

New startups law – key takeaways from an employment perspective



01

To which companies does it apply?

Despite the law's name, its scope of application goes well beyond what may be considered startups. It includes both startups and scaleups and, as far as the tax regime applicable to stock options is concerned, it also applies to companies that qualify as micro, small or medium size and to small mid-caps, as per Decree-Law 372/2007, in the year before the stock option plan is approved.

Furthermore, it also applies to companies whose activity falls within the innovation area, being considered as such entities that have spent in R&D, patents, designs or industrial models or software an amount equivalent to at least 10% of its expenses or turnover.

02

What is the tax treatment of stock options?

Stock options granted by companies to employees will still be considered for PIT purposes as employment income, but now it is clear that the sole taxable events are:

- _ Disposal of the shares
- _ Loss of Portuguese tax resident status
- _ Free transfer of the shares

In order to benefit from the regime, the stock related rights have to be held for at least one year.

A flat tax rate of only 14% will apply to the taxable income, which corresponds to the the amount of the balance between the selling price and the price of the option or right to which one should add any payments made in order to acquire the option or right.

03

Are there any exclusions?

Yes, the following taxpayers are excluded:

- _ Ones holding (directly or indirectly) at least 20% of the company's share capital or voting rights;
- _ Members of any company's governing body (such as statutory directors).

These exclusions are not applicable to entities who are qualified as startups or as micro or small companies.

04

Is there any procedure companies have to follow in order to be recognized as startups or scaleups?

Yes. It involves a previous online communication to Startup Portugal which is the entity in charge of recognizing such status as well as to monitor the maintenance of the legal requirements for a company to have such qualification.

05

What are the employment related issues companies must bear in mind?

As far as stock options plans are concerned there is no “one size fits all” solution. It is of the utmost importance that the specific plan to be “offered to employees” takes into consideration the type of company, its by-laws and any existing shareholders agreements. Also, let’s not be blinded by the tax regime, as there are other aspects that should be taken into account, notably:

_ The design of the stock option plan should be aligned with the company’s overall employment related incentives scheme, so it serves the purpose of attracting and retaining talent and also to ensure that the most efficient tax and social security solutions are applied;

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_ Considering that in Portugal employers are not free to unilaterally change employees' salary structure (please note that, from a strictly employment law perspective, stock option plans may not be considered as employees' salary), it is crucial that when designing the plan, any change on the employees' salary structure does not lead to any possible employment related risks;

_ When defining eligibility criteria, companies must not only ensure that the plan is addressed to key personnel but also that there is no risk that such criteria may be deemed as discriminatory;

_ Considering the legal framework for termination of employment contracts in Portugal, companies should be particularly careful when determining conditions for vesting and consequences of employment contract termination;

_ Stock options plans are not widely used in Portugal, therefore most employees are not familiar to commonly used schemes. Within this context, it is of the utmost importance that the Plan is written – to the extent possible - in plain language and that an appropriate communication strategy is in place.



For more information

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