

Better conditions for temporary workers

A lack of legislative framework is making things difficult for temporary workers although the labour market needs them, say Dr Melek Onaran Yüksel and Kübra Sivgin of YükselKarkinKüçük

The growth of international competition along with globalisation has had a significant effect on the labour market. These changes have caused employment policies to be reconsidered and have led to the development of new forms of employment. For the past two decades, the increasing need to provide services in a rapidly growing and flexible labour market has led to the spectacular growth of private employment agencies. Private employment agencies have complemented the traditional labour market and are expected to improve working conditions. In this context, private employment agencies play an important role in the functioning of the labour market and have paved the way for changes in employment law.

With the adoption of the Private Employment Agencies Convention of ILO 181 of 1997, private employment agencies are now recognised in the international arena. Through this Convention the ILO seeks to assist its member states to establish policies, legislation and implementing mechanisms for the effective registration

and licensing of private employment agencies, helping them play a constructive role in contributing to a labour market free from exploitative conditions. At present 20 countries have ratified ILO Convention 181. Turkey has not yet ratified this Convention.

According to ILO Convention 181, the term “private employment agency” means any natural or legal person, independent of the public authorities, that provides one or more of the following labour market services: (i) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships that may arise from them; (ii) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to as a user enterprise), assigning their tasks and supervising the execution of these tasks; or (iii) other services related to job-seeking.

In Turkey under the relevant legislation only particular types of agencies are permitted to carry out certain employment activities. In connection with this, only

private employment agencies engaged in services for matching offers of and applications for employment without becoming a party to the employment relationships that may arise are permitted. Turkey has not set up specific legislation on temporary work agencies engaged in services consisting of employing workers with a view to making them available to a user enterprise. An administrative authority, the Turkish Labour Organisation (TLO), a designated institution within the Ministry of Labour and Social Security, is responsible for enforcing legislation on private employment agencies. It is charged with monitoring the activities of private employment agencies. Before analysing the types of private employment agencies operating in Turkey, we will briefly dwell on the international regulations pertaining to private employment agencies and their activities.

A mobile market

With companies increasingly seeking more flexible and mobile staff, and with workers willing to move across borders under varied work arrangements, private recruiters have become even more important to the efficient functioning of labour markets. Against the backdrop of changing national and global labour markets, private employment agencies have steadily increased their market share and expanded their business activities. Today private employment agencies are filling a gap in the labour market, especially in job and employee seeking for both permanent and temporary employment. These agencies also provide access to training, and promote transitions in the labour market. Thus more people enter into the labour market and flexible solutions are offered to employers and employees. Agency work helps to create new jobs, which would not exist otherwise, and especially helps outsider groups such as the young, women, and older, less educated or less skilled people, to reintegrate into the labour market.

All private employment agencies, whatever the placement services they offer, have in common placement as their main activity. Despite variations in their functioning and modes of operations, private employment agencies could be defined generally as service enterprises under private law, carrying out under contract and in exchange for monetary compensation operations on behalf of individuals or companies whose aim is ease or speed up access to employment or career progression by filling a vacancy.

“Services related to human resources management require specific skills and understanding of human beings with their different needs and aspirations”

An initial role of private employment agencies is in placement. The term “intermediary” may be helpful in defining the initial functions of the private employment agencies – that is, they provide services intended to match supply and demand without being a party to the employment relationship. The outcome of this relationship is an employment contract between the worker and the employer.

A second but important function is conducting temporary agency work. Any natural or legal person recruits workers who then become legal employers. These workers are available to a third party user who supervises their work and with whom the agency has signed an assignment contract. Temporary employment agencies recruit workers and then immediately assign them to enterprises that have signed an assignment contract with them. Thus there is a triangular relationship involving two types of contract: one between the temporary employment agency and the worker and the other between the temporary employment agency and the user enterprise; legally the temporary employment agencies are considered as the employer. In other words temporary employment agencies are private employment agencies whose services consist of recruiting workers who are employees of the agency, with a view to making them available to a natural or legal third party user who assigns their tasks and supervises the execution of these tasks.

Government regulation

The ILO Convention 181 recognises that private employment agencies can contribute to the functioning of the labour market. It sets out general parameters for the regulation, placement and employment of workers recruited by private employment agencies and in particular temporary work agencies. Furthermore, the Private Employment Agencies Recommendation 188 relates to the ILO Convention 181 and provides guidance to national legislators in drafting legal frameworks in line with Convention.

According to the ILO Convention 181, a private employment agency is a service enterprise that provides services for matching offers of and applications for employment without becoming a party to the employment relationships and services consisting of employing workers with a view to making them available to a third party user.

Legislating private agencies

In 2003 the Turkish government revised

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policies that prevented private employment agencies from operating in the labour market by the enactment of the new Labour Law numbered 4857. Although Turkey has not ratified the ILO Convention 181, Turkey has also sought guidance from this Convention, and drafted its legislation in accordance with the international standards that it set forth.

Parallel to the provisions of the ILO Convention 181, the newly enacted Labour Law and the secondary legislation on private employment agencies that came into force with it, has promoted cooperation between public employment services and private employment agencies to ensure the most efficient functioning of the labour market, with the public

employment services (namely TLO) maintaining authority in formulating labour market policies.

The relevant legislation on private employment agencies that regulates the scope of operations of private employment agencies pursued in Turkey, and the requirements for establishing and operating private employment agencies are as follows:

- The Labour Law dated May 22 2003 and numbered 4857 published in the Official Gazette dated June 10 2003 and numbered 25134.
- The Law on Turkish Labour Organisation dated June 25 2003 and numbered 4904 published in the Official Gazette dated July 5 2003 and numbered 25159.

“Although the competent authorities are well aware of practices contrary to the current legislation, they choose not to act against such companies”

“The vital question in terms of temporary agency work is, who is the legal employer of the temporary agency worker?”

- The Regulation on the Private Employment Agencies published in the Official Gazette dated February 19 2004 and numbered 25378.
- The Communiqué on the Private Employment Agencies published in the Official Gazette dated August 2 2004 and numbered 25541.

These pieces of legislation regulate the private employment agencies under Turkish labour law.

The TLO, which is the competent employment authority, is empowered to determine the number of private employment agencies that shall perform the permitted employment services, taking into account the needs of the labour market and the current legislation requirements. It gives selected agencies a licence to conduct fee-charging private employment operations.

Scope of permitted services

Under the current legislation private employment agencies that are authorised by the TLO can undertake the task of acting as an intermediary in providing workers with jobs suitable for their qualifications (procuring employment for a worker) and in supplying employers with workers qualified for different kinds of jobs (Article 90 of the Labour Law and Article 17/I of the Law on the TLO).

Accordingly private employment agencies in Turkey may act as intermediaries in job search and placement – in other words they may bring together vacancies and job seekers and may not become a party to employment contracts that may arise from them. Private

employment agencies may also provide employment services incidental to the recruitment and placement of workers, such as the provision of documentation, information and statistical data required for monitoring the labour market, and vocational training and consultancy to the workers. Nevertheless the current legislation neither allows private employment agencies to act as temporary employment agencies, nor does it regulate the establishment of temporary employment agencies that recruit workers who then become legal employees with a view to making these workers available to third party users with whom the agencies have signed personnel provision agreements.

Although the present needs of the Turkish labour market may justify these activities, and such employment services are legally performed by the employment agencies in other countries, current legislation does not allow the private employment agencies to operate as temporary employment agencies. Thus private employment agencies may merely act as intermediaries in the conclusion of the employee's employment contracts.

Licensing requirements

Through the licensing system the current legislation helps to keep a record of private employment agencies. It provides not only the business addresses of those involved in the job placement market, but also information about the types of services private employment agencies offer their clients. This system is not complex and does not place unnecessary burdens on entrepreneurs. Moreover, the advantage of a compulsory licensing system is that it allows for pre-screening of the applicants' capabilities and professional experience in job placement activities.

Although private employment agencies operate as normal private businesses, the aim of the legislation was to note that activities and operations relate to people wishing to find suitable employment. Services related to human resources management, unlike other private businesses such as brokerage services, require specific skills and understanding of human beings with their different needs and aspirations. Thus, private employment agencies are a special category of private business. They should operate through a licensing system to avoid malpractice and abuse.

Pursuant to the current legislation, real persons or legal persons may establish private employment agencies. If it is envisaged that a

legal entity will operate a private employment agency, then the company must first be incorporated. According to the current legislation private employment agencies are operated by joint stock companies, limited companies, commandite companies, or collective companies incorporated in accordance with the provisions of the Turkish Commercial Code.

Private employment agencies must possess a three-year licence to act as an intermediary in the conclusion of the employees' labour contracts, obtained from the TLO (Article 6 of the Law on the TLO). The TLO will renew the licence for another three-year period, upon the realisation of the requirements set forth under the Law on the TLO. The request regarding the renewal of a licence shall be rejected in the absence of certain conditions and requirements. Pursuant to Article 17, second paragraph of the Law on the TLO, real person applicants and those authorised to administer, represent and bind legal entity applicants, applying for a licence to operate a private employment agency, must fulfil certain conditions, such as being a Turkish citizen and having at least an undergraduate degree. They must not have gone bankrupt or entered into debt rescheduling arrangements with creditors. They must not have been sentenced to imprisonment for more than six months, even if they have been released through amnesty. They must not have been sentenced for committing crime against the government of Turkey or any crimes listed in the Turkish Penal Code such as fraud in official auctions and purchase-sales, money laundering, disclosure of governmental secrets or tax crimes. Furthermore, the private employment agency must have a proper administration system, qualified staff, technical equipment and a workplace are adequate and proper to render intermediary services. It must submit a letter of guarantee and pay other expenses required under the current legislation.

An application to the Provincial Directorate of the TLO at the place where the headquarters of the private employment agency shall be located is also required, together with documentation, such as the application petition for obtaining the licence to operate a private employment agency; a copy of the undergraduate certificates of the authorised representatives or real person applicants; the document issued by the trade registry or the commercial court showing that the real person applicant or the authorised representative(s) of the legal entity applicant have not gone bankrupt or

entered into debt rescheduling arrangements; an unconditional letter of guarantee issued by any Turkish bank or financial institution; and other documentation and information required by the TLO. Applications shall be evaluated by the TLO in line with the principles and procedures of the current legislation. The TLO may also inspect the workplace of the private employment agency before granting the licence.

Under the current legislation regulating the operation of private employment agencies in Turkey, save for the exceptional cases described below, private employment agencies cannot charge directly or indirectly any fees or costs to job seekers (employees) for their intermediary services. However, in respect of certain categories of employees (for example, top managers or executive employees) and certain types of professions (for example, professional football players, football coaches, models, and actors) specified in the regulation, the agencies may also charge the workers.

Private employment agencies may also operate through the internet on the condition that they have informed the TLO and have fulfilled the requirements set forth in the legislation. In this case, the agencies shall declare on their website the

date and number of their licences, and shall state that no charge will be sought from job seekers. The agencies may publish advertisements in their websites as well.

A licence holder may open up a branch in the same province or in another province, provided that the fees required for the opening are deposited with the TLO, and the resumés of the branch manager and the qualifications of the personnel employed in the branch, the inventory list of the branch and documents showing the branch has an appropriate workplace to perform the intermediary services, are submitted to the TLO.

Temporary work in Turkey

This employment paradigm is based on a triangular relationship between user, employer and the temporary work agency, which mediates between employee and user enterprise. In the current legislation, private employment agencies may not conduct temporary agency work in Turkey. However, the necessities of the Turkish labour market necessitate temporary agency work, and temporary agency work has become institutionalised in the labour market. It operates in the form of consulting firms or private employment agencies. Such firms exist despite the

absence of any legislative basis. At present, competent authorities (namely the TLO) place no restrictions on the activities of private employment agencies that act as temporary employment agencies as well.

Although commercial players in the labour market have developed the mechanisms that perfect this model, such employment paradigms are confronted with various legal obstacles due to their lack of legislative basis. Employment issues arising from this triangular employment relationship are mainly resolved before the labour courts where the legitimacy of this form of employment and the legal status and rights of the parties concerned are determined.

The provision in the draft of the recently enacted Labour Law regulating temporary agency work was removed before the enactment of the Labour Law due to the attempts of the labour unions to obstruct this form of employment. But it would not be wrong to state that the Turkish labour market is in the process of a legal change that could pave the way for adopting statutory regulations on temporary agency activities. Although there is presently a *de facto* practice contrary to the current legislation, the competent authorities are well aware of such practice; nonetheless

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they choose not to act against such companies. Based on the information provided in the website of the TLO, at present 224 private employment agencies have obtained a licence and are operating in Turkey. Most of the companies that supply manpower are operating as temporary work agencies as well.

As derived from the precedents of the first instance labour courts and the Court of Appeals, judges have tended not to recognise the triangular relationship as legitimate in the absence of any legal basis and have concluded that the legal employer was the user enterprise not the temporary employment agency. Thus the vital question in terms of temporary agency work is, who is the legal employer of the temporary agency worker? On what basis is the employee employed? The situation can be ambiguous. The aim of the courts is to safeguard the rights of the employees. The temporary agency worker has the status of a permanent employee in the user company, which in turn should accept the full responsibility as its principal employer. Scholarly opinions recognise the user party as the worker's sole employer when this is actually the case, or at least the co-employer together with the temporary work agency.

In the absence of any legal basis, employees recruited by temporary employment agencies to be made available to third party users are open to exploitation (low wages, inadequate social rights, discrimination). The anticipated law needs to bring about sound and safe provisions for this form of employment. It would be advisable to benefit from the experience of European countries that have already enacted legislation on temporary employment agencies.

EU labour market

The EU has opened its doors to temporary agency work and temporary employment agencies play a key role in achieving the

EU's objectives. According to data of the European Confederation of Private Employment Agencies (Euro CIETT), private employment agencies are well-regulated labour market intermediaries employing 3.3 million workers in Europe through their network of 30,000 branches. They improve the labour market efficiency and increase participation and diversity in employment. Private employment agencies contribute substantially to reaching the Lisbon objectives by integrating more people into employment, providing more flexible labour solutions demanded by jobseekers and companies and helping to create jobs that would otherwise not exist.

The EU labour market is a model for the services provided by private employment agencies in the labour market. This model can be adapted to national labour market needs and the demands of companies and workers. Such tailor-made approaches to the use of private employment agencies as labour market intermediaries should respect the freedom of negotiation of the agency work industry, and should not include discriminatory measures against the agency work industry. In many EU member states students increasingly use temporary agency work to earn additional income and acquire professional experience.

The Euro CIETT is the authoritative voice representing the interests of agency work businesses in Europe. It is the social partner for the temporary agency work sector. It also brings together the 25 national federations of private employment agencies. Turkey has recently joined the Euro Ciett. Thus, the Turkish Association on Private Employment Agencies (OIBD, *Özel İstihdam Büroları Derneği* in Turkish) has become a Euro Ciett member. The Euro Ciett General Assembly held on October 25 2007 ratified this decision.

OIBD was established in 2004 and private employment agencies that are active

in Turkey are members of the association. Services provided by the member agencies include temporary agency work, permanent recruitment, outplacement, vocational training, interim management, staff leasing, payroll services and executive search. As a trade organisation, OIBD's main objectives are to advocate for a better recognition of the positive role of private employment agencies in the Turkish labour market and to try to bring about the adoption of legislation on temporary agency work to regulate the industry. In the last progress report issued by the European Commission regarding Turkey, it was noted that labour laws are pending, and there are employment policy issues that need to be resolved by the Turkish legislators. In the latest government programme, the Turkish government declared that changes have been planned in the Labour Law, which would include the regulation of temporary agency work.

There is a clear need for the expansion of employment through temporary agency work in the Turkish labour market. However, so far labour unions have not supported this employment pattern. The Turkish legislator is aware of the inferior status of temporary work agency workers in the labour market and the tendency of employers to use this form of employment to circumvent collective agreements and predetermined working conditions under the guise of managerial flexibility. It is aware of the need to put into force a law that safeguards workers' rights in all aspects of employment.

In the wake of the EU accession process and the growth of the temporary agency segment in the labour market, legislation needs to be changed to cover temporary agency work to protect labour conditions and provide social security provisions to temporary agency workers. Otherwise the growth of illegal intermediaries in this form of employment without any legitimate basis will have adverse affects on employment relationships and may stand as a barrier to EU accession.

The growing demand for more efficient utilisation of human resources coupled with the needs of the labour market, the need to permit private employment agencies to act as temporary employment agencies, and the need to change the legislation to that effect are unavoidable. Until the legislation is changed, private employment agencies undertaking services similar to temporary employment agencies will still be deemed as conducting illegal activities in the view of the current legislation.

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