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Law and Practice

Contributed by Morais Leitão, Galvão Teles, Soares da Silva & Associados, SP, RL.

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Morais Leitão, Galvão Teles, Soares da Silva & Associados, SP, RL. (Lisbon - HQ) has a team fully dedicated to labour and social security with a total of 13 counsels. The primary office is based in Lisbon, with other offices in Oporto, Funchal, Angola, Mozambique and Macau. Both in a consultancy capacity and in litigation before labour courts, the firm assists a vast number of companies, including many multinationals, in all areas pertaining to labour relations. In line with recent economic developments, it has been providing advice to a number of clients involved in personnel rationalisation processes, namely by participating in the non-contentious and contentious phases of collective lay-offs and redundancies. The firm's close involvement in the labour law aspects of M&A and outsourcings should also be underlined. The firm assists its clients on all legal matters related to labour relations. With regard to labour litigation, in defence of its clients' interests, the firm is often present in the courts, namely in the labour courts. We have acted on behalf of our clients in legal actions concerning the work relationship, training, development and cessation of employment. Advice on social welfare and security is an integral part of the service we provide. Identification of the causes of the termination of the work contract, and the relevant public social welfare solutions, can minimise the impact on the work force of inevitable rationalisations and business restructuring measures. In the context of social welfare, clients benefit from our in-depth knowledge of public retirement solutions, as well as the definition and implementation of complementary benefits schemes. We assist in elaborating and updating pension schemes. The firm has acquired considerable experience in special welfare schemes to replace the public system of social security.

Author

Joana Almeida joined the firm in 1998 and is a managing associate. She is a member of the labour and social security team. Joana provides day-to-day consultancy in all areas of labour and social security law, in relation to both individual and collective employment relationships. Acting on behalf of domestic and foreign clients, she has participated in several corporate restructuring processes, provided legal advice on the acquisition and sale of companies and business areas and conducted proceedings for the termination of employment contracts. Joana has also been involved in the conception and implementation of fringe benefit plans of various sorts. She acts as legal counsel for several clients on labour litigation and social security matters. Joana is a member of the Portuguese Bar Association (admitted in 2000), and is a Specialist Lawyer in Labour Law, a title awarded by the Portuguese Bar Association in 2007. She has contributed to numerous publications relating to employment law.

1. Terms of Employment

1.1 Status of Employee

Blue-Collar and White-Collar Workers

Portuguese law does not distinguish between blue-collar and white-collar workers as such. However, certain terms and conditions of employment differ depending on the type of functions that are carried out by the employee. That is the case (to name a few) with the length of probation period; the prior notice the employee is required to give to terminate the contract; the admissible duration of post-contractual non-competition commitments; or the court preventing reinstatement in the event of unlawful dismissal.

One of the areas of law where differences between employees (based on the respective functions) are most significant is at the level of working time. For example, only employees carrying out certain types of functions may work exempted from timetable. Among them, only employees in management positions may waive the allowance due for working

pursuant to that special regime. Likewise, employees in management positions do not necessarily benefit from the mandatory period of 11 hours of rest between consecutive working days.

One type of contract of employment – *comissão de serviço* – is restricted to employees in management positions or those whose functions are based on a particular relationship of trust. These features explain that, contrarily to the rule in Portuguese law, employers are entitled to terminate the contract at will, by giving notice and paying compensation.

Other Statuses
Civil servants are subject to a particular employment regime. Likewise, there are special features in the framework applicable to employees working for the State or public entities pursuant to individual employment agreements.

Other types of contract observe specific regimes, the Labour Code applying only to the extent it is compatible with the contract's special features. That is the case with domestic service, sports contracts, shipboard work and work in ports.

The provisions of the Labour Code on rights relating to personality, equality and non-discrimination and health and safety apply to contracts where there is economic dependence but not subordination (which therefore do not constitute contracts of employment), working at home being one example.

The mandate of members of the board of directors who are not employees is governed by company law. However, the provisions of employment law on work accidents and occupational diseases apply (with the necessary adaptations) to directors who receive pay. Trainees, who are also subject to particular legal regimes, must also be protected against accidents.

1.2 Contractual Relationship

Against a constitutional background which forbids dismissal without cause, open-ended contracts of employment are the rule under Portuguese law. Accordingly, fixed- and unfixed-term employment contracts are meant for situations where the employer faces a temporary need (eg temporary replacement of an employee who is absent, seasonal activity, exceptional increase of activity, and execution of a defined, non-lasting service, among others). Likewise, contracts of employment entered into by agency workers are typically concluded for a fixed or unfixed term, the term being based on a temporary need of the user company similar to those which justify recourse to fixed- and unfixed-term work.

Both definite employment contracts and agency work contracts are subject to a maximum duration: three years for fixed-term contracts, six years for unfixed-term contracts and six, 12 or 24 months for agency work, depending on the relevant motive. Contracts entered into for a fixed term are also subject to a maximum number of renewals (three).

As a measure of employment policy, employers may resort to fixed-term contracts to hire employees seeking their first job or in long-term unemployment. Contracts entered into on these grounds may not exceed a global duration of 18 months and two years, respectively, the maximum number of renewals referred to above (three) applying. Companies launching a new activity or opening up a new establishment may also have recourse to fixed-term work, for a maximum period of two years counted from the start of activity or the opening up of the establishment, provided, in the latter case, the company has fewer than 750 employees in total.

Significant changes to the regime on definite work contracts have been announced. In particular, the intention is to reduce the maximum duration of fixed-term contracts to two years and of unfixed-term contracts to four years; to eliminate the possibility to hire employees seeking their first job as fixed-term workers; to limit the possibility to hire fixed-term workers on the basis of the start of a new activity or new establishment to companies with fewer than 250 employees; and to impose a maximum number of six renewals to fixed-term contracts entered into by agency workers, which so far have none.

Since 2009, the law has also allowed a specific type of fixed-term contract in the agriculture or tourism sector. Unlike the norm on fixed-term contracts, this type of contract does not need to be entered into in writing, the employer having the obligation to communicate its conclusion to the social security services by means of an electronic form. Each contract may not last for more than 15 days, in a total of 70 days of work in a calendar year.

In addition to definite work, Portuguese law provides for other specific types of contracts: part-time work, where the period of work is lower than that of full-time workers; intermittent work, where periods of activity are interleaved with periods of inactivity; contracts entered into with multiple employers, where the different employers belong to the same company group or share premises or other organisational structures; remote work, for employees who usually work from outside the company premises with resource to electronic equipment; and contracts entered into under the *comissão de serviço* regime (as defined).

A contract of employment is deemed to be in place when one individual undertakes to render his or her activity for the benefit and under the authority of another, within the beneficiary's organisation and in return for the payment of remuneration. There is a legal presumption that a contract of employment is being executed when some of the features

listed in the law are present (eg the place of activity and work tools belong to the beneficiary of the activity; the timetable is determined by the beneficiary of the activity; the provider is paid a defined amount).

Against this background, only specific types of contracts of employment must be entered into in writing. That is the case with fixed- and unfixed-term employment contracts; contracts with multiple employers; part-time work; intermittent work; contracts entered into under the *comissão de serviço* regime; and remote working. Employment agreements entered into by agency workers, service agreements for the use of agency work or agreements between employers temporarily assigning employees to work under the authority of a third party must also be entered into in writing.

Despite the fact that contracts of employment, as a rule, do not need to be in writing, employers are under the obligation to provide written information on terms and conditions of employment: information about the company and same-group companies; the place or places of work; the employee's job title and functions; the contract's dates of signature and start; the likely duration of the contract (if applicable); the duration of annual leave; applicable periods of notice; amount and periodicity of pay; daily and weekly periods of work; work accidents' insurance policy and insurance company; the applicable collective bargaining agreement; and the applicable work compensation funds. Information on these items must be provided within 60 days from beginning of employment (or up to the date of termination, if the contract lasts for less than 60 days). This being the case, most employers choose to enter into the contract in writing.

Contracts with foreign employees (other than EEA countries and countries guaranteeing equal treatment with Portuguese citizens in terms of access to work) must indicate, in addition, the visa or permit enabling the employee to reside in Portugal; the employer's activity; the way in which remuneration is paid; and the beneficiaries of the pension in the event of death resulting from work accident or occupational disease.

1.3 Working Hours

Maximum Working Hours

As a rule, employees may not be required to work more than eight hours per day and 40 hours per week. Where the applicable collective bargaining agreement reduces the maximum working hours, its provisions prevail (eg 35 hours of work in the insurance sector, or 37.5 hours for administrative employees of building and construction companies).

This being said, the law contemplates a variety of flexible arrangements, which range from agreements providing for flexible timetables to arrangements where the employees work more than the maximum daily or weekly limits.

In the adaptability regime (*adaptabilidade*), employees may be called to work more than eight hours per day and 40 hours per week, provided that, in a given reference period, they work on average eight hours per day and 40 hours per week. Where the adaptability stems from a collective bargaining agreement, the maximum number of working hours can go to 12 per day and 60 per week and the reference period to 12 months; in this case, work rendered in two consecutive months cannot exceed, on average, 50 hours. Where the adaptability is agreed upon on an individual basis, the maximum periods of work are ten hours per day and 50 per week, the reference period being four months (six months, for certain employees or in certain business sectors, eg employees in management positions or working in hospitals, airports, the press, etc). Periods of more work are compensated with periods of less work.

In the time-banking system (*banco de horas*), the maximum periods of work are the same as in adaptability (12 and 60 hours, if contemplated in a collective bargaining agreement, or ten and 50 hours, if by individual agreement) but the ways to compensate work in excess of the eight- and 40-hour average are more diverse: they include equivalent reductions of the working period, increases of the annual leave or payments in cash. This modality is, however, subject to an additional limit, as employees may not be asked to work more than 150 hours per year in these terms where time-banking is the result of an individual agreement.

Adaptability and time-banking can also result from the employer presenting a written proposal to the relevant employees, which they do not oppose in writing within 14 days from receiving it, or from extending to the remaining employees of the relevant unit the regime applicable to a given majority of them: 60% if the adaptability or time-banking are contemplated in a collective bargaining agreement, or 75% if they resulted from a company proposal.

The law contemplates as well three modalities of what it calls (albeit incorrectly) exemption from timetable, all necessarily concluded in writing. The typical one, most commonly used, is that where the employee commits to working more than the maximum working hours per day and week on working days (work during the weekly days of rest is not covered by the exemption and constitutes overtime work). Other employees agree to work more than the maximum periods of work up to a certain number of hours per day or week and others observe a flexible timetable, sticking to the maximum limits. The allowance due (which only employees in management positions may renounce) depends on the type of exemption.

By agreement with the employee or if set forth in a collective bargaining agreement, the daily period of work may increase up to four hours, so to concentrate work in four days of the

week. Collective bargaining agreements may also provide for timetables whereby the employee works (up to these additional four hours) for three consecutive days, followed by a minimum of two days of rest, so to achieve the normal periods of work in a reference period of 45 days.

Certain employees are exempted from the obligation to render work pursuant to the above-mentioned flexible arrangements. That is the case with female employees who are pregnant, in the 120 days following birth or breastfeeding; with minors, disabled people or those with chronic disease, if their health so requires; and students, if the work to be rendered pursuant to those arrangements coincides with classes or exams.

As with definite work, changes have been announced in matters of working time. The proposal is to eliminate time-banking systems individually agreed with the employee and to revise the regime on group-based time-banking.

Part-Time Contracts

Part-time work is that which provides for working periods below the period of work of those working full-time. Collective bargaining agreements may not prohibit part-time work but may establish the maximum percentage of full-time work which qualifies as part-time work (eg 75% in the collective bargaining agreement for social welfare institutions, 90% in banking and financial institutions).

Part-time contracts must be concluded in writing and indicate the daily and weekly periods of work, with a comparative reference to those working full-time. Otherwise, the work is considered to be full-time.

Part-time work may be rendered on a given number of days per week, month or year, if the parties so agree, and be entered into for indefinite or limited periods of time. Employees who went from full-time to part-time work for a defined period are entitled to resume full-time work. Those with family responsibilities, reduced work capacity, a disability or a chronic disease should be given a right of preference to access part-time work.

Part-time workers are entitled to equal treatment, unless objective reasons justify a difference in treatment. As a rule, pay is calculated in proportion to the period of work; meal allowance is due in full whenever the employee works for five hours or more per day.

Overtime

Employers may only request employees to render overtime work in situations of temporary increase of work which do not warrant the hiring of an employee, in cases of *force majeure* or where overtime work is indispensable to prevent or repair serious damage to the company or its viability.

Overtime based on temporary increases of work must not exceed a certain number of hours per day and year. Overtime for reasons of *force majeure* or to prevent or repair damage to the company have no limit.

The maximum daily limit of overtime work depends on the relevant day: two hours on weekdays and the maximum daily period of work on the weekly days of rest and bank holidays.

The maximum annual limit of overtime work depends on the company's size: companies with fewer than 50 employees can request the employees to render up to 175 hours of overtime work per year and companies with 50 or more employees can request the employees to render up to 150 hours of overtime work per year. A collective bargaining agreement may increase the annual limit to 200 hours.

Specific limits apply to part-time workers: they may render up to 80 hours of overtime work per year or the number of hours corresponding to the proportion between their respective period of work and that of full-time workers, if higher. By written agreement with their employer, part-time workers may agree to render up to 130 hours of overtime work per year. As with full-time workers, a collective bargaining agreement may increase the annual limit to 200 hours.

All kinds of overtime work are paid with a remuneration increase: 25% in the first hour (or fraction thereof) of a weekday and 37.5% thenceforth; 50% for each hour or fraction thereof on the weekly days of rest and on public bank holidays. Collective bargaining agreements may rule otherwise.

Overtime work on the mandatory weekly day of rest (usually Sunday) or which prevents the employee from taking the 11-hour break between consecutive working days entitles the employee to compensatory rest, to be taken in one of the subsequent three working days. Any work rendered on the mandatory weekly day of rest entitles the employee to a compensatory rest whose duration equals one day of work. The compensatory rest of those prevented from taking the 11-hour break has the duration of the part of the break that the employee did not take.

The rendering of overtime work (where overtime work is legal) is an obligation but certain employees are exempted therefrom. That is the case with pregnant employees, employees with children aged less than 12 months, for as long as breastfeeding lasts if necessary for the mother's or the child's health, minors (except in very specific circumstances), those with a disability or a chronic disease, and students.

1.4 Compensation

Minimum Wage

As of 1 January 2018, the minimum monthly wage was set at EUR580. Remuneration in kind (up to certain percentages), commission on sales, production premiums and gratuities which constitute remuneration form part of the minimum wage.

The minimum wage of those in training may suffer a reduction of 20%. The same applies to employees with reduced work capacity in excess of 10%, the maximum reduction in wage being capped at 50%.

Employees working part-time are paid in accordance with the law or the applicable collective bargaining agreement or, if more favourable, in proportion to their period of work.

Bonuses

Employees receive one payment which corresponds to paid annual leave and two payments that correspond to holiday allowance and Christmas allowance.

Specific allowances may be granted in view of the specific circumstances in which the work is rendered. In some cases, such allowances are dictated by law (eg night work pay increase; special remuneration due for working exempted from timetable); in most cases, the allowances are set out in collective bargaining agreements (eg meal allowance, shift allowance, on-call allowance, allowance for errors). Unlike base remuneration, the reduction of which is forbidden, the allowances are due for as long as the employee works in the particular conditions which gave cause to the allowance being paid.

In the absence of a provision to the contrary, either in the law or in a collective bargaining agreement, allowances are calculated based on base remuneration and seniority premiums (*diuturnidades*).

Government Intervention

There is no legal obligation to increase pay, provided the employee is paid at least the minimum wage and in accordance with the pay scales of the applicable collective bargaining agreement.

What the law does regulate is the minimum compensation due in the event of the contract terminating. As compensations have significantly decreased in recent years, a complex transitory system is now in place, which differentiates the amount of compensation due depending on the date the contract was concluded and the period (of the contract's execution) to which compensation refers. Depending on these two factors, compensation can range from one month to 12 days of base remuneration and seniority premiums. In individual termination agreements or in the negotiation phase of collective dismissals, the parties are free to agree on compensation higher than that prescribed by law.

1.5 Other Terms of Employment

Vacations and Vacation Pay

Employees are entitled to 22 paid working days of leave per year, which become due on January 1st and refer to the work rendered in the previous year. In the year of hire and the year of termination, the leave is calculated in proportion to the period of work rendered. In the year of hire and in situations where the contract was suspended, the employee must work for six months prior to the leave – corresponding to two working days of leave for each month worked – being due.

Collective bargaining agreements in certain sectors (eg banking and insurance) increase the period of paid annual leave (usually, to 25 working days). In other sectors (eg pharmaceutical, building and construction), the period of leave may increase up to three more days in view of the employee's assiduity, in reminiscence of a legal regime which was in the meantime repealed.

Pay during the period of annual leave should be equal to that in active service. Unless a collective bargaining agreement rules differently, holiday allowance must include base remuneration and those elements of pay which account for the specific way in which the employee renders work (thus including, for example, night work increase or shift allowance, but not commissions on sales).

Required Leave

Portuguese law contemplates several leaves for parental and childcare reasons.

A pregnant employee is released from the duty to work as often as needed to attend pre-birth medical appointments, without loss of pay; the father may accompany her three times.

In the case of clinical risk for the mother or the unborn child, the employee may be granted leave of absence during the pregnancy.

Leave in the event of abortion has a minimum duration of 14 days, up to 30 days.

Parental leave goes from 120 to 150 days, extended to 180 if the parents share the leave. The mother is under the obligation to take leave in the six weeks following birth; the father must take leave in the 15 working days following birth.

Leave in the event of adoption has the same duration as parental leave. In the period leading to adoption, the prospective adoptive parents are released from work to attend three meetings with governmental services.

A breastfeeding mother is entitled to two hours of paid leave per day, for as long as breastfeeding lasts. The same applies to the mother or father who feeds the child, limited, in this case, to the child's first year of life.

The law also contemplates the parents' right to take a three-month leave, work part-time or combine the two modalities until the child turns six. This regime may be followed by the parents taking a leave with a maximum duration of two years, extended to three years in the event of a third child or more and to four years if the child is disabled or has a chronic disease.

Parents with a child with a disability or chronic disease aged less than one are entitled to request for a reduction of the working period by five hours per week, or other special working conditions.

Parents with children under the age of 12 or, regardless of age, with a disability or chronic disease are entitled to work part-time or pursuant to a flexible timetable combining a period of mandatory presence with flexible hours of start and term.

Employees may take up to 30 days of justified absence each year to assist a child under the age of 12 who is sick or had an accident. If the child is disabled or has a chronic disease, no age limit applies. Contrarily, if the child is 12 or more years old the limit of justified absences for year decreases to 15. Grandparents are also entitled to be absent for 30 days following the birth of a grandchild of a child aged less than 16 who lives with the employee, as well as to substitute for the parents in providing assistance to a grandchild who is sick or had an accident.

Other than the pre-birth medical appointments and the hours of paid leave during breastfeeding and the child's first year of life, all other leaves and absences cause loss of pay and are compensated, in full or partially, by the public social security regime.

Employees who are sick are entitled to paid sickness allowance from the social security as of the fourth day of absence. They may take up to 15 days of justified absence to attend to a spouse, civil partner or family member (living with the employee) who is sick. If the spouse or civil partner is disabled or has a chronic disease, the period of justified absence increases by 15 days.

The law contemplates as well justified absences for reasons of marriage, death of a family member, to attend meetings at the children's school, to exercise functions as employee representative or during the period of campaign for those running for public office, for example. Students, in particular, benefit from a complex set of rights, which range from the granting of days off to prepare for exams to leave of absence to attend classes, the right to schedule annual leave in accordance with school needs and the entitlement to a ten-day leave (without pay) each year.

Confidentiality and Non-Disparagement
Employees are expressly bound to confidentiality during the execution of the contract of employment but not upon its termination, so employers are advised to extend contractually the confidentiality obligation post-contract. This being said, there are various court decisions stressing that post-contract confidentiality covenants may not operate as non-competition commitments, in the sense that confidentiality may only seek to prevent the disclosure of knowledge which does not form part of the employee's professional experience.

There are no specific limitations on non-disparagement requirements, in the sense that employees (as any other individual or entity) should refrain from making disparaging comments about their current or former employer.

Employee Liability
In addition to disciplinary liability, employees may be found civil or criminally liable for breaches of their contract of employment. For example, the penalty for leaving employment without observing one's prior notice is the remuneration corresponding to the period of notice which failed to be given, without prejudice to the liability for other damages suffered by the employer as a result.

Contractually agreed indemnities (which are common in situations of post-contractual non-competition commitments, for example) are valid. As with any provisions of this kind, they may be reduced should the court find them excessive.

The abusive exercise of rights by members of employee representative bodies may also give rise to disciplinary, civil or criminal liability.

2. Restrictive Covenants

2.1 Non-Competition Clauses

Employees are expressly bound by law not to compete with their employer during the execution of the contract, so there is no need for specific undertakings in this regard. Accordingly, non-competition during the contract does not entail a payment in return. Breaches thereof constitute a breach of the duty of loyalty, sanctioned at various levels (disciplinary, civil or even criminal).

Post-contractual non-competition commitments, however, are subject to a tight regime. They must be entered into in writing, either in the contract of employment or in the termination agreement. They are valid provided the competing

activity is likely to cause damage to the employer and the employee is paid adequate compensation during the restricted period. Undertakings of this kind have a maximum duration of two years, extended to three years if the employee exercised an activity based on a particular relationship of trust or had access to particularly sensitive information from a competition point of view.

Damage arising from post-contractual competitive activities may be potential (ie need not be effective) but employers are advised to set out non-competition commitments which are reasonable and well defined in terms of scope (including geographical scope).

The law does not define "adequate" compensation, thus leaving room for uncertainty. The only legal reference points to compensation being inferior to the remuneration paid to the employee while on service; this being said, insignificant compensation could be found to be unenforceable. Depending on the structure of remuneration, it might make sense for the compensation to take into consideration variable remuneration as well.

Employers are also advised to agree on the payment of specific compensation during the restricted period, rather than to establish that the remuneration paid during the contract or the compensation due at the time of termination already includes the compensation due in return for the non-competition commitment. On a number of occasions, the courts have found the employee's commitment not to be enforceable on the basis that the compensation due was neither determined nor determinable.

There have been judicial decisions of the superior courts quashing provisions whereby the employer reserved the right to subsequently release the employee from the non-competition undertaking, taking the view that the matter could not be left at the discretion of one of the parties.

2.2 Non-Solicitation Clauses - Enforceability/ Standards

Pursuant to Portuguese law, agreements between employers prohibiting the hiring of the respective employees or establishing the payment of indemnities in the case of hiring are null and void, and therefore not enforceable. Despite the wording of the law (agreements between employers), the prohibition is likely to encompass both unilateral and bilateral commitments, as well as situations where the person making it is an employer, or only a prospective employer, at the time of making.

Employment law does not govern non-solicitation of customers. Strictly speaking, commitments of this kind differ from covenants not to compete: in theory, one may commit not to solicit customers of the former employer and still be allowed to engage in a competitive activity with that of the former employer. In practice, the two undertakings are at times difficult to separate, as someone who is prevented from approaching clients of the former employer is restricted in his or her ability to work in the same market or business area.

3. Data Privacy Law

3.1 General Overview of Applicable Rules

As holders of personal data, employees benefit from the protection afforded in Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016.

The Government is working on a law proposal complementing the application of the rules of the Regulation, with one provision aimed specifically at the treatment of personal data in the context of employment. Assuming that the final Bill to be passed will replicate the proposal, one of the most significant novelties would be the express enshrinement that recorded images and other personal data obtained by means of remote surveillance could be used for disciplinary purposes, where they are used for criminal purposes (so far, their use in the disciplinary context has been controversial and given rise to contradictory judicial decisions at the level of the appeal courts).

The Labour Code also contains specific provisions governing personal data, biometric data, medical tests and exams, and means of remote surveillance. In some cases, their regime will either be changed or deemed to have been repealed as a result of Regulation 2016/679, as with the need to either notify or obtain authorisation of the national data protection authority (*Comissão Nacional de Protecção de Dados*, or CNPD) prior to treating biometric data or installing means of remote surveillance.

The common ground of the regime of the Labour Code in terms of data privacy is that constraints to employees' privacy should be kept to the strictly necessary to accommodate the stringent interests of the employer. Hence, and for example, the employer can only request the candidate or the employee to provide information about his or her private life or to undergo medical tests and exams to the extent that (depending on the relevant case) the relevant data are strictly needed to assess their ability to perform the work, to the extent that particular demands related to the nature of the activity so require or to the extent that they seek to safeguard the employee and third parties. In all cases, the justification for the request must be served in writing and be well grounded, and the doctor in contact with the data may only disclose to the employer whether the candidate or employee is apt to perform the work.

There is also an express assurance of the employees' right to keep private messages and private access to information (ie online activity) confidential. This does not prevent the employer from establishing rules governing private use of company means of communication and to sanction the employees for misuses thereof; however, in doing so, employers are advised to take into consideration the guidelines issued by the CNPD on the topic.

4. Foreign Workers

4.1 Limitations on the Use of Foreign Workers

Limitations of the law on the use of foreign workers do not apply to citizens of EU and EEA countries, countries with which Portugal has concluded an agreement providing for the free movement of persons, refugees, beneficiaries of subsidiary or temporary protection, and members of the family of a Portuguese citizen or of one of the above-mentioned foreign individuals.

Otherwise, the rule is that foreign employees must obtain a residence visa prior to entering Portugal. The granting of visas depends on the existence of work vacancies which have not been filled by Portuguese citizens or others with preferential access to the work market and on a favourable prior opinion of the national immigration authority (*Serviço de Estrangeiros e Fronteiras*). Once in Portugal, the foreign employee in possession of a work contract or work promise must request the appropriate residence permit enabling him or her to perform subordinated work.

Particular regimes apply to foreign employees in specific circumstances. For example, those intending to incorporate a start-up or in possession of a work contract providing for the exercise of a particularly qualified activity (eg CEO, CFO) are exempted from the prior need to obtain a residence visa.

4.2 Registration Requirements

The registration requirements applicable to foreigners in need of a residence visa and/or permit are those involved in the obtaining of the visa or permit. The employer must also communicate the beginning of the contract of employment (as well as its term) to the inspection services of the Ministry of Labour prior to the contract starting.

Foreign employees from EU and EEA countries are allowed to live and work in Portugal but must register with the competent authorities in the 30 days subsequent to having been in the country for three months.

5. Collective Relations

5.1 Status of Unions

Unions are permanent associations of employees with the aim of promoting their professional interests. As such, they are one of the most important employee representative bodies contemplated in the law and the only one to which the law (and the Constitution) recognises the right to collective bargaining.

Other than collective bargaining, unions are entitled to participate in the making of employment-related legislation, to render services to their associates and to intervene in judicial and administrative procedures, either representing their own interests or those of their associates.

Trade union representatives at company level (*delegados sindicais*) are entitled to information and consultation on a variety of topics (eg transfers of undertakings, redundancies, decisions likely to cause substantial changes to the work organisation or the contracts of employment) and to convene meetings outside and during working times (in this case, up to 15 hours per year). They may post and distribute union-related information and must be given an appropriate place inside the company in which to carry out their functions (in companies with 150 employees or more, such place is to be provided on a permanent basis).

Both trade union representatives at company level and employees who form part of the union's management bodies have the right to paid time off to carry out their responsibilities as employee representatives. They may also take justified absences, this time without pay. The number of employees who benefit from these rights depends on the number of unionised company employees and the limit in terms of paid time off depends on the union body to which the employee belongs.

5.2 Employee Representative Bodies - Elected or Appointed

Works councils (*comissões de trabalhadores*) are elected by the employees and represent all company employees. Perhaps for this reason, they are the employee representative body to which the law recognises the widest set of rights (but not the right to collective bargaining, which historically and constitutionally is reserved to unions). Hence and for example, the matters about which the works council is to be informed and consulted are significantly wider than that of trade union representatives; and where there is a works council, the employer need not engage with the trade unions during collective dismissal procedures.

Unions are elected in accordance with their own statutes and represent only the employees affiliated with the union.

Trade union representatives at company level are appointed by the union.

Portuguese law contemplates other types of employee representative bodies in specific areas, as is the case with the representatives of employees in the field of health and safety or members of the European Works Council, both of which are also elected by the employees.

5.3 Collective Bargaining Agreements

Collective bargaining agreements (*convenções colectivas de trabalho*) are agreements negotiated between employers or associations of employers, and trade unions. They can be as wide as to cover one business sector (eg banking, insurance, automotive, pharmaceutical), a group of employers (eg oil and energy companies) or one single employer (eg the company providing the public land transportation service of passengers in Lisbon).

Collective bargaining agreements can also result from one employer (or employers' association) or a trade union adhering to a collective bargaining agreement negotiated by others. Decisions issued by an arbitration tribunal voluntarily incorporated by the parties are also a type of negotiated collective bargaining agreement.

Part of the content of collective bargaining agreements is contractual in nature, in the sense that it regulates the relationship between the contracting parties. As with any contract, the contracting parties must conclude it and execute it in good faith and may be found liable for breaches thereof.

The remaining and most important part of collective bargaining agreements is that which regulates the terms and conditions of employment of the employees whose individual contract of employment is subject to the collective agreement. Certain terms and conditions of employment may only be governed by collective bargaining agreements (ie not in individual contracts of employment); that is the case with indemnities in the event of dismissal, for example. Certain terms and conditions of employment may be regulated by collective bargaining agreements either more or less favourably than the corresponding legal regime (eg pay increase for overtime work) and others only in a manner more favourable to the employees (eg duration of the period of vacation). It is only in matters of pay that collective bargaining agreements may dispose retroactively.

An employee may enforce the regulatory part of collective bargaining agreements against his or her employer even though the collective bargaining agreement was not concluded between the employer and that specific employee. In this sense, collective bargaining agreements are a type of contract that defies the traditional concept of contracts being effective only between the parties.

Portuguese law also contemplates instruments of collective regulation of an administrative (ie not negotiated) nature.

These are enacted when the Government extends existing negotiated collective bargaining agreements to non-affiliated employers and/or employees operating in the sector of the collective agreement or issues the regulation itself. An example of the latter is the regulation for administrative employees not covered by other collective bargaining agreements, by virtue of which the employees are entitled to terms and conditions of employment which are not mandatory by law (eg meal allowance and seniority premiums). Decisions by mandatory arbitration tribunals are also a form of administrative collective regulation.

6. Termination of Employment

6.1 Grounds for Termination

On the part of the employer, motivation to terminate the contract is normally required, the exceptions being termination during the probation period, at the end of fixed-term contracts or upon termination of the *comissão de serviço*.

Where motivation is required, it is required a priori: in causes for termination as diverse as disciplinary dismissal or redundancy procedures, the dismissal decision must be grounded, the respective motive being detailed; and in court, the employer may only make use of facts and grounds mentioned in the dismissal decision.

On the part of the employee, motivation to terminate the contract is not required as a rule. Where the employee terminates the contract with allegation of cause, motivation is required and ought to be disclosed at the time of termination.

Different grounds for dismissal call for different procedures. This being said, most procedures are structured in a similar way, comprising three main stages: information, defence or negotiation, and decision.

Disciplinary dismissals start with the employee being made aware of the facts of which he or she is accused, together with a manifestation of the intention to dismiss him or her. The employee presents a written defence and asks for probative diligences to be carried out. The procedure ends with the employer issuing a grounded, written dismissal decision.

Collective dismissals begin with the employer communicating the intention to proceed with the dismissal; the motives for dismissal and other related documentation must be disclosed. Information is followed by negotiations between the employer and the employee representatives, aimed at reducing the impact of the dismissal or agreeing higher compensation. Representatives from governmental services participate

in the meetings. The procedure ends with the employer's dismissal decision, which must be issued in writing and contain a set of mandatory elements (eg motive for dismissal, date of termination, amount of compensation to be paid).

The structure of dismissals based on the extinction of the job position is similar to that of collective dismissal, except for the stage of negotiation, which is replaced with the employee issuing a written opinion on the requirements of dismissal. The employee may request the intervention of the inspection services of the Ministry of Labour.

Dismissals based on the employee's failure to adapt to the job position are more complex. The employer starts by communicating the intention to carry out the dismissal. The employee may request for probative diligences to be executed; upon being informed, by the employer, of the result of such diligences, the employee and the relevant employee representative body have ten working days to issue a grounded opinion on the dismissal. The procedure ends with the employer issuing a detailed written dismissal decision, to be copied to the employee representatives and the inspection services of the Ministry of Labour.

Collective Redundancies

Collective redundancies may take two forms: collective dismissals or dismissals based on the extinction of the job position. Collective dismissals apply when companies with 50 or more employees intend to dismiss five or more employees and companies with fewer than 50 employees intend to dismiss two or more employees, in both cases within a three-month period. Otherwise, the correct procedure is that of dismissal based on the extinction of the job position.

Both forms of collective redundancies must be based on market, structural or technological motives. The law provides examples of each of these three, but others are admissible. The reduction of the company's activity caused by a decrease in demand for goods and services is an example of a market motive. The company's financial imbalance, a change of activity or a restructuring of the business organisation constitute structural motives for dismissal. Changes in production techniques are technological motives.

Other than these, collective dismissals may be based on the closure of one or more of the company's sections or equivalent structures. Situations of total and definitive shutdown of the company do not constitute dismissal as such but (unless the company has fewer than nine employees) the expiry of the contracts of employment must be preceded by the procedure contemplated in the law for collective dismissals.

6.2 Notice Periods/Severance

The required notice period depends on the party (employer or employee) putting the contract to an end and on the cause for termination. Other than during the probation period, notice for termination must be given in writing.

During the probation period, the employer must serve a seven-day notice if the contract has lasted for more than 60 days and a 15-day notice if the contract has lasted for more than 120 days.

In collective redundancies (collective dismissal, dismissal based on the extinction of the job position and expiry based on the company's shutdown), the notice period due from the employer depends on the employee's period of service with the company: 15 days for employees with less than one year of service; 30 days for employees with one or more years of service, up to five years; 60 days for employees with five or more years of service, up to ten years; and 75 days for employees with ten or more years of service. The same notice applies to dismissals based on the employee's failure to adapt to the job position.

Employers must communicate the end of fixed-term contracts 15 days in advance of the end of the initial term or the renewal in force. The corresponding notice period for the employee is eight days. However, the employee is free to leave at any time, provided he or she gives notice of 15 or 30 days, depending on whether the contract has lasted for less than six months or for six months or more.

In unfixed-term employment contracts, the notice period due from the employer amounts to seven, 30 or 60 days, depending on whether the contract has lasted up to six months, from six months to two years or for more than two years.

An employee hired under an open-ended contract of employment must warn the company 30 or 60 days in advance, depending on whether he or she has up to two, or more than two, years of service. Depending on the employee's functions, the parties may agree on notice periods as long as six months.

In contracts entered into under the *comissão de serviço* regime, both parties must communicate the end of the *comissão de serviço* 30 or 60 days in advance, depending on whether the regime lasted for two years or for more than two years. The parties may agree to increase the notice period.

The contract of an employee who retires and continues working or turns 70 without retiring is converted, by operation of law, into a six-month fixed-term contract, with no limits in terms of renewals or maximum duration applying. Expiry of the contract must be communicated 15 or 60 days in advance of the term of the renewal in force, depending on whether the initiative is the employee's or the employer's.

When severance is required (always from the employer), it is required on top of notice. That is the case with collective redundancies, termination of fixed- or unfixed-term contracts of employment or termination of contracts entered into under the *comissão de serviço* regime, for example.

During a probation period, severance is not required but failure to serve the appropriate notice entitles the employee to the remuneration corresponding to the notice period that was not observed. The same applies (outside the probation period) to an employee failing to serve the required notice.

Pregnant employees, female employees during the 120 days after birth or breastfeeding and male parents during parental leave may only be dismissed following a favourable opinion of the national equality authority (*Comissão para a Igualdade no Trabalho e no Emprego*, or CITE). Where the CITE (on suspicion of discrimination) opposes the dismissal, the employer must seek the court's authorisation prior to dismissal.

Otherwise, other entities or authorities may be asked to intervene in the dismissal procedure but their views are not binding.

In disciplinary dismissals, the employer has the obligation to consult the works council or, if the employee is a union representative, the union, prior to issuing the dismissal decision.

In collective dismissals, meetings in the negotiation phase are presided over by a specific service of the Ministry of Labour. Where such service finds the procedure to be irregular from a formal or material viewpoint, they should point it out (but the employer may choose to proceed to dismissal).

In dismissals based on the extinction of the job position, the employee may request the intervention of the inspection services of the Ministry of Labour, which will issue a non-binding opinion on specific aspects of the procedure.

6.3 Dismissal for (Serious) Cause (Summary Dismissal)

Portuguese law defines cause for (disciplinary) dismissal as the guilty conduct of the employee the seriousness and consequences of which make it immediately and practically impossible to maintain the employment relationship.

The law offers examples of conducts which constitute cause for dismissal but its list is not exhaustive. The following are some of the conducts mentioned in the law: unlawful disobedience to (lawful) instructions; repeated conflicts with other employees; repeated lack of interest in carrying out one's duties; severe damage to the company's patrimony; false justification of absences; unjustified absences, which either cause damage to the company or, regardless thereof, reach five consecutive absences or ten non-consecutive absences in a given calendar year; guilty failure to observe rules on health and safety; crimes against representatives of the employer or other employees; failure to observe a judicial or administrative order; and abnormal reductions in productivity.

The burden to prove cause lies with the employer.

The employer has 60 days from becoming aware of the infraction (or a shorter period provided for in the applicable collective bargaining agreement) to take disciplinary action, provided no more than one year has passed since the employee's infraction (or the statute of limitation of criminal law, if the relevant facts constitute a crime as well).

Those deadlines are interrupted by the employee being given a detailed written description of the facts of which he or she is accused, together with an express warning of the intention to dismiss him or her (short of which the employee may not be dismissed). Where the company has a works council or the employee is a trade union representative, the works' council or the trade union must be given copies of these documents. The above-mentioned deadlines are also interrupted by the employer initiating (prior to handing in the accusation) a preliminary inquest, provided such inquest is necessary to prepare the accusation and is conducted in a diligent manner.

Upon receiving the accusation, the employee has ten working days (or a different period provided for in the applicable collective bargaining agreement) to consult the disciplinary file and present his or her written defence. Where the employee asks for probative diligence to be carried out (eg witnesses to be heard, documents to be attached to the file), the employer may only refuse them by justifying in writing that they are irrelevant or seek to delay the procedure.

Upon conclusion of the probative diligences, the employer sends a copy of the disciplinary file to (if applicable) the works council and the trade union, which have five working days to issue a non-binding opinion.

Upon receipt of the employee representatives' opinion or term of the deadline for them to issue it, the employer has 30 days to issue the dismissal decision, which must be in writing, grounded and take into consideration all circumstances of the case.

The disciplinary procedure must be concluded within one year, otherwise the dismissal is unlawful.

The procedure in companies with fewer than ten employees is simplified.

The contract of employment ends, with immediate effect, when the employee receives, or would have received but for his or her fault, the dismissal decision. As the employee gave (guilty) cause for termination, compensation is not due.

Employees dismissed with cause are only entitled to unemployment allowance if they challenge the dismissal in court.

6.4 Termination Agreements

Termination agreements are permissible. They must be entered into in writing and specify the date of signature, the date of termination of the contract and the period during which the employee may revoke the termination agreement (seven days from signature). The parties are free to agree on other terms, such as the compensation due or post-contractual commitments.

Where the employer wishes to avoid the employee having the right to revoke the termination agreement, the parties' signatures of the agreement must be recognised by a notary.

Where – in the context of the termination agreement – the employee is paid a global compensation, there is a legal presumption that all credits due at the time of termination or by virtue thereof were included in the compensation. Accordingly, the burden to prove otherwise lies with the employee.

As it is only at the time of termination that the employee may lawfully waive credits arising from the contract of employment, together with the payment of compensation employers are advised to include in the agreement a statement from the employee that all credits arising from the contract have been duly paid.

6.5 Protected Employees

Only pregnant employees, female employees during the 120 days after birth or breastfeeding and male parents during parental leave are protected against dismissal, in the sense that their dismissal requires a prior, favourable opinion from the national equality authority (CITE), short of which the employer must seek the court's prior authorisation to proceed to dismissal.

Likewise, the employer may not request the court to prevent reinstatement of employees unlawfully dismissed, where they are in one of those categories. Indemnity (in alternative to reinstatement) due to these employees will be set by the court between 30 and 60 days of base remuneration and seniority premiums, with a minimum of six months' pay, whereas the usual indemnity ranges from 15 to 45 days of base remuneration and seniority premiums, with a minimum of three months' pay.

Employee representatives are not protected against dismissal as such, except for the fact that employers must consult the relevant trade union prior to dismissing trade union representatives for disciplinary reasons. The works council issues an opinion on all disciplinary dismissals of company employees, including employees who are members of employee representative bodies.

However, where the dismissal is found to have been based on the employee being or intending to be an employee representative, indemnity for unlawful dismissal is also set by the court between 30 and 60 days of base remuneration and seniority premiums, with a minimum of six months' pay.

7. Employment Disputes

7.1 Wrongful Dismissal Claim

Employees can challenge dismissal on both procedural and substantive grounds.

In fact, failure to observe the legal procedure for all kinds of dismissal invalidates the dismissal. So if the employer (for example) failed to prepare a detailed description of the facts of which the employee is accused, failed to promote negotiation with the employee representatives during the collective dismissal, or failed to pay the compensation due to the employee until the date of termination, the dismissal will be found to be against the law.

Likewise, dismissals may be declared illegal if the respective motive was not proven in court, or was found to be meaningless. Dismissals for political, ideological, ethnic or religious reasons, even on the pretext of a legitimate ground, are also against the law.

Employees unlawfully dismissed are entitled to the lost pay from the date of dismissal until the date of the courts' last decision. Income from post-dismissal professional activities and unemployment allowance are deducted from the loss of pay; the unemployment allowance is paid back (by the employer) to the social security.

At the same time, employees unlawfully dismissed may choose between reinstatement in the exact same terms and conditions of employment or an indemnity. Depending on the seriousness of the dismissal, indemnity is set by the court at between 15 and 45 days of base remuneration and seniority premiums, with a minimum of three months' pay.

In companies with fewer than ten employees or where the relevant employee occupied a management position, the employer may request the court to oppose reinstatement, based on reinstatement being highly detrimental to the company's operations. Should the court agree, the indemnity will be increased to 30 to 60 days of base remuneration and seniority premiums, with a minimum of six months' pay. Opposi-

tion to reinstatement will not be granted if the dismissal was prompted by political, ideological, ethnic or religious motives, if the grounds for the opposition were artificially created by the employer or whenever the employee dismissed was pregnant or breastfeeding or the dismissal took place during the 120 days after birth or during parental leave.

7.2 Anti-Discrimination Issues

Employees are protected against discrimination on the following grounds: ancestry, age, sex, sexual orientation, gender identity, marital status, family situation, economic situation, education, origin or social condition, genetic heritage, reduced work capacity, deficiency, chronic disease, nationality, technical origin or race, territory of origin, language, religion, political or ideological beliefs and trade union membership. The list, however, is not exhaustive.

The onus is on the one claiming discrimination to identify the employee or employees in comparison with whom he or she is being discriminated against. The employer has the burden to prove that the difference in treatment is not based on a prohibited ground.

Employees being discriminated against have the right to be indemnified for all pecuniary and moral damages suffered as a result.

8. Dispute Resolution

8.1 Judicial Procedures

There are specialised employment forums: the employment courts, at the level of first instance courts, in a total of 44 around the country, and the Social Sections of the (five) Appeal Courts and the Supreme Court of Justice.

The law does not specifically contemplate class action claims in the employment field; public health, environment, protection of consumers, cultural and public domain are the areas typically addressed in this type of lawsuit.

In court, the parties are represented by lawyers registered with the Bar, all of whom are qualified to litigate in court.

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Those without the means to pay for a lawyer are appointed one by the State.

Public Prosecutors (*Ministério Público*) ensure special representation in specific lawsuits: those assessing the lawfulness of the incorporation and statutes of associations of employers, trade unions and works council; of provisions of collective bargaining agreements; of the subordinated nature of contractual relationships; and the conciliatory phase of lawsuits arising from work accidents.

8.2 Alternative Dispute Resolution

Pursuant to the general arbitration law, all disputes referring to pecuniary interests may be solved by voluntary arbitration, provided they are not subject to the exclusive jurisdiction of the judicial courts (eg the lawfulness of individual and collective dismissals) or necessary arbitration. Non-pecuniary interests may also be addressed in arbitration, provided they do not refer to unavailable rights (eg rights concerning work accidents).

The Labour Code contemplates three types of arbitration aimed at solving conflicts arising from a collective bargaining agreement: voluntary arbitration, when the parties to the agreement agree to go to arbitration; mandatory arbitration, at the request of either of the parties, upon recommendation of the Standing Committee for Social Dialogue (*Comissão Permanente de Concertação Social*) or upon initiative of the Ministry of Labour; and necessary arbitration, in sectors which ceased to be covered by collective bargaining agreements. In all cases, the arbitration decision is as binding as a collective bargaining agreement.

Provisions in collective bargaining agreements where the parties commit to arbitration are common and enforceable.

Provisions of that kind in contracts of employment are rarely ever used. Where the dispute does not refer to unavailable rights or matters of the exclusive competence of the judicial courts, pre-dispute arbitration agreements are, in principle, enforceable.

8.3 Awarding Attorney's Fees

Both a prevailing employee and employer can be awarded attorney's fees. Such award, however, is limited to 50% of the total amount both parties paid to the court as judicial fees, which is likely to be below the injured party's costs with attorney's fees.