

# EMPLOYMENT LAW OVERVIEW 2017

## Portugal





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# I. GENERAL

## 1. Introductory Paragraph

Portuguese labour law is highly protectionist. Its rules and principles apply both to individual employment relationships and to collective bargaining agreements, which endow trade unions with an important role, particularly in business areas or industries where said agreements are applicable on a broader scale as a result of government extension measures.

In 2009 the Labour Code (originally issued in 2003) underwent a relevant reform. This resulted in more flexible solutions, namely on work time organization issues.

From 2011 onwards, in view of the austerity package measures, a number of relevant changes were also introduced. Reductions to the severance compensations due in case of redundancy and reductions to extra work pay. Some of these measures were changed in 2016 under a tendency to withdraw some of the previously applied austerity provisions (e.g. national holidays that had been suspended were put back in place in 2016).

## 2. Key Points

- A relevant reform to labour law took place in 2009 and additional relevant changes were introduced after 2011 with important impact on employee rights and obligations.
- Two of the most striking features of Portuguese law are probably the variety of its sources and the level of protection it grants employees.
- Collective bargaining agreements are entered into at regional, national or industry level, between the unions and employers' organizations or on company or multiple company levels between the unions and the relevant employing companies.
- The scope of application defined in a collective bargaining agreement may be extended, after its entry into force, by a government extension act. In such cases, the provisions of the extended collective agreement, depending on the extension terms, will apply either in a specific region or

at a national level, to all companies operating in the relevant business sector or industry and employees at their service (regardless of such employees being union affiliated).

## 3. Legal Framework

Employment law, rules and guidelines prevailing in Portugal are mostly based upon the following laws:

- The Portuguese labour and social Constitution provisions;
- The Portuguese Labour Code subject to a major reform in 2009 and subsequently amended and respective implementing decree;
- The Social Security Contributory Code and respective implementing decree [Law no. 110/2009, of September 16 (amended by Law no. 119/2009, of December 30 and Law no. 23/2015, of March 17) and Implementing Decree no. 1-A/2011, of January 12 (last amended by Implementing Decree no. 6/2013, of October 15)];
- Procedural legal framework on labour and social security misdemeanours (Law no. 107/2009, of September 14, last amended by Law no. 63/2013, of August 27);
- Legal framework on age and invalidity retirement (Decree-Law no. 187/2007, of May 10, last amended by Decree-Law no. 8/2015, of January 14);
- Legal framework on protection in the event of sickness (Decree-Law no. 28/2004, of February 4, last amended by Decree-Law no. 133/2012, June 27);
- Legal framework on protection in the event of parenting (parental leave and respective subsidies) [Decree-Law no. 91/2009, of April 9, last amended by Decree-Law no. 70/201, of June 16 and Decree-Law no. 133/2012, of June 27];
- Legal framework on the Public Capitalisation Scheme (Decree-Law no. 26/2008, of February 22);
- Legal framework on Safety and Health at Work (Law no. 102/2009, of September 10, last amended by Decree-Law no. 88/2015, of May 28);
- Legal framework on the compensation of accidents at work and occupational diseases (Law no. 98/2009, of September 4);
- List of Professional Illnesses and National Table of Disabilities (Decree-Law no. 352/2007, of

October 23 and Implementing Decree no. 6/2001, of May 5, amended by Implementing Decree no. 76/2007, of July 17);

- Social Security's Disability Verification System (Decree-Law no. 360/97, of December 17, last amended by Decree-Law no. 165/99 of May 13);
- Legal framework on unemployment protection applicable to employees (Decree-Law no. 220/2006, of November 3, last amended by Decree-Law no. 167-E/2013, of December 31);
- Legal framework on unemployment protection applicable to self-employed professionals (whose services are mostly provided to a single contracting authority) [Decree-Law no. 65/2012, of March 15, last amended by Decree-Law no. 13/2013, of January 25];
- Legal framework on unemployment protection applicable to self-employed professionals with an entrepreneurial activity and to members of corporate bodies (Decree-Law no. 12/2013, of January 5);
- Legal framework on Work Compensation Funds (Fundo de Compensação do Trabalho and Fundo de Garantia de Compensação do Trabalho) [Law no. 70/2013, of August 30 (amended by Decree-law no. 210/2015 of September 25)].

In addition to the abovementioned legal sources, employees' and employers' contractual relationships are also governed by the following instruments:

- Collective bargaining agreements (convenções colectivas de trabalho), i.e., agreements negotiated between one or more trade unions and one or more employers' organizations or employers;
- Employment contracts;
- Company internal regulatory instruments (regulamentos de trabalho) implemented by each organization to apply to its own employees;

Precedent court decisions are not legally binding. However, the decisions of the Constitutional Court (Tribunal Constitucional) and the Supreme Court (Supremo Tribunal de Justiça) have in certain cases general application.

## 4. New Developments

A relevant reform of labour law in recent years occurred in 2009. This had an important impact on the rights and obligations of employees. More flexible

solutions and measures to safeguard and promote employment, and to protect the unemployed were implemented. In fact, the Labour Code known as the new 2009 Code was amended in the context of several public reforms that aimed to increase corporate competitiveness and productivity by allowing labour law, collective bargaining agreements, and individual employment contracts to be more flexible. 2012 also registered a relevant reform amendments in labour law, affecting specific provisions of the Portuguese Labour Code namely on severance pay for contract termination.

In 2016, following the new government that took office, changes occurred / were implemented in the short run. The most relevant of which as far as private employment matters were an increase of the minimum wage and the reinstatement of number of suspended national holidays. As far as public servants are concerned measures such as the end of pay cuts and the reinstatement of the 35 hours working week after working hours of the public servants having been increased to 40 hours a week in the context of the austerity measures applied in Portugal.

Therefore in recent years, 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 extra work bonus amounts that exceeded those provided for by law, were kept on hold, the same having been applied to the extra payment amounts applicable to work rendered on public holidays. The suspension measure had been ordered by Law no. 23/2012 on June 15 and came into force on 1 August 2012. This same law reduced by half the amounts that were previously foreseen in the Labour Code for extra work pay and public holiday work extra pay. From 1 January 2015, the application of such collective bargaining agreement provisions was automatically reinstated.

During 2015 the Portuguese Labour Code underwent two amendments. 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 of which no discrimination, privilege or prejudice may influence recruitment or labour rights or conditions, thus reinforcing the right of equal opportunities and treatment in the access to work and employment (article 24/1). A second amendment was published in September (Law no. 120/2015, of September 1). The latter included a



number of provisions on the protection and support of parenthood, both for female and male workers. 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 are allowed to execute their job functions through telework. Flexible timetables and part time options are available for parents with children under the age of 12. Other measures could be pinpointed like, for example, measures that introduced financial incentives for professional training (the so called “cheque formação”).

In 2016, several impending changes to legislation, as a result of the new government, have been included below.

Law no. 8/2016 of 1 April introduced the reinstatement of public holidays Corpus Christi (movable), implantation of the Republic (October 5), All Saints’ Day (November 1) and restoration of independence (December 1). All four indicated holidays had been suppressed (or suspended) from the 2013 working calendar in the context of the austerity measures approved the year before. On the same date a decree n.º 67/2016 was published setting the retirement age in 2017 at 66 years and 3 months.

At the same time, new rules of access to early retirement in 2016, were also approved amending the regime of retirement age anticipation (Decree no. 10/2016). The eligibility to apply for early retirement pension now depends on the beneficiary being at least (i) aged equal to or over 60 years and having, at least, (ii) 40 years of relevant remuneration registration and payment of social security monthly contributions over the same remuneration. The granting of early retirement pensions is now also subject to prior information given to the beneficiary on the amount of the pension and the subsequent explicit acceptance by the same.

It is also important to note the right to early retirement of beneficiaries with age equal to or above 55 years and below 60 years and 30 or more civil years with registration of relevant remuneration for calculating the pension, who have submitted application for early retirement to the date of entry into force of this law, even if the beginning of the pension will occur after that date.

Moreover, decree no. 11/2016 creates an exceptional measure, as a “reverse austerity” measure, to support employment by reducing the contribution rate paid by the employer. Following the recent increase of the minimum monthly wage from € 505 to € 530 the Portuguese government decided to implement an exceptional measure to support employment by reducing by 0.75% the Social Security contribution rate paid by the employers on the remuneration due to employees between February 2016 and January 2017 (including the amounts paid as vacation and Christmas allowances). The measure applies to employees hired prior to 1 January 2016 and earning, as of 31 December 2015, a monthly base salary between € 505 and € 530.

At the same time, pensions were also increased in line with the strategic policies contained in the new government programme towards increasing family income “as a means to relaunch the economy”. In this same line, Portuguese Parliament approved provisions to restore full payment to civil servants and public sector employees, after salary cuts being kept in force for between 2011 and 2015. The cuts were reduced in 40% in January 2016 and gradually reduced on a quarterly basis (60% on 1 April and 80% on 1 July) being cuts totally eliminated on 1 October 2016.



## II. HIRING PRACTICES

There are some legal restrictions on conducting background verifications on job candidates and employees such as drug tests, financial and credit checks, criminal checks, academic qualifications or previous employments.

In what concerns the selection process, for example, there are some legal restrictions on information that may be sought in candidate screening, including information that the candidate may be asked to provide at an interview, during the hiring practices and in the employment agreement.

An employer is not allowed to request information on the candidate's private life except for information that is strictly necessary or relevant to assess the candidate's aptitude and abilities for the job. In such cases, the specific reasons for requiring such information must be provided in writing to the candidate by the potential employer.

The employer is also not allowed to request information about the candidate's health or pregnancy, except when relevant in view of specific requirements imposed by the nature of the job role. Again, in such case, the potential employer must provide written information on such requirement to the candidate.

In this latter case, the information must be provided to a doctor who will merely inform the employer on whether the candidate qualifies or not for the job.

In what concerns the possibility of obtaining supporting documents such as previous employment contracts, educational certificates, past pay slips, and others, the screening of candidate supporting documents on previous employment experience and educational certificates may be requested from the candidate insofar as the information is relevant and not excessive for the purpose for which it is required.

Some legal restrictions also apply to conducting health checks and to selecting a candidate on the basis of health information.

In fact, except for general health exams that are specifically required to evaluate the candidate's general physical and psychic conditions to exercise the role

being engaged and to evaluate potential effects of the activity in question and working conditions on the employee's health condition, the employer is not allowed to require any other health or medical tests or exam results from the candidate.

There are some exceptions, however, to this rule, namely:

- exams required for purposes of the employee's own protection or safety or that of a third party; or
- exams justified by the specificities of the role / activity to be performed.

In both cases the potential employer must provide the candidate with due explanation, in writing, on the reasons for the additionally required tests or exams.

It is also important to note that within the limits of admitted background verifications, consent is generally required to the extent that it involves candidate's personal data that is qualified as sensitive data, instead of non-sensitive data.

There are some compliance requirements or restrictions related to the employee's personal data protection and privacy while conducting background checks.

The general rule under Portuguese law is that the controller or its representative must notify the local Data Protection Authority (DPA) before carrying out any processing operation of personal data (including data transfer).

The DPA's prior authorization is required if the processing (and transfer) involves sensitive data. The candidate must be informed of any data sharing with other companies and must have given consent for such sharing, except if other processing lawfulness grounds apply.

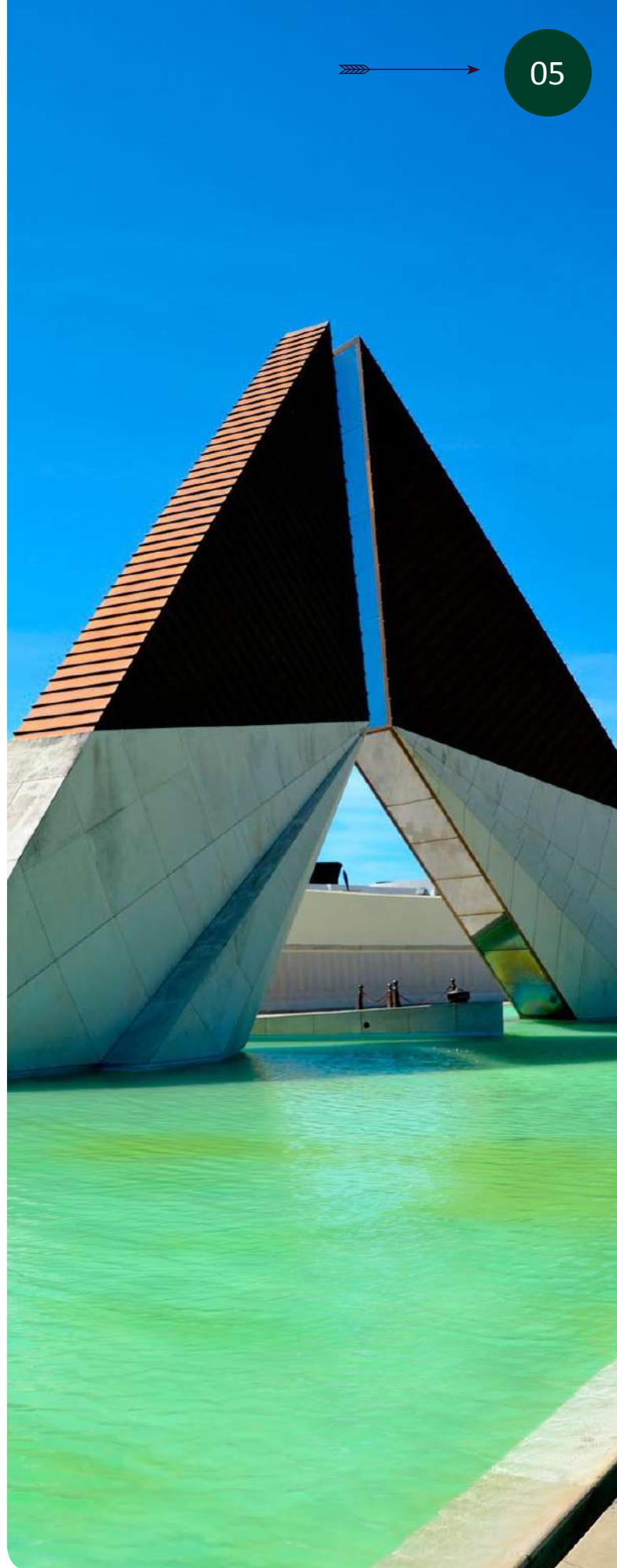
Transfers outside the European Union (EU) are subject to prior authorization from the local data protection authority, except if the transfer is performed under the terms of an agreement between the transferor

and the transferee drawn in accordance with the standard contractual clauses for the transfer of personal data approved by the EU Commission Decisions or if transferee is located in a state that has been considered by Decision of the EU Commission as provider of an adequate level of protection for personal data transferred from the EU.

Under data protection laws, personal data must be maintained only for the period strictly required.

Although data protection law does not fix any specific data storage periods, the Portuguese Labour Code requires employers to keep the following information on recruitment processes launched, disaggregated by gender of candidates, for a period of 5 years:

- invitations for available positions;
- employment-offer advertisements;
- number of candidates for Curriculum Vitae appraisal;
- number of candidates called for pre-selection interviews;
- number of candidates awaiting recruitment;
- admission or selection test results;
- social reports performed to assess possible gender discrimination in the access to job positions, training, promotions and work conditions.



## III. EMPLOYMENT CONTRACTS

### 1. Minimum Requirements

Generally speaking, the employment contract does not require any special form and may, therefore, be agreed under written form or verbally.

However, there are certain situations in which the contract or some clauses must be executed in writing, examples of which are: 1) fixed term employment contract; 2) part-time employment contract; 3) temporary work contract or intermittent employment contract; 4) teleworking contracts; 5) single employee contracts with multiple employers; 6) non-competition clauses.

Where the law requires written form for certain employment contracts, failure in this requirement, does not entail, in principle, the nullity of the contract.

In fact, what happens in most cases is that the contract is deemed to be subject to general employment rules (e.g. part time contract will be deemed to be full time; temporary contracts will be deemed permanent employment, etc.).

In order to supply the employee with a minimum set of information, the Code requires the employer to provide the employee with written information on the employment contract and working conditions.

When executed in written form, the employment contracts must be signed by the person or persons who are authorized to represent the company in dealings with third parties according to the company's articles of association or duly empowered to do so.

In what concerns official language, there is no legal requirement for employment contracts to be executed in Portuguese, thus the use of other languages (e.g. English) is acceptable provided the employee understands the language used. Moreover, bilingual versions may also be used, in which case it is recommended to set a prevailing version. Nevertheless, contracts drawn in a foreign language, as a rule, will have to be translated into Portuguese when filed with a Portuguese authority or official and a translation certification may also be required.

### 2. Fixed-term/Open-ended Contracts

Unless otherwise specified by the parties, employment contracts are deemed open-ended (i.e. permanent employment).

Fixed term contracts are permitted by law provided that they are executed in written form and provided they are meant to fill a role required on the basis of a merely temporary need of the employing company.

Hence, if there is no written contract, the employment contract will be deemed to be an open-ended contract.

### 3. Trial Period

Trial periods (initial probation) for permanent employees are 90 days, 180 days for high complexity, trust or responsibility roles and 240 days for management, directorate and equivalent responsibility roles.

Fixed and unfixed term temporary contracts are subject to shorter probation periods (i) 15 days if agreed for an expected or fixed duration shorter than 6 months; and (ii) 30 days for durations equal to or longer than 6 months.

During the initial probation/trial period, the employer and the employee are free to terminate the employment.

For termination within the contract trial period by the employer, no prior notice is required within the first 60 days.

Termination during the probation period requires the employer to give a seven or 15-day prior notice in cases where the probation period has lasted for more than 60 or 120 days, respectively.

Termination of a labour agreement by either of the parties during the probation period does not require any grounds of justification and no indemnification is due.

The maximum terms for the probation period vary between 15 and 240 days, according to the type of activity and the nature of the agreement (for a permanent



employment contract, the average probation period is 90 days).

The employee is not subject to any prior notice to terminate the contract during the trial period.

#### 4. Notice Period

The employee is free to resign, subject only to the following prior notice periods:

For permanent employees:

- 30 days for contracts which have been on force for up to 2 years;
- 60 days for contracts which have been on force for more than 2 years;

For fixed (or unfixed) term (temporary) employment agreements:

- 15 days for contracts, which agreed (or expected) duration is less than 6 months;
- 30 days for contracts, which agreed (or expected) duration is equal to (or longer than) 6 months.

It is not possible to agree on longer probation periods than those legally foreseen but it is possible to agree on shorter probation periods, as well as to fully exclude probation periods.

Companies often pay salary in lieu of notice period in situations of collective dismissal but the legality of this practice is questionable. The employee is allowed to do it with the consent of the employer. The salary must be fully paid until the date of the proper termination of the contract.



## IV. WORKING CONDITIONS

### 1. Minimum Working Conditions

In Portugal, collective labour regulation instruments can determine the minimum working terms and conditions.

At the same time, collective labour agreement instruments can only be set aside by a labour contract when the latter establishes more favourable conditions for the employee and if the contrary does not result from the collective labour agreement rules.

Workers posted abroad are entitled to local working conditions provided by law and collective bargaining agreements with overall effectiveness, whenever these are more favourable than those that generally apply in the place of work, on the following subject matters:

- a) protection against dismissal;
- b) maximum length of working time;
- c) minimum periods of rest;
- d) holiday;
- e) minimum remuneration and payment of overtime;
- f) transfer of workers by temporary employment agency;
- g) occasional provision of workers;
- h) safety and health at work;
- i) protection of parenthood;
- j) child labour protection;
- l) equal treatment and non-discrimination.

### 2. Salary

The monthly minimum wage in Portugal in 2016 was fixed at € 530. However, in the Azores islands the minimum wage was € 556.50 and in Madeira island €540.60, in order to compensate the insularity.

### 3. Maximum Working Week

The maximum weekly and daily working periods are set at 40 and 8 hours, respectively. However, subject to certain rules, these limits may be assessed on an average basis measured by reference to four or six month periods. This is a system known as adaptability and the additional work hours rendered by the employee on specific days or weeks exceeding the

aforementioned 40 and 8 hour limits do not qualify and are not paid as overtime work but are, instead compensated by equivalent reduction of hours worked on other days or weeks.

Similar flexibility may also be obtained by resorting to the so-called hour bank. In this case additional working hours may be performed, compensated by a monetary compensation, an increase on the vacation period or on a reduction of hours worked on other days.

In general, only work rendered between 10 p.m. and 7 a.m. qualifies as nighttime work, entitling the employee to an appropriate salary increase (an increase of 25% over the payment of equivalent work rendered during the day). Collective bargaining agreements may, nevertheless, extend or adjust the period that qualifies as nighttime work.

### 4. Overtime

The employee may be required to provide overtime work: (i) when the company has to cope with temporary increase of work that do not call for additional employee recruitment; or (ii) in case of force majeure or when the overtime work is needed to prevent or remedy serious injury to the company or its viability.

Overtime work is paid at the normal hourly rate plus:

- 25% for the first hour or part thereof, and plus 37.5% for every subsequent hour or part thereof, on working days
- 50% for the first hour or part thereof, on weekly rest, compulsory or complementary, or on bank holiday

Overtime work rendered on weekly rest entitles the employee to a remunerated compensatory rest day, during one of the following three working days.

### 5. Holidays

Employees are entitled to 22 business days of paid vacation per year.



In the case of temporary contracts lasting up to 6 months the employee is granted 2 working days holiday for each complete month of service and in the case of those lasting up to 12 months or ending in the year subsequent to the year of hiring entitle the employee to a holiday leave period proportionate to the duration of the contract.

## 6. Employer's Obligation to Provide a Healthy and Safe Workplace

The employer has the obligation to permanently ensure employee health and safety conditions at work.

To comply with such duty, the employer must follow a set of general principles focused on the prevention of work accidents and professional illnesses, and thus to comply with several duties.

In general terms, the employer must put in place and ensure:

- Technical work accident preventive measures;
- Employee training, information and consultation on workplace safety;
- Internal or external health and safety services.

The employer must implement appropriate company healthy and safety (H&S) activity at work. This includes organizing and keeping appropriate H&S services and other preventive measures, like ensuring risk exposure assessments and the performance of tests and other actions on occupational risks and health monitoring.

At the same time, an insurance to cover work accidents risk must be contracted by the employer for each hired employee. On other hand, there might be the necessity to set up an internal service of H&S depending on the activity of the company (high risk activities), as well as on the number of employees.

Concurrently, it is mandatory to set up an internal structure that ensures first aid, fire-fighting and evacuation activities. Specific measures must be defined for adoption in case of emergency and certain employees must be appointed as responsible for the implementation of same measures and for calling the competent authorities in case of emergency.

Moreover, the employer has to provide proper H&S training to its employees and must identify the potential occupational risks and try to minimize them,

for instance, when choosing work equipment and facilities, or when designing workstations.

If risks to the employee are assessed in connection with work features or requirements, specific medical checks are also required, and must be carried out before the employee is subject to risk exposure. Employee health surveillance and the monitoring of the exposure to potential occupational risks are mandatory.

Pregnant or lactating employees cannot perform some activities, due to a high-risk exposure to physical, biological or chemical agents and activities carried out in dangerous working conditions.



## V. ANTI-DISCRIMINATION LAWS

### 1. Brief Description of Anti-Discrimination Laws

There is a subsection in the Labour Code on equality and non-discrimination. Employees cannot be discriminated throughout the duration of the employment contracts, including access thereto and termination thereof.

### 2. Extent of Protection

Discrimination based on any grounds is forbidden. The law expressly prohibits discrimination grounded on: parentage, age, sex, sexual orientation, gender identity, marital status, family situation, economic situation, education, origin or social conditions, genetic heritage, reduced work capacity, disability, chronic disease, nationality, ethnic origin or race, territory of origin, language, religion, political or ideological beliefs and affiliation with trade union, without prejudice of other discrimination grounds.

### 3. Protections Against Harassment

Discrimination and harassment are forbidden and employees who are the object of discrimination or harassment acts may claim indemnification and compensation for monetary and non-monetary damages caused.

### 4. Employer's Obligation to Provide Reasonable Accommodations

There is no specific provision or requirement for employer to provide accommodations to employees. In certain sectors, collective bargaining agreements may establish rules on accommodation provisions or on the payment of allowances for the purposes of supporting reasonable accommodation, particularly in cases where the employee is temporarily displaced to provide his/her work.





## VI. SOCIAL MEDIA AND DATA PRIVACY

Employers may dictate the terms for the use of company information technology (IT) and communication means but employees are entitled to keep their private use confidential, including the content of personal emails and Internet access.

According to the Portuguese Data Protection Authority, the employer may define the rules on the admitted private use of IT and communication means made available at the workplace and rules should form part of internal company regulations.

Closed circuit TV (surveillance cameras) in office premises cannot be used to control the employee's performance.

In the workplace, surveillance cameras may be used to protect the safety of persons and goods or when the nature of the activity so requires. Its use is subject to a prior authorization from the Data Protection Authority. Employee work councils must be consulted at least 10 days prior to the authorization request being filed with the competent data protection authority.

The employer is under the obligation to inform the employees of the existence of such equipment.

The processing of employee personal data is subject to prior registration with the local data protection authority (Comissão Nacional de Protecção de Dados – CNPD).

In the case of sensitive data the authority's prior authorization is required. The processing of a limited number of employee data categories, for payroll and HR management purposes, is exempt from prior registration or authorization with the CNPD.

The employee must be duly informed of the categories of his/her personal data processed, purposes of processing and identity of the processing controller. The data subject is also entitled to information on the categories of data recipients and on the employee's rights of access to his/her data and on the rights to his/her data correction, erasure and update and how to exercise same rights.

Legitimate processing of employee data must be based either on the employee's consent (this being the rule for sensitive data) or on processing required to comply with the employment agreement or to fulfil legal obligations.

The transfer of personal employee data outside the EEA is not allowed, unless the country of destination ensures an adequate level of protection for the rights and freedoms of the individuals in relation to the processing of their data. The CNPD's authorization is not required if the controller has executed the 'Standard Contractual Clauses' approved by the European Commission.



## VII. AUTHORIZATIONS FOR FOREIGN EMPLOYEES

A general principle foresees that expatriates working on work permit are granted equal rights and obligations as national employees.

Written form is required for employment contracts with expatriates working on work permit (non-EU). The employer's contract copy must have a copy of documents attesting compliance with legal obligations on the entry and residence of the foreign employee in Portugal duly attached to it. Moreover, the contract must include information on the employee's residence visa or work permit required to carrying out a professional activity as employee in Portugal.

The employee must also attach to the contract the identification and address of the legal beneficiary(ies) in the event of death resulting from work accident or occupational disease.

In addition, the employer must communicate to the Portuguese labour authorities, through electronic form:

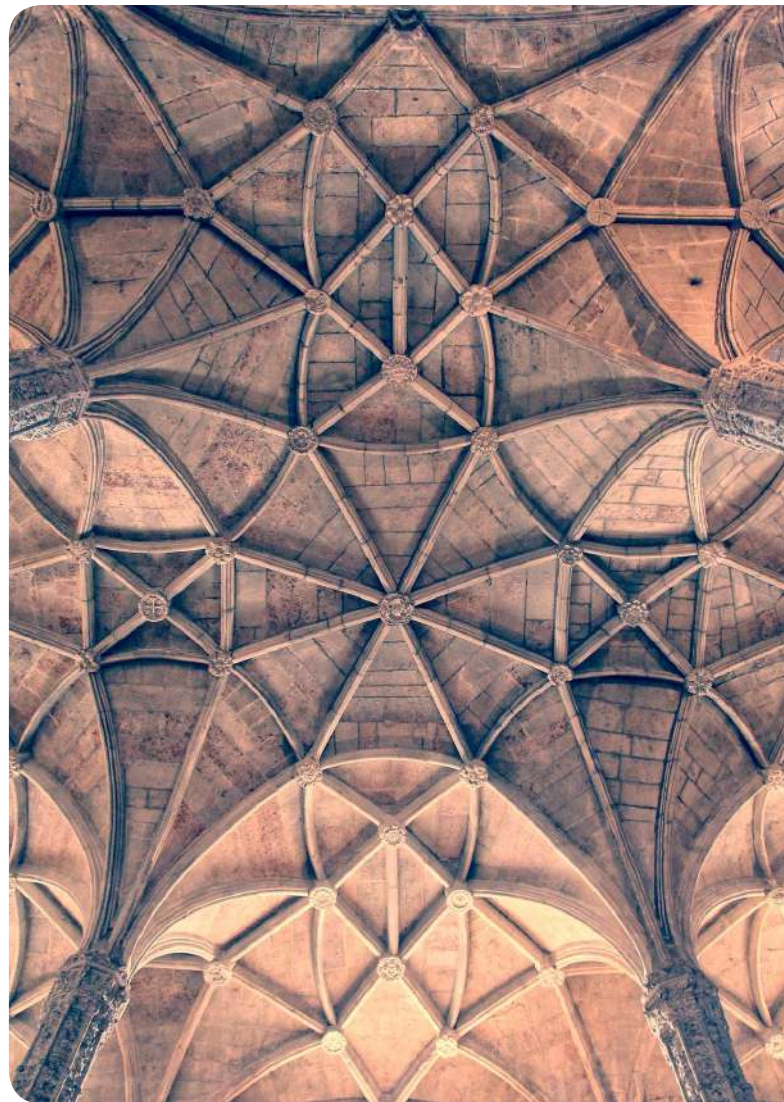
- the execution of the employment contract prior to the beginning of its entry into force;
- The contract's termination, within 15 days upon termination.

In accordance with the law, companies must assure the candidate holds a residence visa or permit specifically granted for carrying out a professional activity as employee in Portugal. In cases where the employer has the intention to employ a foreign citizen (non-EU) currently living abroad, a statement confirming that the employment offer is included in the legal defined quota or that no quota has been set and that no preferential candidate (Portuguese, EU citizen) was found to perform the job shall be issued by the Portuguese Institute of Employment and vocational training and delivered to the candidate for submission together with the visa request.

For the same purpose, the employer shall also provide the candidate with an employment contract or promise of employment contract.

Hiring a foreign employee who does not hold a residence visa or permit for carrying out a professional activity as an employee in Portugal may trigger an employer misdemeanour and in addition an order to suspend the employer's activity may be issued for a time length of between 3 months up to 5 years.

In setting annual overall quota of job opportunities available for non-EU citizens, the Portuguese Government may exclude sectors or activities where labour is not considered as needed; however, no quota has been set since 2009.



# VIII. TERMINATION OF EMPLOYMENT CONTRACTS

## 1. Grounds for Termination

According to Portuguese law, the termination of an employment contract depends on very strict rules that demand the gathering of grounds and several formal procedures. The contract may terminate in the following situations:

- Expiry;
- Mutually agreed termination;
- Dismissal for disciplinary grounds subject to prior internal dismissal disciplinary procedure;
- Collective dismissal (for economical, structural or technological reasons), subject to an internal procedure and prior notice periods which depend on the seniority of the employees affected by dismissal;
- Dismissal for extinction of labour position subject to an internal procedure and prior notice periods in which the notice period will also vary according to the seniority of the employee;
- Dismissal for employee's failure to adapt to a working position, also subject to internal formalities and prior notice periods.

The contract expires in one of these situations: (i) once its term elapses; (ii) supervening impossibility, absolute and definitive, of the employee rendering work of the employer receiving such work; and (iii) with the employee's retirement for age or disability.

## 2. Collective Dismissals

The closing down of a company or of one or more of its departments and the reduction of personnel based on market, structural, or technological grounds allows for a collective employee dismissal to take place, provided the grounds affect at least two or five employees, depending on whether the company has less than 50 employees or more than that.

Employees subject to collective dismissal are entitled to compensation which calculation basis varies.

The procedure for collective dismissal begins with a written communication addressed to the Work Council

or, if there is no such council, to the company union or inter-union representative structure in the company.

If none of these structures exist, the affected employees will be informed, in writing, of the intention to perform a collective dismissal and employees will be invited to nominate a Representative Committee (or up to 5 employees) that will act as representative structure for that purpose.

In the above-referenced communication, the employee representative structures will be provided with the following information:

- description of the legal grounds for dismissal;
- the list of the company's personnel, organized by sectors of activity;
- the criteria that will determine the selection of employees to be dismissed;
- the number of employees to be dismissed and their professional categories;
- period during which the collective dismissal will take place; and
- criteria for any possible general compensation to be granted to the involved employees besides the specific compensation set forth by law or collective agreement.

At the same time, a copy of the communication and the annexed documents shall be sent to the competent department of the Portuguese Ministry of Employment.

Within a 5-day period following the initial communication, a phase of information and negotiation between the company and the employees' representatives must be initiated in order to try to reach an agreement on the dimension and effects of the measures taken, as well as to decide on possible alternative measures that could reduce the number of dismissed employees, namely: (i) suspension of work, (ii) reduction of work, (iii) professional reconversion and reclassification and (iv) early retirement.

After a minimum of 15 days after the initial communication, or as soon as an agreement has



been reached, the employer may send a written communication to each one of the dismissed employees, containing the dismissal decision, expressly indicating the motives and date of the dismissal, the amounts of the compensation and the labour credits, as well as the manner, moment and place of their payments.

On the date on which the decision is sent to the employees, the employer shall send to the competent department of the Portuguese Ministry of Employment (i) the minutes of the negotiations meetings, as well as (ii) a list containing the name of each employee, address, date of birth and of admission to the company, social security situation, profession, category and salary, as well as the individual measure applied and the date foreseen for its implementation.

On the same date, a copy of such list is addressed to the employee's representatives.

Until the termination date, the employer must pay the dismissed employee the compensation that is due by law as well as all other existing labour credits.

The termination of the employment contract must be communicated with the following prior notice:

- 15-day prior notice period, for employees whose seniority is less than 1 year;
- 30-day prior notice period, for employees whose seniority is of between 1 year and less than 5 years;
- 60-day prior notice period, for employees whose seniority is of between 5 years and less than 10 years;
- 75-day prior notice period, for an employee whose seniority is equal to or exceeds 10 years.

### 3. Individual Dismissals

Extinction of a labour position is applicable only when the company lacks grounds to proceed with a collective dismissal as a result of an insufficient number of employees involved (i.e., the company has more than 50 employees and the closing of the section affects only three employees) in a redundancy caused by the above-referred market, structural or technological motives.

If there are at least two similar work positions that may be extinct, the employer must comply with a sequence of non-discriminative legal criteria (starting with the worst performance assessment carried out on the basis

of previously disclosed parameters), in order to select which employees will be affected by the extinction. Employees subject to the extinction of their labour position are entitled to compensation equal to that set for collective dismissal situations.

Even when the grounds occur, extinction of labour position may only determine the termination of the employment contract should the maintenance of the employment relationship prove to be impossible, in terms of the employer failing to have an alternative job position that is compatible with the affected employee's professional category.

Furthermore, it is mandatory that the employer has no fixed term employees executing functions corresponding to the labour position to be terminated.

When there are more equivalent job positions than the number of the positions to be terminated, the identification of the labour position to eliminate has to be made in accordance with the criteria set forth by the law:

- Worst performance evaluation, according to an appraisal system and criteria previously known to all the affected employees;
- Bigger burden in terms of costs for the company;
- Less experience in the job;
- Less seniority in the firm.

Employees who have been transferred to the labour position to be extinguished less than 3 months before termination are entitled to reoccupy the former position (if existing), with no loss of remuneration.

Procedural requirements also apply in this case.

The intention to terminate the employment contract based on the extinction of the labour position must be communicated in writing to the employees' representatives and to each employee involved.

Together with the communication the employer must indicate the grounds for the extinction of the affected labour positions, identify the relevant section they belong to, provide an explanation on the need to dismiss and indicate the professional categories of the employees affected by the job extinction.

The employees involved and the employees' representatives have a 10-day period from the initial



communication's date to oppose in writing to the extinction measure, notably alleging the lack of grounds or that the employer has failed to comply with the requirements described above.

Within 3 business days counted from the initial communication's date, employees' representatives and employees may request the competent department of the Portuguese Ministry of Employment to issue a report on whether the employer has complied with the referred requirements.

Following at least 5 days counted from the term of the 10-day period referred to in above or from the report's reception, the employer may communicate to the employees the decision to terminate their employment agreements based on the extinction of their labour positions.

A copy of the decision must be sent to the employees' representatives and to the competent department of the Ministry of Employment.

The decision must be formalized in writing and include:

- the grounds for the extinction;
- confirmation of the existence of the above described requirements;
- proof that the legal selection criteria for the determination of which position to extinguish has been followed;
- an indication of the amounts of due compensation and all labour credits due, as well as the manner, moment and place their payment will occur; and
- the date on which the employment agreement will terminate.

Finally, the compensation (severance pay) to which the employees are legally entitled and the mandatory prior notice are the ones described under the collective dismissal regime.

The employer may also terminate the labour agreement if:

- the employee's productivity and quality decreases continuously,
- repeated technical problems in the resources affected by the labour position,
- risks to the safety and health of the employee, other employees or third persons or

- the employee developing management functions or functions of technical complexity has failed to comply with objectives previously agreed in writing, provided that it implies the impossibility to maintain the labour relationship.

The grounds above depend on the cumulative verification of the following requirements:

- the introduction of new production procedures, technologies or equipment within the labour position,
- the employee having been given adequate professional training to adapt to the changes
- the employee having been given time, at least 30 days, to adapt to the new technologies
- no other position in the firm is available and compatible with the employee's category.

It is also possible to dismiss an employee in a case where no modifications were made to the position, as long as the following requirements are cumulatively verified:

- a) the employee's work level has modified substantially in such a way that foreseeably it will lead to continuous productivity and quality decrease, repeated technical problems in the resources affected by the labour position, risks to the safety and health of the employee, other employees or third persons;
- b) the employer informs the employee, with a copy of the relevant documents, with a description of the facts and evidence of the substantive modification to the manner the work has been performed, as well as informing that an answer to this communication can be given in 5 working days.
- c) After the answer, the employer must communicate orders and instructions adequate to the execution of the position's functions, with the intention of correcting them.
- d) b) and c) above have been verified.

The employer must send a copy of the communication and the documents to the employee's representatives and, if the employee is a union representative, to the corresponding trade union,.

Employees who have been transferred to the labour position to be made redundant less than 3 months

before are entitled to reoccupy the former position (if existing), with no loss of remuneration.

Moreover, the dismissal can only take place if the compensation and all other labour credits are made available to the employee.

Employees subject to the termination of their employment agreement for failure to adapt are entitled to compensation equal to that set for collective dismissal situations.

In order to formalize the dismissal proceeding, the employer must communicate to the employee, and if the employee is a union representative, to the corresponding trade union:

- the intention to dismiss and the grounds for dismissal;
- the modifications introduced in the position or the substantial modification in the performance of the tasks of the position;
- the results of the professional training and the following adaption period.

Within 10 days following the previous communication, the employee is entitled to require diligence to gather evidence, and the employer has to inform the employee, the employee's representatives and the corresponding trade union, if the employee is a union representative, on the result of such diligence. Any of these people/structures may send the employer their opinion on the grounds of the dismissal.

The employer then has 30 days to proceed with the dismissal, through a grounded, written decision stating:

- the motives or the dismissal;
- confirmation of the requirements set for the determination of the failure to adapt;
- the amount due or the compensation and for the labour credits, as well as the means, moment and place of their payment;
- the date of the termination.

The termination of the employment contract must be communicated to the employee, the employee representatives, the trade union, if the employee is a union representative, and the competent service of the Employment Ministry, with the following prior notice:

- 15-day prior notice period, for employees whose seniority is less than 1 year;
- 30-day prior notice period, for employees whose seniority is between 1 year and less than 5 years;
- 60-day prior notice period, for employees whose seniority is between 5 years and less than 10 years;

For employees whose seniority is equal to or longer than 10 years a prior notice period of 75-days applies.

A disciplinary proceeding must precede dismissal by the employer on disciplinary grounds. Such dismissal is only lawful if the employee is guilty of committing a serious breach in his duties as employee (just cause).

Termination under these circumstances requires the existence of just cause, which means a guilty behaviour that due to its seriousness and consequences makes it immediately and practically impossible for the labour relationship to subsist.

A disciplinary process must be set in motion, involving:

- Previous inquiry into the matter when necessary;
- Accusation note, which must state the facts that justify the dismissal and may or not be accompanied by the employee's preventive suspension;
- The employee has 10 working days to rebut the accusation;
- The employer must undertake an investigation and take into consideration any evidence the employee may have requested in his/her rebuttal;
- Decision of dismissal or non-dismissal (e.g. application of an alternative disciplinary measure).

In addition, the employer is obliged to deliver the decision in writing, explaining the facts and grounds on which the decision is based. The decision must be communicated to the employee and to the work committee or trade union, if the employee is a union representative.

#### **A. IS SEVERANCE PAY REQUIRED?**

Employees subject to collective dismissal, dismissal resulting from job extinction or failure to adapt to the job position are entitled to compensation which calculation basis varies, depending on the seniority period under consideration and date on which the contract was initially executed, between 1 month, 20, 18 or 12 days base salary and seniority premiums per year of service (fractions of seniority are to be calculated on a proportional basis).

Both the labour credits and any compensation that may be due to the employee must be expressly recognized in the decision of dismissal. The amount, as well as the means, moment and location of payment have to be included in the communication giving prior notice.

Should the basis for the decision to dismiss an employee be non-existent or should the employer fail to comply with the procedural requirements, the termination of the labour agreement is unlawful and the employee is entitled to the payment of his/her salary from the date of dismissal until the final court decision. The employee is also entitled to choose one of two remedies: his/her reinstatement into the company or payment of a compensation for dismissal to be set by the court. The indemnity may vary between 15 and 45 days' base salary plus the seniority premiums for each year (or fraction of a year) of seniority, with a minimum of three months' remuneration.

If the dismissed employee's role involved management responsibilities or if the company has less than 10 employees, the employer may oppose to his/her reinstatement in the job position on the grounds that this would seriously affect the employer organization. If the court decides in favour of the employer, ruling against reintegration, the indemnity to be granted to the employee will be calculated between 30 and 60 days' base salary plus the seniority premiums for each year (or fraction of a year) of seniority, with a minimum of six months' remuneration.

## 4. Separation Agreements

Employee and employer may freely agree to terminate an employment agreement in written form. An employee may revoke the termination agreement within seven days from the date on which the termination agreement was entered into, except when the agreement was signed in the presence of a notary.

In a number of cases this is considered a best practice. Only in specific cases where agreements are made in the context of the employees restructuring or based on the same grounds that allow collective dismissal and subject to cap limits of employees with whom separation agreements have been executed triennially will the employee be entitled to unemployment allowance. This sometimes restricts the availability of employees to proceed with separation agreements.

## 5. Remedies for employees seeking to challenge wrongful termination

Employees may not be dismissed without a valid motive or for political or ideological reasons.

In the case of collective dismissal, extinction of labour position or failure of employee to adapt, employees are entitled to a pecuniary compensation.

Pregnant women that have given birth in the last 120 days and those breastfeeding, as well as any employee on paternity license, enjoy special protection. For this reason, dismissal of any of these categories of employee's is illegal without a prior favourable opinion from the competent authority in the area of equality of opportunities between men and women (Comissão para a Igualdade no Trabalho e no Emprego - CITE).

If the CITE's opinion is unfavourable, the employer can only proceed with dismissal of the protected employees by obtaining a court decision recognizing the existence of a valid motive in a lawsuit that may be filed up to 30 days after the unfavourable opinion has been issued.

If the dismissal is considered illegal, the employer cannot oppose to the reintegration of the employee (except if either of the parties requires the payment of extra compensation instead of reintegration), but the employee may choose between the right to reintegration and the right to compensation.

# IX. RESTRICTIVE COVENANTS

## 1. Definition of Restrictive Covenants

The Portuguese Labour Code has a subsection on clauses that limit the freedom of work. These include, among others, provisions on non-competition covenants and minimum permanence duration agreement.

Agreements to restrict the activity of employees during employment or after contract termination are allowed under certain terms and conditions.

Exclusivity clauses during employment are allowed as are non-compete agreement to produce effects after the termination of the contract.

## 2. Types of Restrictive Covenants

Non-compete agreements (after termination) are only legal if the activity of the employee is likely to cause harm to the employer and payment of a non-competition compensation amount is agreed and complied with.

As a general rule, the non-competition covenants are subject to a maximum duration period of 2 years. However, if the employee in question was allocated a role involving special trust nature that entails a special relationship with the company or a role that granted the employee access to particularly sensitive information that is relevant for competitors, the duration of the agreement may be increased to up to 3 years.

It is also possible for the employee to agree to a non-termination covenant, by which the employee undertakes not to terminate the contract, subject to a maximum period of 3 years, as a way to compensate the employer for high expenses incurred with the employee's professional training. The employee may in any case anticipate the end of this period by reimbursing the employer for the relevant expenses incurred.

Although it is common to find companies including non-solicitation covenants in their outsourcing, service provision and joint venture agreements, among others, these restrictive covenants are actually not enforceable under Portuguese labour laws.

## 3. Enforcement of Restrictive Covenants—process and remedies

To enforce restrictive covenants after termination of employment, the agreement must state either the amount of the compensation due to the employee or the criteria for its determination. This compensation can be paid in fractions during the term of the agreement or it can be paid all at once.

The parties may agree on contractual penalties that may be claimed in case of breach of agreed restrictive covenants. Damages caused by breach of such covenants may be claimed from the party at fault.

## 4. Use and Limitations of Garden Leave

When resigning or when having been served a prior notice for dismissal (e.g. collective dismissal) employers frequently choose to grant the affected employee a paid leave. Employers cannot actually instruct the employee to stay away if he/she chooses to continue performing his/her work role until the prior notice period is completed. The only possibility given to the employer is to instruct the employees to use any unused holiday period during the final part of the prior notice being served and, therefore, in practical terms, to actually leave before the end of the prior notice period.

Garden leaves in the context of pending disciplinary proceedings are allowed particularly after the accusation note has been served to the employee.





# X. RIGHTS OF EMPLOYEES IN CASE OF A TRANSFER OF UNDERTAKING

## 1. Employees' Rights

When proceeding to the business transfer that involves the transfer of undertaking (one or more business units or parts of business units, i.e., organized means pursuing an economic activity) transferor and transferee must consult with employee representatives and provide relevant information on the planned transfer.

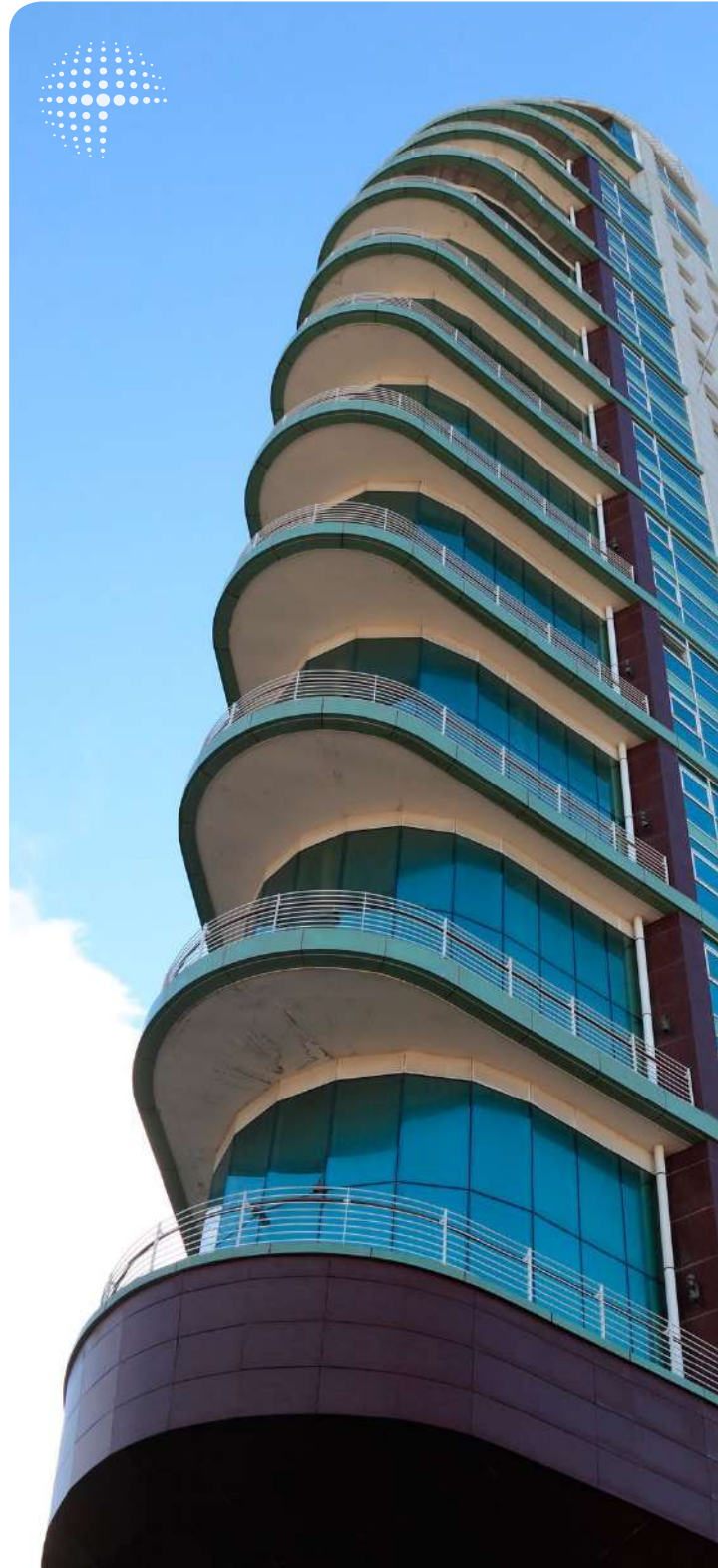
The employee is entitled to maintain his job position previously held with the predecessor, with all existing terms and conditions, with the successor, once the transfer of the undertaking occurs.

During the year subsequent to the business transfer, the transferor is jointly liable with the transferee for employee credits arising from the transferred employment agreements, which became due prior to the business transfer date.

## 2. Requirements for Predecessor and Successor Parties

Prior to transfer, employee representatives (Works Council and trade union representatives) or, in their absence, employees directly have to be informed in writing prior to the transfer about the transfer's date, motives and legal, economic and social consequences, as well as measures envisaged in relation to the employees. Where there are employee representatives and special measures are put in place as result of the transfer, employee representatives have to be consulted prior to the transfer.

These obligations encumber both the transferor and the transferee, in relation to their respective employees or their representatives.



# XI. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

## 1. Brief Description of Employees and Employers Organizations

Trade unions are recognized in Portuguese Law and its respective regime, but are primarily ruled by the Portuguese Republic Constitution and by the Labour Code.

Portuguese law recognizes each employee's free right to affiliation, which means he/she may become a member and leave any trade union. Portuguese trade unions cover almost all existing professional activities. In theory, therefore, all employees could be unionized, despite of unionization rates being quite low. There are two main trade union federations in Portugal: UGT and CGTP. Although formally independent they are strongly connected or close to left wing political parties, mainly the socialist (PS) and the communist (PCP) party. Employers are legally prevented from interfering with unions' activities, even with the purpose of promoting, supporting or financing trade unions. There are several collective bargaining agreements ruling all different kinds of activities.

## 2. Rights and Importance of Trade Unions

The employees are entitled associate with unions for the purpose of defending and promoting their social and professional interests. The union associations of employees cover unions, federations, leagues and confederations.

## 3. Types of Representation

The unions are entitled to negotiate collective labour agreements, render economic or social services to their members, participate in the preparation of labour legislation, initiate and intervene in legal and administrative proceedings concerning the interests of its members, take part in undertaking restructuring processes, establish relationship or membership in international union associations, and others.

## 4. Number of Representatives

The following maximum number of union representatives apply: 1 member in undertakings with less than 50 unionised workers, 2 members in undertakings with 50 to 99 unionised workers, 3 members in undertakings with 100 to 199 unionised workers, 6 members in undertakings with 200 to 499 unionised workers and in undertakings with 550 or more unionized workers the number of representatives is the result of the formula  $6 + [n - 500] : 200$ , where n is the number of unionised employees.





## XII. OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

For purposes of collective defence and pursuit of their rights and interests, the employees can create workers' councils/committees and sub-committees and take part in European work councils.

In each undertaking, employees have the right to create a workers' committee to defend their interests and exercise consultation and information rights and other legally foreseen interests.

The maximum number of employee representatives within the committees depends on the number of employees employed within the undertaking at a certain time: 2 members in employees with up to 9 employees, 3 members in medium sized undertakings, 3 to 5 members in large undertakings with between 201 to 500 employees, 5 to 7 members in large undertakings with between 501 to 1000 employees and 7 to 11 in large undertakings with more than 1000 employees.



## XIII. SOCIAL SECURITY / HEALTHCARE / OTHER REQUIRED BENEFITS

In Portugal the right to social protection is enshrined in the Constitution and is affected mainly by the Social Security System.

Several sectorial compensation funds mostly incorporated during the second decade of the twentieth century and in a nationwide basis are at the origin of the Portuguese Social Security system. These insurance funds were included in the Social Security System in the 70s, giving rise to the unified Social Security System. However, the General Retirement Fund, established in 1929 to ensure the protection of civil servants, maintained its autonomy, allowing employees of public administration benefit from a special regime.

In addition to the Social Security Contributory Code and respective implementing decree [Law no. 110/2009, of September 16], there are some scattered social security rules.

The employer and the employee are subject to social insurance contributions, which must be paid on a monthly basis.

The global contributory rate is 34.75% of the contribution base. The employer is in charge of 23.75% and the employee of 11%. Nevertheless, the employer has to deduct the employee's contributions from its gross wage and to deliver them to Social Security. Civil servants have a specific welfare protection scheme also subject to compulsory contributions.

At the same time, the scope of social protection granted to dependent employees covers the events of sickness, parenting, unemployment, professional illnesses, invalidity, old-age and death as well as a payment of an additional 1% must be contributed for the Work Compensation Funds (Fundo de Compensação do Trabalho and Fundo de Garantia de Compensação do Trabalho). The employer may bear the costs of contributing either under a public capitalisation scheme or under a supplementary scheme for voluntary personal insurance (in the form of pension savings plans, life assurance, etc.) to any particular employee or group of employees.

Furthermore, there is a public capitalisation scheme under which one can voluntarily complement its old-age pension amount through the payment of additional contributions during working age, that are converted into retirement certificates. The due value of contribution may be 2.4 or 6 % (the latter only if the subscriber is over 50 year old) of the contribution base (as settled out in the context of compulsory contributions), according to the subscriber's choice.

The total amount of contributions and income generated by the capitalisation will be available at the date of the subscriber's retirement, who may also choose to convert it into an annuity or to transfer it to children or spouse, if they are subscribers too.

In general, the contribution base comprises all the remunerations, whether in money or in kind, paid to an employee in exchange for the work rendered, as established in the employment agreement, in the collective bargaining agreement, law or practices (i.e. base remuneration, seniority payments, holiday and Christmas allowances). At the same time, bonuses paid are also reflected in the contribution base if frequently paid every five years or less and the employee is entitled to receive them in accordance with objective and general criteria.

The law expressly excludes some benefits from the contribution base, such as values assigned to complement social security benefits, family benefits or reimbursement of medical expenses.

The Social Security System covers (i) sickness, (ii) maternity, paternity and adoption, (iii) unemployment, (iv) professional diseases, (v) disability, (vi) old age and (vii) death.

24 hours before the employment agreement takes effect, the employer shall report the hiring of the employee and the main contractual terms to the Social Security Office through its official website (Segurança Social Directa). The employer must also inform on the termination or suspension of the employment agreement and respective main reasons, as well as on any change on the agreed



type of contract (permanent or fixed-term, part-time, and others.)

The employee is deemed to have started rendering work on the sixth month preceding the infringement's date. This assumption is rebuttable if the employer gives evidence of the date in which the employee actually started to render work.

The employee is considered to continue to render work to the employer while the Social Security Office is not informed on the termination or suspension of the employment contract, thus continuing the duty of paying compulsory social contributions.

Once the employer reports the hiring of a new employee to the Social Security Office the following main obligations arise and must be complied with on a monthly basis and regarding each employee: (i) reporting the remuneration that comprises the contribution base, the working time, and the applicable contributory rate; (ii) payment of the value due as mandatory contributions, borne out by the company (23.75%) and the employee (11%); the deadline for payment is between the 10th and 20th of the month after the one with which the contributions refer to.



# MORAIS LEITÃO

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