VALADAS CORIEL
& ASSOCIADOS
ADVOGADOS

www.valadascoriel.com

EMPLOYMENT AND SOCIAL SECURITY BULLETIN

JANUARY 2023

1. Employment quota system for persons with disability (with a disability level of at least 60%)

As of February 2023, the transition period foreseen in Law 4/2019, of January 10, for companies with more than 100 employees to ensure the minimum quota of employees with disability will expire. For companies with between 75 and 100 employees at their service the mentioned transition period will end in February 2024.

Please note that the mentioned Law establishes an employment quota system for persons with disability (with a disability level of at least 60%). For medium sized companies that employee between 75 and 249 employees, the quota amounts to 1% of the employees at their service. For companies employing 250 or more employees, the quota is of 2% of their workforce.

The Law foresees the possibility for companies to apply for an exemption of the enforcement of the mentioned quota system. Such application must be addressed to the Portuguese Labour Authority ("ACT") accompanied by a duly grounded opinion to be issued by the "Instituto Nacional para a Reabilitação, I.P." (National Institute for Rehabilitation) in coordination with the IEFP, I.P.'s services, concerning the impossibility of its effective application to the labour positions.

Furthermore, they may also be exempted from the fulfillment of the quotas companies that are in a position to demonstrate to ACT the lack of a sufficient number of job candidates with disability that gather the conditions to occupy the labour positions corresponding to the job vacancies from the previous year.

We underline that the failure to comply with the quotas amounts to a serious administrative offence and thus may lead to the application of fines.

2. Annual update of the occupational accidents related pensions' amounts for 2023

It was published the Ministerial Order 24-A/2023, of January 9, that updates the amount of the pensions due as a result of occupational accidents for 2023. Under the Order, the pensions are increased by 8.4%.

3. Annual update of pensions for 2023

It was published the Ministerial Order 24-A/2023, of January 9, that updates the amount of the pensions and other social instalments granted by the social security system as well as the amounts of the retirement, old age and disability retirement granted by the Caixa Geral de Aposentações.

We highlight the increase on the amount of the pensions of the social security general framework and of the social protection convergence regime which will be updated as follows:

a) 4.83% for pensions amounting up to € 980.86 (with a minimum increase of € 13.43);
b) 4.49 % for pensions amounting from € 960.86 up to € 2882.58 (with a minimum increase of € 46.41);
c) 3,89% for pensions amounting to more than € 2882.58 (with a minimum increase of € 129.43).

With a few exceptions provided for in the law, pensions amounting to more than € 5765.12 will not be updated.

4. Ministerial Extension Orders

They were published the following Extension Orders ("EO"):

- EO of the collective bargaining agreement ("CBA") between Associação dos Agricultores do Baixo Alentejo and Sindicato Nacional dos Trabalhadores da Agricultura, Floresta, Pesca, Turismo, Indústria Alimentar, Bebidas e Afins (SETAAB). The territorial scope of application of the EO is limited to the Beja District and excludes the following activities: horticulture, fruit growing, floriculture (within the Municipalities of Aljejuz e Odemira), poultry and egg production, farming of pigs, agriculture cooperatives, beneficiaries' associations and hunting. The new salary scale and monetary clauses are applicable as from July 1, 2022;

- EO of the amendments to the CBA between Associação Portuguesa das Empresas do Sector Eléctrico e Electrónico and the Federação dos Sindicatos da Indústria e Serviços - FETESE and others. The extension is applicable to companies that carry out, within the electric and electronic, energy and telecommunications sectors, to at least one of the following industrial or commercial activities: manufacturing, design, research or software engineering, systems engineering, installation, maintenance and technical assistance, basic, complementary or value-added telecommunication services. They fall outsider the scope of application of the EO companies affiliated at AGEFE and employees unionized at unions belonging to FIEQUIMETAL. The new salary scale and monetary clauses are applicable as from July 1, 2022;

Legal Alerts

- EO of the amendments to the CBA between the Associação Portuguesa dos Industriais de Curtumes and the Federação dos Sindicatos dos Trabalhadores Têxteis, Lanifícios, Vestuário, Calçado e Peles de Portugal - FESETE. The new salary scale and monetary clauses are applicable as from July 1, 2022;

- EO of the amendments to the CBA between FENAME - Federação Nacional do Metal and the Sindicato dos Trabalhadores do Sector de Serviços - SITESE and others. They fall outside the scope of application of the OE companies affiliated at the Associação dos Industriais Metalúrgicos, Metalomecânicos e Afins de Portugal – AIMMAP and employees unionized at FIEQUIMETAL. The new salary scale and monetary clauses are applicable as from August 1, 2022;;

- EO of the amendments to the CBA between Associação da Hotelaria, Restauração e Similares de Portugal (AHRESP) and the Sindicato dos Trabalhadores e Técnicos de Serviços, Comércio, Restauração e Turismo - SITESE (tourism lodging). The EO is not applicable to companies affiliated at the Associação da Hotelaria de Portugal (AHP), at APHORT - Associação Portuguesa de Hotelaria, Restauração e Turismo, at Associação dos Industriais Hoteleiros e Similares do Algarve - AIHSA or at the Associação dos Hotéis e Empreendimentos Turísticos do Algarve (AHETA). The new salary scale and monetary clauses are applicable as from July 1, 2022;

- EO of the CBA between ALIF - Associação da Indústria pelo Frio e Comércio de Produtos Alimentares and the Sindicato Nacional dos Trabalhadores da Agricultura, Floresta, Pesca, Turismo, Indústria Alimentar, Bebidas e Afins – SETAAB. The EO is not applicable to employees unionized at unions represented by FESAHT. The salary scale and monetary clauses are applicable as from July 1, 2022;

- EO of the CBA between ANEFA - Associação Nacional de Empresas Florestais, Agrícolas e do Ambiente and the Sindicato Nacional dos Trabalhadores da Agricultura, Floresta, Pesca, Turismo, Indústria Alimentar, Bebidas e Afins – SETAAB. The salary scale and monetary clauses are applicable as from July 1, 2022;

- EO of the CBA between ACIRO - Associação Comercial, Industrial e Serviços da Região Oeste and CESP - Sindicato dos Trabalhadores do Comércio, Escritórios e Serviços de Portugal and other. The territorial scope of application of the EO is limited to the Municipalities of Torres Vedras, Cadaval, Sobral de Monte Agraço and Lourinhã. The salary scale and monetary clauses are applicable as from July 1, 2022;

- EO of the amendments to the CBA between Associação dos Distribuidores de Produtos Alimentares (ADIPA) and others and the Sindicato dos Trabalhadores e Técnicos de Serviços, Comércio, Restauração e Turismo - SITESE (wholesale). The EO is not applicable to employees unionized at unions represented by FEPCES. The new salary scale and monetary clauses are applicable as from July 1, 2022;

- EO of the amendments to the CBA between Associação dos Distribuidores de Produtos Alimentares (ADIPA) and others and the Sindicato dos Trabalhadores e Técnicos de Serviços, Comércio, Restauração e Turismo – SITESE (food retail). The EO is not applicable to employees unionized at unions represented by FEPCES nor to companies affiliated at APED. The new salary scale and monetary clauses are applicable as from July 1, 2022.

Latest developments on the ongoing employment law reform

The Parliament's Specialized Standing Committee for Employment, Social Security and Inclusion ("Committee") continues to discuss and to vote the amendments to the employment law foreseen in the Bill 15/XV.

The approval by the Committee of several of the mentioned amendments has come to light. From those we highlight the following:

Telework

It will be possible to define in the telework agreement a specific amount to be paid by the employer to cover the additional expenses that the employee will have to incur in within the scope of the rendering of work under a telework regime.

Under article 168th of the Labour Code ("LC"), the employer is required to cover all "additional expenses" that the employee has to bear as a direct result of the purchase or use of informatic of telematic equipment and systems required for executing the work, including any increases on the costs of energy and communications in the workplace, as well as any expenses related to maintenance of such equipment and systems. The amount to be paid by the employer in relation to such expenses is deemed, for tax purposes, as a cost for the company and is not considered as employee's income. Furthermore, according to the mentioned article of the LC, they are considered as additional expenses the ones corresponding to the purchase of goods or services that the employee did not have before the execution of the telework agreement as well as the ones to be determined by comparing the employee's homologous expenses in the same month of the previous year prior to the starting date of the agreement.

As from the amendments to the telework legal framework introduce by Law 83/2021, there were doubts in the legal interpretation of the law as well as practical difficulties for the companies to set up streamlined payroll procedures to accommodate the payment of the amounts to be paid to employees to cover the additional expenses related to the telework. In order to overcome such difficulties, a number of companies, whether in the individual telework agreements or in the applicable CBAs, defined a fixed amount for compensating such expenses to be paid to the employees on a monthly basis. Such solution raised issues as far as the tax and social security treatment of such amounts was concerned, as the law provided that only expenses regarding which there was evidence (such as invoices) could fall under the category of "additional expenses".

The Portuguese Tax Authority has recently issued an opinion on the matter, espousing the following understanding:

- In order to prove the "additional expenses" one should look, in first instance, to the agreement executed between the employer and the employee, as well as to the evidence of the increase on the expenses, as per the documentation/invoices that may be produced by the employee, and by comparing them with the homologous expenses of the same month of the previous year. Furthermore, such documents/invoices shall be sufficient to determine that they are related to the "workplace" that was determined in the telework agreement, although not being mandatory that the employee is the person directly liable for the payment of the invoices;
- The supporting payment document for the "additional expenses" must be verified by the payroll or similar document, this being the tax relevant document for the employer that shall report such amount in the Monthly Remuneration Statement as non-subject to taxation employment related income (code A23);
- The payment of an amount in consideration of monetary compensation for covering the "additional expenses" arising from the rendering of telework, with no direct connection to any document supporting the same, lead to the taxation of such amounts, under article 2, paragraph 2 of the Personal Income Tax Code.

The amendment that was now approved by the Committee is aimed at overcoming this difficulty, by allowing the parties to agree on the amount to be paid by the employer as compensation for the additional expenses, and to include such amount in the telework agreement. Notwithstanding, in our view, the amendment alone is not sufficient to overcome the practical difficulty that companies face regarding this matter, nor does it prevent possible tax related contingencies. In fact, one could ask the question of what is the cap of the amount the parties may agree on to cover the expenses, being that there is the risk that such amount (or part thereof) is deemed excessive and therefore may qualify as an integral part of the employee's salary and thus subject to taxation. This contingency is not merely a tax related one, as if the amount is deemed to be a part of the employee's salary it will fall within the scope of application of the relevant rules concerning protection of salary and therefore it may not be reduced and may have to be included in the calculation of vacation and Christmas bonuses, among others.

In our view, the only route to ensure that the now approved amendment is effective and risk free is by legally establishing a cap for the amount the parties may agree on (as occurs, for instance, for meal allowances, that are tax exempted up to a certain amount).

Father's exclusive parental leave

It will be increased to 28 days (from the current 20).

Latest developments on the ongoing employment law reform

Increase on the number of justified absence days in case of death of a spouse

There will be an increase on the number of justified absences in case of death of an employee's spouse to 20 days.

Overtime payment

Overtime exceeding 100 hours per year will be paid as follows:

a) Increase of 50% over the normal hourly rate for the first hour of fraction thereof and of 75% for the following hour(s) or fraction in normal working day;

b) Increase of 100% over the normal hourly rate for each hour or fraction thereof in weekly rest day or public holiday.

Increase in the amount of the severance payment in case of termination of term employment contracts

Severance payment for the termination of term employment contracts will be calculated based on 24 days of base salary and seniority bonus per year of employment.

Companies that terminate employment contracts for objective reasons (both collective dismissals and extinction of labour position(s) procedures) will be prevented to outsource services

Companies that have resourced to collective dismissals or to extinction of labour position procedures will be prevented from hiring external services to ensure services/tasks that were executed by the employees who were dismissed for a period of 12 months following the dismissal.

In our view, this is an unacceptable (and we have strong doubts on its conformity with the Portuguese Constitution) limitation, among others, to the freedom of company management. Furthermore, in our view the rule is, to say the least, difficult to reconcile with relevant EU rules concerning transfer of undertakings, collective dismissals and freedom of enterprise.

It will not be possible for employees to "write-off" employment related credits

The lawmaker's intention is to prohibit the waiver by the employee of any potential outstanding employment related credits upon the termination of the employment contract. This amendment will have a significant impact in companies' HR procedures.

The rule at stake entails that the "traditional" clauses included, for instance, in employment contract termination agreements, under which the employees state that, upon receiving the agreed amounts, they are fully paid for all credits arising both from the execution and the termination of contract, will not be enforceable. Thus, even in case such clause is agreed on, the employee may judicially claim other employment related credits, such as overtime, vacations, professional training, etc., within one year following the termination of the employment contract.

According to the information that has been made available, it is expected that the legislative procedure will be completed in the course of this year's first trimester.

Protection of the safety and health of employees – Work with display screen equipment – Protection of the employees' eyes and eyesight - Spectacles

Judgment of the EU Court of Justice (CJ) of 12/22/2022 – Proc. C-392/21

In the Judgement, following a request for a preliminary ruling on the interpretation of article 9, paragraph 3, of Council Directive 90/270/ECC, on the minimum safety and health requirements for work with display screen equipment.
The request was made by Romanian Court and the underlying case is related to an employee who carries out his work on display screen equipment. On-screen work and other risk factors, such as discontinuous visible light, lack of natural light and mental overload caused a significant deterioration in his eyesight. The employee therefore had to, on the recommendation of a specialist, change his glasses in order to correct the decline in his visual acuity. The employee asked his employer to reimburse him of the expenses related to the purchase of the glasses. That request was rejected.
The CJ ruled that:

1. Article 9(3) of Council Directive 90/270/EEC of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment (fifth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) must be interpreted as meaning that 'special corrective appliances' provided for in that provision include spectacles aimed specifically at the correction and prevention of visual difficulties relating to work involving display screen equipment. Moreover, those 'special corrective appliances' are not limited to appliances used exclusively for professional purposes;
2. Article 9(3) and (4) of Directive 90/270/ EEC must be interpreted as meaning that the employer's obligation, laid down in that provision, to provide the workers concerned with a special corrective appliance, may be met by the direct provision of the appliance to the worker by the employer or by reimbursement of the necessary expenses incurred by the worker, but not by the payment of a general salary supplement to the worker.

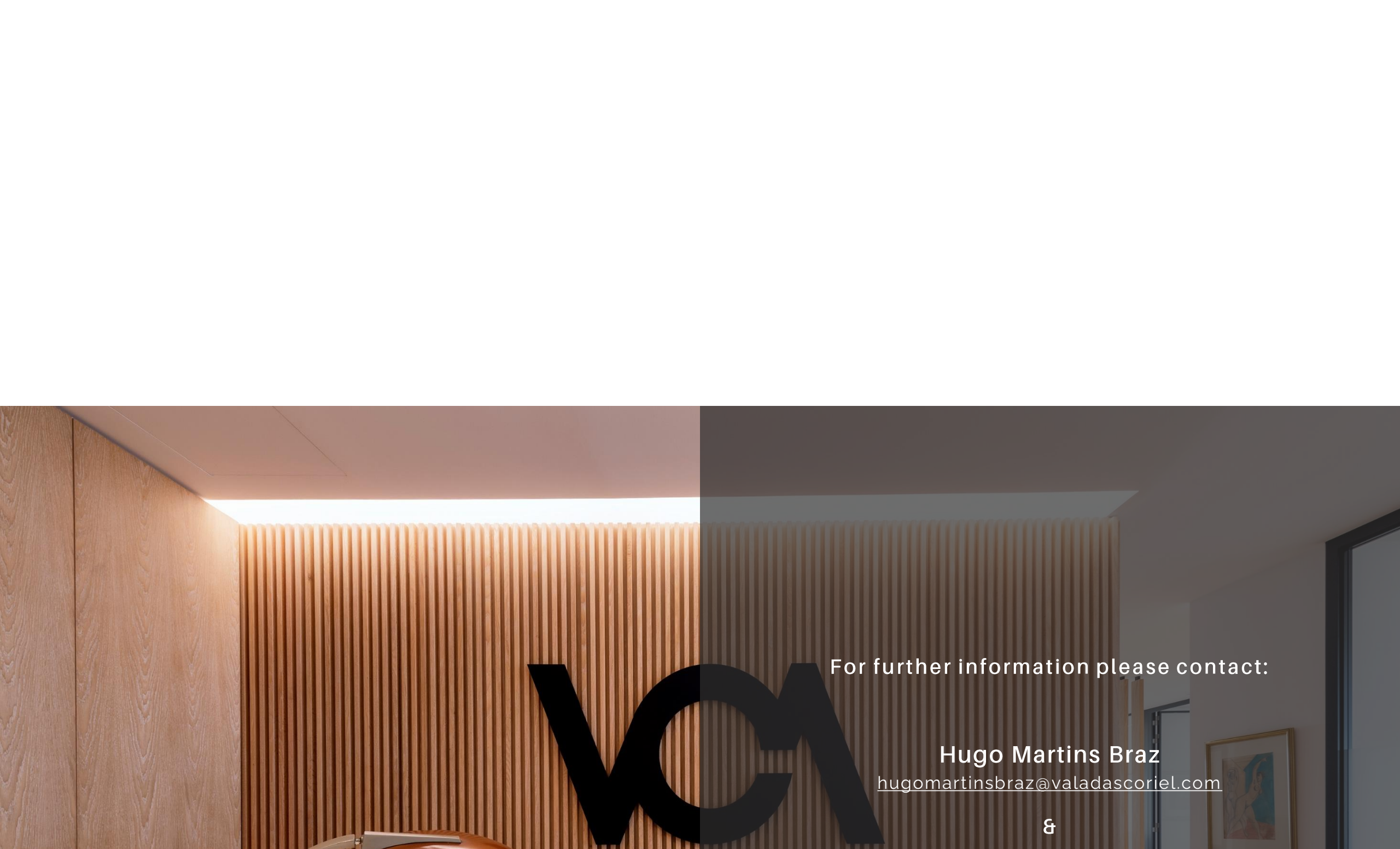
We note that in Portugal the mentioned Directive was transposed by the Decree-Law 349/93, of October 1, being that the understanding espoused by the CJ may, under our national legal framework, be applicable in our jurisdiction.

EMPLOYMENT DEPARTMENT

Hugo Martins Braz
Partner
hugomartinsbraz@valadascoriel.com

Tiago Lopes Fernandez
Of Counsel
tiagolopesfernandez@valadascoriel.com

Maria Moura Fonseca
Senior Associate
maria.fonseca@valadascoriel.com



For further information please contact:

Hugo Martins Braz
hugomartinsbraz@valadascoriel.com

&

Tiago Lopes Fernandez
tiagolopesfernandez@valadascoriel.com