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CHANGES TO EMPLOYMENT LAW

Main amendments with impact in Human Resources management

Introduction

Law 13/2023, of April 3rd, encompasses significant changes to the Portuguese employment law. The changes that now came into light are a result of a long and sinuous legislative process which, in essence, stemmed from the measures laid out in the so-called Decent Work Agenda ("Agenda do Trabalho Digno"), which the Government trumpeted as being aimed at enhancing working conditions and the reconciliation of professional, private, and family life.

The amendments cover a wide range of matters, not only foreseen in the Portuguese Labour Code ("LC") but also in specialized laws such as the ones governing Temporary Work Agencies, Domestic Work Employment Contracts, Labour Procedure Code, Labour Conditions Authority ("ACT") powers, just to name a few.

The new law is characterized (which unfortunately is becoming increasingly the case) by a poor legislative technique, featuring rules with dubious wording, often contradictory and espousing solutions outlying the densification of concepts that for decades both legal opinion and case law have supported. It goes without saying that all of this comes at a loss for legal advisors, who will face increasing difficulties when trying to provide accurate solutions to clients, as well as to both employees and companies, in light of the significant and undesirable level of legal uncertainty. One can also clearly identify an intention to bring into law solutions for specific cases which were widely covered by the media over the last couple of years, a tendency to try to solve individual cases which consistently leads to poor legal solutions.

We should nevertheless highlight some positive points, such as the definition of a legal framework for work in digital platforms and more stringent sanctions for undeclared work. We note, however, that these new legal solutions will only be effective if accompanied by an increase in the level of enforcement by the competent authorities which will heavily rely in a strengthening of the means made available to such entities, which is yet to be seen.

In this paper we highlight the changes we deem more relevant for the daily management of human resources for most companies.

Main changes to the Labour Code

Economically dependent self-employed workers

The criteria for assessing the existence of economic dependency between a services provider and the activity's beneficiary are densified, which is achieved by an express link to the framework foreseen in the Social Security Contributions Code. Thus, economic dependency is deemed to occur whenever a services provider is (i) an individual who directly and without resourcing to third parties renders an activity to the beneficiary, (ii) more than 50% of his annual income is sourced from that relationship and (iii) such annual income if higher than 6 times the amount of the IAS (€ 2,882.58 currently).

The scope of legal rules which are applicable to self-employed workers under economic dependency will include Collective Bargaining Agreements ("CBA") whose scope of application is the same economic activity, professional and geographic sector. This is a completely new framework being that, in our view, the application of CBAs to this type of contractual arrangements will lead to high levels of litigation, as we deem this solution not to be in line with Constitutional principles related to the extent CBAs may be applicable to non-executing parties.

Legal presumption of employment contract within digital platforms related work

There is a rebuttable presumption of employment contract whenever, in the relation between the services provider and the digital platform, some of the following characteristics may be identified:

- The digital platform establishes the amount of the payment for the work or may set minimum or maximum caps for such amounts.
- The digital platform has direction powers and establishes specific rules, such as concerning the provider's appearance, his conduct towards the service's user or the way in which the activity should be carried out.
- The digital platform controls and oversees the rendering of work, including in real time, or checks the quality of the activity, either electronically or through algorithmic management systems.
- The digital platform limits the provider's autonomy as far as the organization of the work is concerned, in particular regarding the choice of working hours or days thereof, the possibility of accepting or refuse tasks, to subcontract the services, to choose the clients or to provide services to other platforms.
- The digital platform enforces labour powers over the services provider, such as disciplinary powers, including platform exclusion by account cancelation.

› The equipment and working tools are property of the platform or are rented by it.

Parenthood

Possibility of coordinating the initial parental leave with part-time work

Parents will have the possibility of, once a 120 consecutive days parental leave period has elapsed, to cumulate the remaining leave period with part-time work.

Change on the mandatory parental leave periods for mothers and fathers

The parental minimum mandatory parental leave period for the mother is reduced to 42 consecutive days (from the current 6 weeks). On the other hand, the mandatory period for fathers is increased to 28 days (from the current 20). The father's mandatory leave period may be taken continuously or be divided into blocs with a minimum duration of 7 days each; in any case it has to be fully taken within the 42 days following the child's birth.

Caregiver Employee

A large number of rights is granted to employees who have the legal status of informal non-principal caregiver, which includes many of the rights granted to employees within the framework of parenthood protection and of employees with family responsibilities, from which we highlight the following:

Caregiver leave

Right to an annual 5 consecutive business days leave to provide assistance to the cared person,

Part-time work

Right to work on part-time (half of the full-time working hours, as a rule), for a maximum period of up to 4 years (which may be continuous or interchanged with full time work).

Flexible working schedule

Right to apply for a working schedule under which the employee chooses, within determined time slots, the beginning and ending hours of his normal daily working period.

The schedule, to be drafted by the employer, shall:

› Include one or two slots of mandatory presence, with a duration of half the normal daily working period.
› State the time slots for the starting and ending of the daily work, each with a duration not inferior to one third of the normal daily working period, being that the slots' duration may be reduced in order to accommodate to the regular working hours of the establishment or undertaking where the employee renders work.
› Establish a resting period with a duration not longer than 2 hours.

The employee may execute up to 6 hours of consecutive work and up to 10 hours of work each day (being the compliance with the weekly normal working hours assessed in average taking per reference a 4-week period).

Protection in case of dismissal

Dismissal of caregiver employees has to be preceded by the issuance of a prior opinion by CITE (a governmental entity in charge of overseeing compliance with equality of rights and non-discrimination). In case of termination on grounds of just cause (for disciplinary reasons), there is a rebuttable presumption that said termination is unlawful.

Exemption from the execution of overtime

It is not mandatory for employees to perform overtime whenever there is the need to provide assistance.

Information Duty

There is a densification of the information duty concerning relevant aspects for the execution of the work, which now includes, among others, the parameters, criteria, rules and instructions in which algorithms or other AI systems are based, that affect both recruitment as well as the maintenance of the employment relationship, including profiling and monitoring of performance.

We highlight, within this context, that a new rule was introduced under which, lack of compliance with the information duty concerning the length of conditions of trial (probation) periods leads to a rebuttable presumption that the parties intended to exclude such periods.

There is also a strengthening of the information duties concerning salaries, that now must include all its components, as well concerning the right to ongoing professional training.

Trial periods

Further to the already mentioned presumption of exclusion of the trial period in case of lack of compliance of the information concerning this matter, they were included new rules that determine the reduction of exclusion of such period for situations of hiring of first-time job seekers and long term unemployed persons.

The prior notice period for the termination of the employment contract by the employer's initiative in the cases in which the trial period has already lasted for more than 120 days was extended to 30 days.

Term employment contracts

Increase in the amount of the compensation for the termination of term employment contracts

The amount of the compensation owed to employees as a result of termination of term employment contracts, and provided that such termination does not flow from the employee's initiative, is increased to 24 days of base salary and seniority bonus for each year of employment (being the fraction of year calculated on a *pro rata* basis).

Temporary Work

The legal requirements for the licensing and operation of temporary work agencies will become more stringent. They were also introduced changes to the legal frameworks of the contracts for the use of temporary employees and to temporary work contracts.

Execution of a contract for the use of temporary employee(s) with non-licensed company

It will now be considered that the work is provided to the user (company that benefits from the employee's activity) under open ended employment contract.

Successive contracts prohibition

Under the previous framework, once the maximum duration of the contract for the use of temporary works is reached, it is forbidden for a temporary employee or one hired under a term employment contract to succeed in the same job position before a period corresponding to one third of the duration of the contract, including renewals, has elapsed.

The scope of the prohibition is now broadened and will include not only the same job position but also the same professional activity as well as the execution of contracts for service for the same object or activity. Furthermore, the prohibition is extended to the execution of contracts executed with a company that has a controlling or group relation with the employer or that shares common organizational structures.

Further to be qualified as an administrative offence, breach of said prohibition leads to the conversion of the employment contract, being deemed that an open-ended employment contract is in place between the employee and the user and the employee's length of service is counted as from the beginning of the rendering of work to the user under the successive contracts.

Maximum duration of temporary employment contract

It will be possible to renew fixed-term temporary employment contracts up to 4 times and a 4-year maximum duration for successive temporary contracts for different users is introduced, regardless of said contracts being executed with the same employer or with companies that that have a controlling or group relation with the employer or that shares common organizational structures.

Remote work

Increase on the number of situations that may grant the employee to work under a telework regime

They will now include employees with children who, regardless of age, are disabled, chronically ill or who suffer from an oncologic disease, provided that belonging to the same household.

Setting of the amount of the compensation for expenses

The employment contract, the individual agreement for the performance of telework or the applicable CBA, may set the amount of the compensation to be paid to the employee for the additional expenses to be borne as a consequence of the rendering of this type of work.

It is yet to be issued by the Government an Administrative Order setting the cap for the amount which will be deemed, for tax purposes, as a cost for the employer and that will not be considered as employee's taxable income.

Justified absences

Absences due to the death of a spouse

It is increased to 20 consecutive days the period of justified absences in case of death of a spouse who is not legally separated.

Proof of the employee's sickness

For the sake of justifying the absence, the proof of the employee's sickness may be provided by way of a self-statement of sickness via the National Health Services online platform. This form of justifying sickness related absences is solely valid for situations of up to 3 days of consecutive absences and may only be used twice a year.

Overtime

Overtime payment will be increased as from the 101st hour of overtime per year, which will be paid at the hourly rate with the following increases: 50% for the first hour or fraction thereof and 75% for each following hour or fraction thereof, if rendered on a normal working day; 100% for each hour of fraction thereof if rendered on weekly rest day or public holiday.

Waiver of employment related credits

It will no longer be possible for employees to waive employment related credits upon the termination of employment contracts, exception made to situations of court settlements.

Within the context, the clauses that are commonly used in employment contract termination agreements under which, following the payment of the agreed compensation and other employment related credits (such as outstanding overtime work, vacations, etc.), the employees state that they hold no further claim of any nature against the company will no longer be enforceable. Therefore, the employee will still have the possibility to file a lawsuit against the company aimed at claiming other employment related credits that may not be included in the termination agreement.

Terminations for objective reasons (such as collective redundancies)

Increase in the amount of the compensation

The basis for the calculation of the compensation due to the employee for termination of employment contract for objective reasons (such as within a collective dismissals or extinction of labour position procedures) is increased from the current 12 to 14 days of base salary and seniority bonus for each full year of service. The new amount will only be applicable as from the entering into force of the new law, which means that for older contracts the compensation will be calculated based on 12 days in relation to the previous years and 14 days for the period following the entry into force of the new law.

Outsourcing prohibition

A new prohibition is introduced under which it is not possible for a company to outsource services which were previously carried out by employees whose employment contracts were terminated under a collective dismissal or extinction of labour position procedure in the preceding 12 months. Failure to comply with such rule is deemed as a very serious administrative offence.

We believe this new rule to be unconstitutional as it amounts to an unproportional curtailment of the right of

freedom of enterprise. Furthermore, the extension of the prohibition is not clear as it may lead to discussions as to if its breach has the potential of "merely" leading to the application of fines or if may impact the lawfulness of the employment contracts termination procedure previously carried out by the employer.

Professional internships

Minimum amount to be paid to interns may not be lower than the Guaranteed Minimum National Wage, currently set at € 760.00 per month.

The professional internship is considered as an employment relationship for purposes of Social Security contributions.

Social security

Consequences for lack of compliance of the deadlines to communicate the hiring of employees and/or failure to make such communication

2023 State Budget Law had already increased the deadline for communicating the hiring of employees to the Social Security services from the 24 hours preceding the beginning of the execution of the employment contract to the previous 15 days.

Now, in case of failure to communicate the hiring of the employee, it will be considered (a rebuttable presumption) that the employment relationship started on the 1st day of the 12th month prior to the lack of compliance with the communication duty.

Furthermore, employers that do not comply with the communication duty once a 6-month period has elapsed following the deadline to do it, may be sanctioned under article 105, paragraph 1 of the Legal Framework for Tax Offences (up to 3 year prison sentence or a fine up to 360 days).

Extension of the regime for hiring entities that benefit, in the same year, of more than 50% of the activity of self-employed workers

The scope of application of the framework applicable to hiring entities – those that benefit, in the same year, of more than 50% of the amount of the activity of self-employed workers and that are therefore under the obligation to make contributions to the Social Security – is extended and will include activities carried out by sole proprietorships and single-person limited liability companies.

Key Contacts

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