle of good faith set forth in Article 2 of Civil Code. This obligation arises out of judicial decisions.

1) What are the cases of compassionate leave under Additional Article 2 Labor Law?

According to Additional Article 2 of the 4857 numbered Labor Law, “Employee shall be allowed to take; three days leave of absence with pay in the event of employee’s marriage or adoption of a child, or in the event of the death of the employee’s mother, father, spouse, brother or sister, and child; and five days leave of absence with pay in the event of employee’s spouse giving birth (p.1). Employed parents whose child has at least seventy percent disability or chronic disease documented by a medical report, shall be allowed to take up to ten days leave of absence with pay in a year for attending the treatment of the child; on condition that leave may be taken by only one of the parents and without interruption or with segments (p.2)”. The leave of absence regulated in this article, is another circumstance where the employer has to remunerate the employee despite the employee not working, in addition to annual leave with pay, national holidays, general holiday leaves and weekends. The duration mentioned by the law refers to the minimum number of days that will be granted to the employee, it is possible for the duration to be increased by the employment contract or the collective bargaining agreement. In addition, compassionate leave must be taken at the moment of the occasion that requires the leave. If compassionate leave is not granted to the employee at the moment of the occasion, the employee will not be entitled to a right to a monetary claim, but the conditions for the employee to rightfully terminate the employment contract due to work conditions not being executed properly, will arise.

2) What are the cases of compassionate leave granted due to the principle of good faith?

In Turkish employment law, it is accepted by judicial decisions that, the employer is obliged to allow the employee a compassionate leave under some circumstances that are not worded in the law. In these cases, the employee’s discontinuation of work

will not be counted as his absence. It is seen that; judicial decisions refer to compassionate leave as a “social leave based on a legitimate excuse”. In its decisions, Court of Cassation emphasizes that, compassionate leave should not be considered within the scope of the general right to rest, as it depends on the occurrence of specific events and circumstances (Court of Cassation 9. HD. E. 2011/6774 K. 2013/13240 T. 2.5.2013). In the same light, in a decision granted in 2018, Court of Cassation ruled that decreasing the number of days of an employee’s annual leave due to the employee being on compassionate leave, among other reasons, creates a basis for rightful termination of the employment contract by the employee (Court of Cassation 9. HD. E. 2015/19319 K. 2018/12077 T. 29.5.2018).

Court of Cassation grounds the circumstances in which employees should be allowed to take a compassionate leave, on the principle of good faith regulated under Article 2 of Civil Code. According to Court of Cassation “The reasons that justify an employee’s absence are not possible to determine and limit in advance, they should be determined according to the merits of each case. Whether or not the reason for absence can be justified should be determined in accordance with the objective principle of good faith and by taking matters such as, the nature of the incident, the condition that the employee is in, the characteristics and requirements of the workplace, into consideration.” Therefore, whether or not the employee has a right to a compassionate leave will be determined by taking into consideration:

- a) The nature of the incident,
- b) The circumstances in which the employee is in,
- c) The characteristics and requirements of the workplace and traditions and in line with objective rules of the principle of good faith.

It is possible to give some examples of Court of Cassation decisions, in order to further clarify the matter. For example, in a recent decision the Court of Cassation ruled that, for the employer to state that the employee should never come back to work if he leaves now, when the employee requested to leave work early upon finding out his sister was giving birth (cesarean section), constitutes wrongful termination of the employment contract by the employer. Therefore, it is possible to say that Court of Cassation considered the absence of the employee to be justified by a valid excuse in this case (Court of Cassation 9. HD. E. 2017/6027, K. 2020/18789, T. 16.12.2020). In another case, the employee claimed to be attending a funeral and therefore was taking a compassionate leave and the witness he introduced attested to this claim. Court of Cassation expressed that, in order to determine whether or not the excuse is valid, whose funeral the employee attended to and whether or not his proximity to the deceased requires a compassionate leave, needed to be clarified (Court of Cassation 22. HD. E. 2013/2453 K. 2014/1292 T. 03.02.2014).

In the context of the abovementioned decisions, the conclusion that the employee has a right to compassionate leave when one of his close family members (mother, father, child, sibling, grandparent, grandchild etc.) have a health emergency, can

be drawn. Moreover, in cases of death, other than the death of those listed in Additional Article 2 of Labor Law (mother, father, spouse, child), for example, of relatives up to third-degree (grandparent, grandchild, uncle, aunt etc.), the employee can request compassionate leave. In this case, it is possible and appropriate for the duration of compassionate leave to be shorter than the three days determined by Additional Article 2 of Labor Law.

Apart from the circumstances listed above, in Turkish law, those summoned as witnesses to criminal courts according to Article 43 Code of Criminal Procedure, and to civil courts according to Article 245 of Code of Civil Procedure, have to be present at the court on the date and time that the court notifies. Similarly, in situations such as being summoned by law of enforcement and being appointed as expert by court, people have a legal obligation to attend to the said invitations. Therefore, in these cases the employee can ask for a compassionate leave from the employer and the employer is obligated to allow the employee to take the requested leave.

In return of the employer's obligation to grant the said compassionate leave, the employee is obligated to prove the existence of the reason for which the leave is requested. Especially, in case the employee has an official or private document regarding his reason to be excused, this needs to be presented to the employer.

For compassionate leave that needs to be granted as per the principle of good faith, the employer does not have an obligation to pay wages for the duration of the compassionate leave, to employees who work on an hourly or daily basis. However, contrary can be agreed on with the employment contract or the collective bargaining agreement. For employees who work with a fixed monthly wage, the employer is obligated to pay the relevant wage to the employee for the period of the employee's compassionate leave as well. This is because Labor Law art. 49 sets the main principle regarding fixed monthly wage in this matter, by including "employees who will be remunerated with a monthly wage even in cases of illness, absence with leave or similar reasons" in its wording.

In order to accomplish uniformity and predictability in the workplace, a human resources procedure can be prepared with regards to the cases where the employer has to grant compassionate leave due to the principle of good faith. The procedure can determine under which circumstances compassionate leave will be allowed and how the process of the leave will be carried out, in accordance with the information presented above. However, what is important here is to take Court of Cassation decisions into consideration and not making regulations that are too strict and too limiting.

For further information, please contact:



Dr. Ulaş BAYSAL

ulas@baysaldemir.com



Dr. Muhittin ASTARLI

muhittin@baysaldemir.com