L&E GLOBAL

an alliance of employers' counsel worldwide


# Employment Litigation: Procedures, Remedies and Best Practices

An L&E GLOBAL Publication

2016

L&E GLOBAL

an alliance of employers' counsel worldwide

# Employment Litigation: Procedures, Remedies and Best Practices

L&E GLOBAL
an alliance of employers' counsel worldwide

**L&E GLOBAL** is an international alliance of law firms, which provide counsel to employers on labour relations, employment law, immigration law and employee benefits.

L&E Global's client service strategy is effectively responding to economic challenges and changing client expectations, as well as the internationalization of legal services by delivering simplified attorney-client relationships in regards to billing, and overall advice and counsel, by offering clients a one-stop shop for all of their employment law needs.

L&E Global has 21 international members and more than 1,500 attorneys across 5 continents with firms in Australia, Austria, Belgium, Brazil, Canada, China, France, Germany, India, Italy, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland and the United States.

In addition, L&E Global has established reciprocal associated partnerships in more than 30 other important international business regions - such as those found in Colombia, Japan, and the United Kingdom.

By aligning their forces together, through L&E Global, these independent law firms become a single legal powerhouse for businesses working on complex cross-border labour and employment projects throughout the world.

Through one point of contact – L&E Global – businesses have all the information they need to manage their workforce affairs efficiently, with trustworthy advice from labour and employment law leaders from around the world.

L&E Global… A strong and reliable alliance that works for you, wherever you are, across the globe.

For more information about L&E Global please visit our website at www.leglobal.org or contact us:

**L&E Global**
Avenue Louise 221
B 1050 Brussels
Belgium
T +32 2 64 32 633
E leglobal@leglobal.org

# Contributors


## Argentina
**MBB Balado Bevilacqua Abogados**
María de las Mercedes Balado Bevilacqua
mercedes.balado@baladolaw.com.ar

## Australia
**Harmers Workplace Lawyers**
Michael Harmer
michael.harmer@harmers.com.au
Greg Robertson
greg.robertson@harmers.com.au

## Austria
**Gerlach Rechtsanwälte**
Roland Gerlach
roland.gerlach@arbeitsrecht.at
Markus Löscher
markus.loescher@arbeitsrecht.at

## Belgium
**Van Olmen & Wynant**
Chris Van Olmen
chris.van.olmen@vow.be
Esther Soetens
esther.soetens@vow.be

## Brazil
**TozziniFreire Advogados**
Mihoko Sirley Kimura
mkimura@tozzinifreire.com.br

## Canada
**Filion Wakely Thorup Angeletti**
Robert B. Bayne
robertb@filion.on.ca
Jonathan Dye
jdye@filion.on.ca

## China
**Zhong Lun Law Firm**
Carol Zhu
carol.zhu@zhonglun.com
Alice Xu
alice.xu@zhonglun.com

## Colombia
**Posse Herrera Ruiz**
Cristina Caballero
cristina.caballero@phrlegal.com
Carolina Camacho
carolina.camacho@phrlegal.com

## Denmark
**Labora Legal**
Anne Kathrine Schøn
aks@laboralegal.com
Nina Wedsted
nw@laboralegal.com
Catrine Søndergaard Byrne
csb@laboralegal.com

## France
**Flichy Grangé Avocats**
Florence Aubonnet
aubonnet@flichy.com

## Germany
Pusch Wahlig Legal
Dr. Kara Preedy
preedy@pwlegal.net
Meike Christine Rehner
rehner@pwlegal.net

### India
**IndusLaw**
Avik Biswas
avik.biswas@induslaw.com
Jaya Shruthi Reddy
jaya.shruthi@induslaw.com
Shrutika Umarji
shrutika.umarji@induslaw.com

### Italy
**LABLAW – Studio Legale**
Sharon Reilly
s.reilly@lablaw.com
Marco Tesoro
m.tesoro@lablaw.com

### Japan
**Nijubashi Partners**
Akiko Monden
a-monden@nijubashilaw.com

### Mexico
**Natividad Abogados**
Tomas Natividad Galeana
tommnat@natividad-abogados.com.mx
Alejandra Cravioto Gutierrez
alejandra.cravioto@natividad-abogados.com.mx

### The Netherlands
**Palthe Oberman**
Christiaan Oberman
oberman@paltheoberman.nl
Karol Hillebrandt
hillebrandt@paltheoberman.nl
Simone Drost
drost@paltheoberman.nl

### New Zealand
**SBM Legal**
Penny Swarbrick
penny@sbmlegal.co.nz
Matt McGoldrick
matthew@sbmlegal.co.nz

### Norway
**Storeng, Beck & Due Lund ANS (SBDL)**
Thomas Braut Svendsen
thomas@sbdl.no
Marianne Gjerstad
marianne.gjerstad@sbdl.no

### Poland
**A. Sobczyk & Współpracownicy**
Arkadiusz Sobczyk
arkadiusz.sobczyk@sobczyk.com.pl
Janusz Zagrobelny
janusz.zagrobelny@sobczyk.com.pl

### Portugal
**Morais Leitão, Galvão Teles, Soares da Silva & Associados**
Helena Tapp Barroso
htb@mlgts.pt

### Romania
**Magda Volonciu & Asociatii**
Magda Volonciu
magdavolonciu@volonciu.ro
Ștefania Stanciu
stefaniastanciu@volonciu.ro

### Spain
**Bufete Suárez de Vivero**
Iván Suárez
isuarez@bufetesuarez.com

### Sweden
**Hamilton Advokatbyrå**
Fredrika Skoog
fredrika.skoog@hamilton.se
Sara Ejdeskog
sara.ejdeskog@hamilton.se

### Switzerland
**Humbert Heinzen Lerch**
André Lerch
lerch@hhl-law.ch

### United Arab Emirates
**Clyde & Co.**
Rebecca Ford
rebecca.ford@clydeco.ae
Sara Khoja
sara.khoja@clydeco.ae

### United Kingdom (England & Wales)
**Clyde & Co**
Nick Dent
nick.dent@clydeco.com

### United States
**Jackson Lewis P.C.**
John L. Sander
john.sander@jacksonlewis.com
Linda Otaigbe
linda.otaigbe@jacksonlewis.com

### European Union
**Van Olmen & Wynant**
Stéphane Baltazar
stephane.baltazar@vow.be
Gautier Busschaert
gautier.busschaert@vow.be

# Table of Contents

# INTRODUCTION

For employers with operations in multiple jurisdictions, litigation over disputes related to employment matters is a very real concern, which applies to every sector of industry, in every region of the world.

## EMPLOYMENT LITIGATION

Typical points of contention include discrimination, harassment, wage and hour violations, wrongful dismissal, breach of contract, as well as safety in the workplace violations, amongst others. However, while the issues that give rise to such claims are similar, the litigation process is unique to each jurisdiction. For instance, Australia, Colombia, France, Sweden, the United Arab Emirates and the United Kingdom have designated specialized employment tribunals to oversee employment law claims. Conversely, in the United States and Canada, specialized employment courts simply do not exist. Correspondingly, a dedicated labour and employment bar does not exist in China, India or Japan, though there are of course attorneys in those jurisdictions who specialize in that field. Moreover, some countries, such as Belgium and Germany, have different proceedings concerning individual claims arising out of an employment relationship and proceedings concerning the relationship between the employer and other employee representatives (e.g. works councils), referred to as 'collective disputes'. This distinction is important, as different procedural rules apply to each type of proceeding.

## EUROPEAN UNION

To further complicate matters, employers with personnel inside the European Union are required to follow the laws of the Member States, EU regulations, and decisions of the Court of Justice of the European Union (CJEU), since EU law takes precedence over national laws. The litigation process for issues involving European Union directives is quite complex. Essentially, the procedure to challenge a European Union directive requires a national court to question the CJEU on the interpretation or validity of the law. The reference for a preliminary ruling promotes active cooperation between the national courts and the CJEU and the uniform application of EU law throughout the EU. Here too, there is an important distinction regarding the party that may request the preliminary ruling. For example, most employers would fall under the category of private litigants or non-preferential plaintiffs (anyone other than Member States, the Commission, the European Parliament and the Council) and must demonstrate an interest in the outcome of the claim in order to request the annulment of a European act. In other words, the contested act must be addressed to the plaintiff or must concern him or her directly.

## ADR

Employers and employees faced with a long, drawn-out court battle, often utilize alternative dispute resolution (ADR) procedures to resolve the claim. The most popular forms of ADR include mediation, conciliation hearings and arbitration. ADR also varies greatly by region. In Argentina (specifically within the City of Buenos Aires), Norway, Romania and Switzerland, the law establishes a mandatory conciliation procedure before a claim can be filed with the courts. Following the conciliation hearings, mediation and arbitration remain available to both parties in order to resolve the issue before resorting to litigation. Over the years, mediation has become a popular alternative to resolve employment law disputes, especially in the United States, given the time, expense and potentially negative exposure of litigation. Meanwhile, mediation is rarely used in Brazil, except in conflicts related to collective bargaining.

## APPEALS

Similarly, while all jurisdictions allow for some level of appellate review, the laws governing this procedure are extremely precise and detail everything from whether the

decision can be appealed on points of fact or law, which party may appeal, the time frame to appeal, the required credentials for the attorney handling the appeal, as well as which decisions are indeed final and cannot be appealed.

## TIPS

Defending a lawsuit can be time consuming, very expensive and can negatively impact the morale of the workforce, the company's public relations image as well as the company's financial stability. Therefore, the central pillars to avoid litigation or minimize the impact of litigation on the employer's business are: knowledge of the applicable legal sources which affect the individual employment relationship, a clear contractual basis for the individual agreements, and efficient dispute-management and documentation. The following 'best practice' policies are recommended for employers:

- draft complete and precise contracts, have them reviewed by an attorney and update them on a regular basis so they are in line with applicable legislation;
- create a proper personnel file for each employee and document shortcomings with written evidence and implement evaluation procedures;
- define work expectations and communicate with the employees and allow them - to the extent possible - participate in decisions that affect them;
- where applicable, invest in social dialogue with the works council, the trade union delegation and the unions to avoid collective labor disputes or to have them settled promptly;
- seek legal advice at an early stage of a conflict or even before a problem arises;
- evaluate whether it may be preferable to settle the case out-of-court by means of a settlement agreement.

As indicated above, there are numerous scenarios, procedures and considerations involved in employment litigation and several ways an employer can minimize the risk of litigation. For these reasons, L&E Global has created this international guide in order to provide our members' clients, HR professionals and academics an introductory analysis of the litigation process throughout the globe.

For more information on the law in a particular L&E Global member country please contact:

**Stephan C. Swinkels**
Executive Director | Member of the Board, L&E Global
Avenue Louise 221
B 1050 Brussels
Belgium
T +32 2 64 32 633
M +31 6 523 25 531
E stephan.swinkels@leglobal.org
W www.leglobal.org

# PORTUGAL

## I. Overview

### a. Introduction

Labour procedure in the Portuguese jurisdiction is its own special branch, independent from general civil procedure. This specialization is in line with the specific nature of most of the labour law rules and principles, which apply in the context of both the individual employment relationship and the collective agreement level.

In this later context, it is important to note the relative weight that trade unions have in Portugal, particularly in business areas that are heavily regulated by collective bargaining agreements. As far as employment litigation is concerned, trade unions are entitled to file suits whenever the claims involve collective interests within the unions' scope of activity and in representation and substitution of affiliated employees, against breaches of individual employee rights or guarantees undertaken by employers on a general basis, affecting union representatives or union members. The same applies to other employee representative structures (as is the case of employee work councils).

The labour court judge is granted broader powers than those exercised by judges in general civil or commercial courts, to decide beyond the specific terms of the claim which, to a certain extent, reflects the fact that a relevant number of existing labour law rules are of a protective nature towards the employees and have the intention of creating legal mechanisms to level the power imbalance between employers and employees.

A distinctive feature of labour and employment litigation in the Portuguese legislative system which should also be signalled is the fact that most procedures comprise of a preliminary conciliation stage, following the filing of a claim and before the defendant is required to submit the response (and counter claim, if any).

### b. Claims

Portuguese law recognises a variety of claims of a different nature, which explains the procedural division between common and special procedures (explained further in chapter II (The Litigation Process) below).

A number of litigation procedures are qualified as urgent, having priority over the regular labour procedures. Examples of urgent procedures are those connected with work accidents and with claims against employee dismissals (both individual and collective dismissals).

Most litigation dealt with by labour courts arises from individual employment disputes, namely those which concern work accidents and professional illnesses and employment contract disputes, such as claims arising from disciplinary procedures and claims against contract dismissal. A number of claims also concern the qualification of existing contractual relationships as employment relationships (as opposed to independent professional activities or businesses). This has significantly increased in the last two years due to a new type of special judicial procedure that was introduced in Portugal in September, 2013, with the purpose of reducing the cases of employees formally imposing self-employed hiring alternatives on job candidates as a way to elude the application of statutory labour law principles and rules.

Other collective labour disputes involving collective employee representation structures or entities and employers (or employer representative associations) can translate into disputes arising from collective bargaining agreements and their interpretation, or conflicts which derive from specific collective action tools, such as strikes and civil liability originating from their illegal use. Nevertheless, collective conflict claims are less common as there seems to be certain reluctance from trade unions and other employee representative structures to resort to the courts in such cases.

Certain employer conduct, such as the failure to comply with labour regulation, is sanctioned with fines by means of an administrative process conducted by the relevant labour authority. Litigation frequently follows an administrative procedure that results in the application of fines; however, the law entitles defendants to appeal decisions of the labour courts that impose such fines.

Finally, a number of labour law provisions are covered by criminal sanctions (for example, employer lock-out or qualified disobedience). Labour courts, however, do not have jurisdiction over criminal matters, even when they arise from labour law issues. These are dealt with by the criminal courts.

### c. Administrative Agencies that Investigate or Adjudicate Claims

The two main administrative agencies, which have jurisdiction to investigate and adjudicate claims involving labour or labour connected misdemeanours, are:

- the Autoridade para as Condições de Trabalho (ACT) [the Authority for Work Conditions]; and
- the Instituto da Segurança Social (ISS) [the Social Security Institute].

ACT's mission is to promote the improvement of labour conditions by monitoring compliance with labour regulations and controlling respect for applicable legal rules and principles on safety and health in the workplace. The ACT is also responsible for promoting policies that prevent professional risks.

The ACT has powers to investigate labour misdemeanours and to decide upon the application of both fines and accessory sanctions (for example, employers' temporary activity suspension). The ACT is also empowered to investigate situations where an activity is being carried out as self-employment, but where there is some evidence that the situation should be properly qualified as an employment relationship subject to labour protective laws. The special procedure introduced in September 2013, as mentioned above, created a special jurisdiction for claims before the labour courts, which seek the recognition of an employment relationship in place of an existing self-employment relationship. Such claims are originated by inspective actions conducted by the ACT.

The ACT is also empowered to investigate, in cooperation with the Public Prosecution Office, labour crimes, which may be connected to labour misdemeanour cases. However, as previously mentioned, such crimes do not fall within the jurisdiction of the labour courts.

The ISS's mission is to manage social security systems (unemployment, sickness pay, retirement pensions, parental leave pays, and funding for the treatment, recovery, and reparation of illnesses or disability resulting from professional risks).

The ISS has jurisdiction to investigate and adjudicate fines or accessory penalties in the context of misdemeanour responsibility within the social security system and rules.

Another agency could also be mentioned, that being the Comissão para a Igualdade no Trabalho e no Emprego (CITE) [Commission for Equal Rights in Labour and Employment].

The mission of the CITE is to pursue equal rights and opportunities between men and women, and to avoid gender discrimination in employment and in professional training. It is responsible for ensuring respect for legal and collective agreement provisions on this subject matter, as well as all issues generally relating to the protection of parenthood and the conciliation between professional activity and family and personal life, in all sectors of activity.

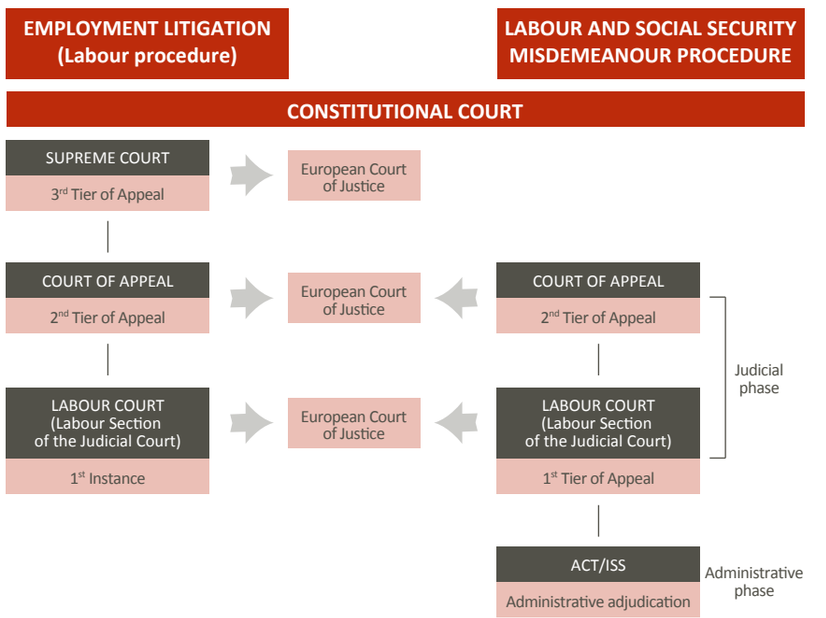




The CITE cannot adjudicate claims, but it must be consulted in cases that fall within the scope of the agency's mission and activity. For example, employers must consult CITE prior to dismissing a pregnant employee or an employee who is breastfeeding or who has recently given birth. In such cases, if upon consultation, CITE issues an opinion contrary to dismissal, the employer will only be allowed to move forward with the dismissal after having obtained recognition from the labour courts, through a special judicial procedure, that the dismissal was not discriminatory and that there is, indeed, due grounds to proceed with the employee's dismissal.

### d. Court / Tribunal System

#### THE PORTUGUESE COURT SYSTEM




The Portuguese Court System is divided between the lower courts (judicial courts) – Tribunais Judiciais – and two levels of higher courts: the Courts of Appeal and the Supreme Court. There are five Courts of Appeal – Tribunais da Relação – and their competence is territory based. The Supreme Court (Supremo Tribunal de Justiça) is a final appeal court (except where constitutional issues arise, in which case further appeal to the Constitutional Court will be admissible), although third tier appeals are limited. The Supreme Court has nationwide jurisdiction.

Within the labour jurisdiction litigation, there is a stark difference between litigation involving civil labour conflicts and those that arise from procedures regarding labour and social security misdemeanours.

As far as the **civil labour conflicts** are concerned, disputes are initiated by the relevant claim being entered by the plaintiff in the labour sections of lower courts, in their role

as first tier courts in the judicial hierarchy. Appeals from rulings granted by the labour sections of the judicial courts (the labour courts) to the 2nd tier appeal courts are subject to specific rules, which will be further discussed below in chapter II. The possibility of further appeals (from the appeal decision) being brought before the Supreme Court is limited to certain cases and lawsuit values, but are, in any case, not permitted when the appeal decision of the Court of Appeals fundamentally coincides with the decision of the Labour Court in the 1st instance.

Somewhat different is the structure in the case of litigation following **labour and social security misdemeanour** administrative procedures investigated by the labour and social security authorities that have authority to apply fines and accessory sanction measures. In this case, the judicial procedure is always preceded by an administrative phase. As mentioned above, both the ACT and the ISS, each in their own sphere of action, investigate misdemeanour cases and have powers to impose both fines and accessory measures resulting from such investigation. Misdemeanour decisions issued by either administrative agency imposing fines or other sanctions may be appealed to the Labour Sections of the Judicial Courts (the Labour Courts). When filed, the appeal is subject to payment of a judicial fee. The appealing defendant may choose to deposit the amount of the awarded fine in escrow to ensure that the administrative decision sees its effects suspended.

If issues arise involving a discussion on the application of a specific legal provision resulting on the breach of a constitutional principle or rule provided for in the Portuguese Constitution or the adherence of the interpretation of local law provisions to European law principles at any level of litigation, the Court may suspend the process and send the specific question to the Constitutional Court or to the European Court of Justice, respectively, for a preliminary ruling.

Appeals to the Constitutional Court are generally admissible whenever the lawsuit (or appeal) decision refuses to apply a specific legal provision on the basis that it does not comply with a provision contained in the Constitution or whenever the decision is based on one or more provisions which compatibility with constitutional provisions has been the object of discussion in the relevant lawsuit.

## e. Alternative Dispute Resolution (ADR)

The Portuguese Labour Code specifically rules the recourse to arbitration as alternative dispute resolution mechanism for issues arising from collective bargaining agreement interpretation and application and conflicts on the definition of the scope of minimal services in case of strike in essential or prime social need service or business areas (or minimal services to guarantee safety and maintenance requirements).
Collective conflicts

### *i. Negotiation*

Every so often, the parties, employers, and employees or employee representative bodies, may reach an agreement through direct negotiation. Most of the time, negotiation is the key to closing off new collective bargaining agreements or their revision.

### *ii. Conciliation*

Conciliation is a particular form of negotiation, that is provided for in the context of collective agreement negotiations, where new agreements or revised agreements are not reached after the negotiation activity has been initiated and has led to a negotiation deadlock or inconclusive results. In such cases, the responsible ministry of labour is called upon by one of the negotiating parties to facilitate further negotiation rounds.





Conciliation may be called upon by either (or both) negotiating parties if, for instance, no response has been received from one of the parties to the other party's formal proposal of a new collective bargaining agreement or a revision proposal. The goal of this alternative mechanism is to bring the parties closer in order to reach an agreement. Throughout this process the conciliator plays an active role, including with the presentation of possible solutions for deadlock or deal breaker issues.

### *iii. Mediation*

The mediation is structured as an additional stage to the conciliation. Like with conciliations, mediations may be requested by any of the parties involved in the collective agreement negotiation procedure. A mediator from the competent service of the responsible ministry of labour, prepares an agreement proposal or recommendation which should reflect a balance between the interests and positions of each of the parties involved. The mediator may request information from the parties or from State departments if necessary. The parties have the ability to approve or decline the mediator's proposal, and refusal is assumed if no response is given. If the mediator's proposal is accepted by both parties, the parties will be required to sign the corresponding collective convention (new or revised).

### *iv. Arbitration*

Voluntary arbitration is available to parties for the resolution of any labour disputes related to the interpretation, integration, and application of collective bargaining agreement provisions. Each party appoints one arbitrator, who will, in turn, designate a third arbitrator.

Arbitration is mandatory in the following three cases:

- in the case of frustrated negotiations of a first collective bargaining agreement (in which negotiation, conciliation, and mediation have failed), where a voluntary arbitration was not possible due to one of the parties having acted in bad faith and subject to prior consultation with the Permanent Commission of Social Dialogue (consultation body that includes representatives from unions and from employer federations);
- in cases where the Permanent Commission of Social Dialogue issues a recommendation, approved by the majority of its members, for mandatory arbitration to be adopted for resolution of disputes in the context of collective bargaining agreement negotiations or revision; or
- by ministerial initiative (employment ministry), after consultation with the above mentioned Commission in the case of conflicts related to the negotiation or revision of collective bargaining agreements involving areas that render essential services involving the protection of peoples' life, health or security.

The resource to mandatory arbitration may additionally be determined for resolution of conflicts in the context of collective bargaining agreement negotiation or renegotiation, by decision issued by the employment ministry, following request of either of the negotiating parties, and in cases where a previous existing collective bargaining agreement has elapsed and a new agreement has not been put in place for 12 months of more and provided no other bargaining agreement applies to at least 50% of the employees of the same company, group of companies, or business activity.

In all cases of arbitration, the decision binds the parties and produces the same effect as a collective bargaining agreement.

**Individual Conflicts**

Alternative Dispute Resolution mechanisms are also provided for in the context of individual conflicts. However, arbitration in the case of an individual conflict is slightly different from arbitration in the case of collective conflicts. The principle of resorting to voluntary arbitration for individual employment conflicts is admitted, as a principle, but there is no specific legislation on arbitration for this purpose in Portugal and the general arbitration law (dated 2011) establishes that labour conflicts arising in connection with individual employment agreements will be subject to specific legal provisions. Nevertheless, the general arbitration provisions do not exclude the possibility of labour issues being brought to voluntary arbitration by the parties, provided the issues under discussion are limited to employee disposable rights and entitlements. This is, not at all, the current practice.

## II. The Litigation Process

### a. Typical Case

The Portuguese Code of Labour Litigation Procedure foresees two major types of procedures: a) the Common Procedure and b) different Special Procedures. Additionally, the Code also provides special injunctions for labour related issues (these include, among others, measures for temporary suspension of employee dismissal and urgent preventive measures towards health and safety at the workplace).

One of the different types of Special Procedures must be adopted for specific litigation issues and claims for which a specific procedure structure is expressly foreseen by law. All other non-typified claims of a labour or employment nature (i.e. for which no special procedure is provided for) will follow the, so called, Common (or ordinary) Procedure structure model. This means that when preparing to file a claim in the Portuguese labour courts one must first check whether the plaintiff is pursuing a typified claim or judicial measure for which a special procedure model applies – in which case that should be the specific type of lawsuit to adopt – or not – in which case the common procedure rules and labour lawsuit structure will be applicable.

The following typical claims have special procedure rules that qualify as Special Procedure cases:

- Challenges of the lawfulness of an individual employee dismissal;
- Actions arising from work related accidents and professional diseases;
- Challenges of collective dismissal measures;
- Claims relating to the institutions of social security, family allowance, trade union organisations, employers' associations, and workers' commissions;
- Challenges (by employee representative structures) of a confidential nature of information provided by employer (for representative consultation purposes) or of refusal (by employer) to provide information to representative structures (or to consult structures on same information);
- Judicial measures for protection of employee's personality rights;
- Judicial measures towards equality and non-discrimination on the basis of gender; and
- Recognition of the existence of an employment contract.

The structure of the special procedure cases typically differs from the standard procedure described below. Examples of these differences may be found, for instance, in the special lawsuit that must be filed when challenging a collective dismissal (in which the expert evidence is produced in a preliminary stage prior to the main hearing) and in the special action for the recognition of the existence of an employment contract (where the procedure starts with the filing of a participation addressed by the Portuguese





employment authority, to the public attorney's office, reporting the "suspicion" of false self-employed case being the public attorney (and not the potentially interested party/employee who may actually not even intervene in the lawsuit, if he/she chooses so) the one filing the petition.

***i. Steps in the Process***

The Common or ordinary type of Procedure is structured on the basis of the following stages: a) Claim Filing (Court seizing); b) Conciliation Hearing; c) Defence / Response [and Counter claim] Filing; d) Preliminary Hearing [optional]; e) Final Hearing, e) Judgment; and f) Appeal(s) [depending on the nature and value of the claims].

***ii. Pretrial Proceedings***

**Claim Filing (Seizing the Court)**

The proceedings start with the filing of an initial application/petition by the claimant containing a written submission describing the facts on which the claim is based, detailing the nature of the claim(s) and its (their) monetary evaluation. This, and all other procedural protocol, is submitted electronically on a specific platform to which lawyers and courts have access and on which all written submissions, seizures notifications, and all other process information which is served and available.

It is important to note that the evidence that the claimant intends to present must, as a rule, be listed in this petition (provided or requested, in the case of documents), including the witness list (although this may be changed up to 21 days before the trial starts), subject to a maximum of 10 witnesses.

The defendant is then summoned to a conciliation hearing together with the claimant, in presence of the judge. A copy of the petition is provided to the defendant beforehand.

**Conciliation Hearing**

This hearing starts with each party briefly presenting a summary of their claims, after which the judge will encourage the parties to reach an agreement.

If no agreement is reached, the judge fixes the date for the final hearing and instructs the Court to immediately notify the defendant to present his/her defence and counterclaim (if any) within 10 days following the conciliation. In specifically complex claims, or very extensive ones, the defendant may request that an additional 10 days are granted to prepare and submit the defence. Sometimes the parties are not able to reach an agreement at the conciliation hearing but wish to have some additional time to conclude an ongoing negotiation. In such cases, an agreement may be reached to temporarily suspend the process or to adjourn the conciliation session and fix a new date to continue the session.

**Defence / Response [and Counter claim] Filing**

Once the defence is received by the court and the claimant, the claimant is granted 10 days to respond to any preliminary or formal process issues included in the defence or 15 days when a counterclaim is presented. If no such matters are included in the defence, the claimant will not have a right to respond to the defence.

After the presentation of these documents, the parties may only submit new written documents to bring forward supervening facts which constitute new rights or which modify or extinguish any of the rights already in discussion.

**Preliminary Hearing (optional)**

Following the previous stages, the judge invites the parties to perfect or remedy deficiencies that the claims or responses may have and, if the complexity of the cause so demands, convenes the parties for a preliminary hearing. When a preliminary hearing is convened, the date of the final hearing may be postponed.

***iii. Role of Witnesses, Counsel and Court / Tribunal***

**Final Hearing**

In the final hearing, the case is typically presented to one judge. If the decision is susceptible to appeal, the parties may request the recording of the audience and this will allow the appeal to cover evidence of proven and unproven factual issues.

Before the hearing actually starts, the judge will make a final attempt to reconcile the parties, and if this is unsuccessful, the final hearing promptly commences.

As the claims and pleas have been presented in the documents aforementioned, the hearing starts with the presentation of evidence, namely, the hearing of witnesses.

As a general rule, each party must prove the assertions beneficial to their own position. However, there are a few exceptions to this rule and the burden of proof can be lightened for the employee or inverted in his/her favour, such as in cases of discrimination in the workplace or recognition of the existence of an employment contract.

After all the evidence has been presented, the floor is given to the claimant's lawyer, followed by the defendant's lawyer, to plead their case one last time. Each party will be granted a maximum of one hour.

**Judgment**

If the question at hand is particularly simple, the final decision may be delivered right after the final pleadings of each party. In this case, differently to the civil procedure, the final decision can be delivered in a summarized manner, without all the required formalities.

If this is not the case, the court's final decision has to be delivered within the 20 days following the final hearing, and it must obey the formalities set out in the civil procedure code, which includes the need to identify the parties in litigation and the object of their discussion, listing the legal issues that the court was called to decide upon. The decision must then list the facts under discussion that the court considered to have been proven and the legal principles and rules based on which the final decision was issued. The decision must also indicate relevant facts that the court considered not to have been proven and must include a critical analysis of the relevant pieces of evidence that lead to the conclusion on the different sets of proven and unproven facts and allegations, as well as on instrumental or any decisive circumstances that were considered by the court to be relevant for the final decision on the facts. Facts admitted by agreement or confessed are also indicated as such.

The parties can always ask for a reform of the final decision, but can only appeal in some situations.

***iv. The Appeal Process***

Usually, a party can only appeal to the 2nd tier Court if the case value exceeds the threshold value of the 1st tier Court (currently set at € 5,000.00), and parties can only





appeal to the Supreme Court of Justice if the case value is above the threshold value of the 2nd tier Court (presently € 30,000.00).

There are certain claims that always grant the losing party the right to appeal, such as claims regarding the validity or subsistence of an employment contract.

Appeals to the 2nd tier Court must be filed within 20 days following the delivery of the final decision, although there are some exceptions to this which either shorten this term to 10 days (for example, appeals based on the discussion of procedural court competence or jurisdiction issues) or extend it, allowing 30 days to file the appeal (for example, if the appeal includes revision of recorded evidence – re-appreciation of the court's decision on proven and unproven facts).

The appealing party presents his/her appeal in writing, and then the other party is allowed the same term to respond (and in some cases, to present a secondary appeal). After this, the court presents its decision (in a number of cases the public attorney is called upon in the appeal process to issue an opinion on the party's allegations).

The 2nd tier Court has the power to review the facts (whenever the appeal also comprised a request to revise the decision issued on the facts) and legal arguments contained in the final decision issued by the 1st tier Court. The Supreme Court of Justice is bound by the facts established in the judgement of the court below and does not review them. It reviews whether the judgement of the 2nd tier Court is in line with the applicable employment law provisions. As a rule, if the 2nd tier Court confirms the decision issued by the 1st tier Court, further appeal to the Supreme Court of Justice is excluded.

## b. Costs, Attorney's Fees, Remedies / Damages, Timing, ...

The costs usually incurred in a labour procedure are court fees and the cost of legal representation, although, if the parties require expert witnesses, for example, those will be included in the fees due. From the filing of the suit to the final decision, each party will be responsible for their court and legal representation costs, but, at the end of the procedure, the losing party(ies) will be liable for the payment of the costs incurred by the winning party (proportionally to their loss). Nevertheless, the winning party must request payment of such legal costs directly from the losing party within 5 days after the decision (or appeal) is issued.

Legal costs are calculated based on the case value, and can vary from € 102 (suits in which the case value is set at € 2,000 or less) to more than € 1,600 (when the case value ranges between €250,000 and € 275,000). The losing party will also be required to support the lawyer fees of the winning party up to a limit of 50% of the court costs borne by the parties.

Employees that litigate in court on employment issues under the representation of the public attorney (within specific employment issues where this representation is foreseen) or represented by trade unions (that are granted free of charge) are exempt from paying court fees if their monthly income does not exceed € 2,040.00. Trade unions acting within their scope of interest are also exempt from paying court fees.

The cost of legal representation depends on the value negotiated with the lawyer(s).

**Remedies and Damages**

In the case of claims for illegitimate contract termination by the employer or contract termination for cause by initiative of the employee, compensation awarded by Labour Courts is generally based on the number of years worked at the employer and the

employee's salary. For instance, in the case where an employee requests compensation for unlawful contract termination by the employer (in lieu of being reinstated in his/her previous position), besides being entitled to pay for the period between the date of dismissal and the final court decision confirming dismissal to be unlawful, the employee is awarded compensation of an amount between 15 to 45 days of salary for every year and fraction of a year of service at the employer.

Personal injury damage compensation is awarded on the basis of equity and fairness.

**Timeframe**

The standard duration of a suit varies a lot depending on its complexity and geographical area (because of the number of existing cases and public employees in each Court), and can range between 8 months to 3 years (although there may be exceptions). In some special procedure cases, there are shorter periods set in law. The statistics show that, for instance in 2012, the average duration of labour litigation lawsuits was 12 months, and 13 months in 2013 (in both cases, excluding appeals).

### c. Trade Unions, Work Councils and Other Employee Representative Bodies

As mentioned above, in the context of employment litigation, trade unions qualify as legitimate parties both to file suits that involve collective interests within its scope of activity and to file suits connected with breaches of individual employee rights, performed on a general basis and affecting such union affiliated members. The same rights are granted to Employee Works Councils for the benefit of the respective company employees.

## III. Tips to Avoid Litigation

In the present context, considering both the specific powers that labour authorities have to officially initiate administrative and even judicial procedures and taking into account the standard type of litigation initiative that trade unions and other employee representative structures typically pursue, as well as the most common individual employee claims that may be found in Portuguese courts, the following preventive measures or policies could be taken as useful "tips" for employers to avoid employment and labour litigation:

- Perform regular employment audits on company policies and practices: either broader or more specific (work hours, remuneration, collective bargaining agreements, professional training, etc.);
- Periodically review template employment contracts and other standard drafts adopted in the context of employer/employee or employer/candidate relationships: in order to assure compliance with the applicable rules and to update documents in view of amendments to legal provisions and labour or other relevant authorities' interpretation or guideline updates;
- Revise specific rules and collective bargaining business area provisions on extra payment or allowance payment rules: in order to ensure that employees are paid in full and on time the amounts they are entitled to. In a number of these cases the burden of prove is on the employer and the costs of litigation are a lot of times higher than the actual amount claimed;
- Make use of probation periods to actually check that the employee has been adequately selected and is a due performer: the same opportunity will not arise later;
- Follow up employee complaints: analyzing them and addressing feedback;
- Promote regular meetings with employees' representative bodies: eventual issues may be anticipated and potentially remedied;
- Get preventive legal advice: this usually means expense savings ahead;
- Train business partners: in human resources and legal matters;





- Be prepared to be sued: by way of example, keeping all documents organized, requiring exchange of communication to be in writing whenever convenient, etc.;
- Reach an agreement for the termination of the contract: favouring this route whenever possible.

## IV. Trends and Specific Cases

### a. New or Expected Developments

A new Government took office at the end of 2015 and changes are expected to be implemented, following some expected change of policy on economic and consumption incentives.

The increase of the minimum wage is one of the lines that has already been negotiated with employee and employer representative structures, and an increase of actions against fake service providers (claimed to be employees) has been pre-announced as an expected development.

### b. Recent Amendments to the Law

Last year (2015) started with the end of a suspension period of almost two and a half years, during which all clauses contained in collective bargaining agreements providing for extra work bonus amounts that exceeded those provided for by law were kept on hold. The same applied to the extra pay amounts applicable to work rendered on public holidays. The suspension measure was ordered by Law no. 23/2012 of June 15 and it came into force on August the 1st, 2012. This same law reduced the amounts that were previously proscribed in the Labour Code for extra work pay and public holiday work extra pay by fifty percent. From January the 1st 2015, the application of such collective bargaining agreement provisions was automatically reinstated.

During 2015 the Portuguese Labour Code underwent two alterations. The first amendment occurred in April (Law no. 28/2015, of April 14), whereby gender identity was expressly added to the illustrative list of features on the basis upon which no discrimination, privilege, or prejudice may influence recruitment or labour rights or conditions, thus reinforcing the right to equality in the access to work and employment (article 24/1). A second amendment was published in September 2015 (Law no. 120/2015, of September 1). This amendment included a number of provisions on the protection and support of parenthood, both for female and male workers. The new measures include the extension of the mandatory period for the father parental license and provisions whereby both parents will be permitted to enjoy their license at the same time. Parents with children under the age of 3 will be allowed to execute their job functions through telework and flexible timetables, and part time options will be available for parents with children under the age of 12. Other measures could be pin-pointed like, for example, measures that introduced financial incentives for professional training (the so called "cheque formação").

2016 will start with an increase of 25 euros to the minimum monthly wage (for full time employees), raising the amount from € 505 to € 530. Slight increases in pension amounts were also approved for 2016. These measures are in line with one of the strategic lines of the new government programme connected with the intended "increase of the family income as a means to relaunch the economy" and a desire for economic recovery by the stimulation of employment.

## V. Conclusion

The Portuguese employment legislation has a history of continuous change, very much in line with economic and political opinions, although some stabilization has occurred in recent years. Whilst no strict rule of precedent is applicable, higher court decisions are an undoubtable tool when seeking adequate interpretation and application of specific labour provisions. Case law should therefore be kept in mind when business decisions and policies, which affect workforce conditions, are adopted. Seeking qualified advice at an early stage is one of the most effective ways to avoid litigation.

Litigation, nevertheless, is reasonably accessible to employees, and is especially prevalent in employment termination matters in strongly unionized business areas, with ADR methods not commonly utilised for individual employment conflict resolution.

## Notes

L&E GLOBAL
an alliance of employers' counsel worldwide

## Members

### Australia
**Harmers Workplace Lawyers**
Level 27 St Martins Tower
31 Market Street
Sydney NSW 2000, Australia
T +61 2 9267 43 22
www.harmers.com.au

### Austria
**Gerlach Rechtsanwälte**
Pfarrhofgasse 16/2
1030, Wien, Austria
T +43 1 919 56 56
www.arbeitsrecht.at

### Belgium
**Van Olmen & Wynant**
Avenue Louise 221
B-1050, Brussels, Belgium
T +32 2 644 05 11
www.vow.be

### Canada
**Filion Wakely Thorup Angeletti LLP**
150 King Street West
Suite 2601 Box 32
Toronto, Ontario, Canada
M5H 4B6
T +1 416 408 32 21
www.filion.on.ca

### France
**Flichy Grangé Avocats**
66 avenue d'Iéna
75116 Paris, France
T +33 1 56 62 30 00
www.flichy.com

### Germany
**Pusch Wahlig Legal**
Dorotheenstraße 54
D-10117 Berlin, Germany
T +49 (0) 30 20 62 953-0
www.pwlegal.net

### Italy
**LABLAW – Studio Legale**
Corso Europa 22
20122 Milan, Italy
T +39 02 30 31 11
www.lablaw.com

### Mexico
**Natividad Abogados**
Buffon No. 4 Col Nueva Anzures
Mexico DF CP 11590
T +55 5089 72 00
www.natividad-abogados.com.mx

### The Netherlands
**Palthe Oberman**
Prins Hendriklaan 41
1075 BE Amsterdam, Netherlands
T +31 (0) 203 446 100
www.paltheoberman.nl

### New Zealand
**SBM Legal**
52 Broadway
Newmarket
Auckland 1023, New Zealand
T +649 520 8700
www.sbmlegal.co.nz

### Norway
**Storeng, Beck & Due Lund ANS (SBDL)**
Hieronymus Heyerdahlsgate 1
0160 Oslo, Norway
T +47 22 01 70 50
www.sbdl.no

### Poland
**A. Sobczyk & Współpracownicy**
ul. Zaleskiego 8/3B
31-525 Kraków, Poland
T +48 12 410 54 10
www.sobczyk.com.pl

### Romania
**Magda Volonciu & Asociatii**
World Trade Centre
10 Montreal Square
1st Floor, Sector 1
Bucharest, Romania
T +40 372 755 699
www.volonciu.ro

### Spain
**Bufete Suárez de Vivero**
Torre Inbisa, Planta 15-D
Plaza Europa 9-11
Hospitalet de Llobregat
08037, Barcelona, Spain
T +34 93 295 60 00
www.bufetesuarez.com

### Switzerland
**Humbert Heinzen Lerch**
Meisenweg 9
8038, Zurich, Switzerland
T +41 (0) 43 399 89 99
www.hhl-law.ch

### United States
**Jackson Lewis P.C.**
44 South Broadway
14th Floor
White Plains, NY 10601
T +1 914 328 0404
www.jacksonlewis.com

## Affiliated Members

L&E Global's Affiliated Members include the following premier employment law practices of full-service firms:

### Brazil
**TozziniFreire Advogados**
Rua Borges Lagoa, 1328
CEP 04038-904, São Paulo, SP, Brazil
T +55 11 5086-5000
www.tozzinifreire.com.br

### China
**Zhong Lun Law Firm**
36-37/F, SK Tower, 6A Jianguomenwai Avenue, Beijing 100022, China
T +86 10 59572288
www.zhonglun.com

### India
**IndusLaw**
#101, 1st Floor, "Embassy Classic"
#11, Vittal Mallya Road
560001, Bangalore, India
T +91 80 4072 6600
www.induslaw.com

### Portugal
**Morais Leitão, Galvão Teles, Soares da Silva & Associados (MLGTS)**
Rua Castilho, 165
1070-050 Lisboa, Portugal
T +351 213 817 400
www.mlgts.pt

### Sweden
**Hamilton Advokatbyrå**
Hamngatan 27, Box 715
SE-101 33 Stockholm, Sweden
T +46 8 505 501 00
www.hamilton.se


**L&E GLOBAL**
Avenue Louise 221
B-1050, Brussels
Belgium
T +32 2 64 32 633
www.leglobal.org