EVERSHEDS SUTHERLAND FCB

Newsletter

Updates to Portuguese Labour Code

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Agenda for Dignified Work | Amendments to Portuguese Labour Code and related legislation

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In the scope of government's Agenda for Dignified Work ("Agenda de Trabalho Digno"), was published Law no. 13/2023 of 3 April, amending the Portuguese Labour Code (hereinafter "Labour Code") and related legislation.

The main amendments cover the matters relating to: (a) situations assimilated to an employment contract; (b) presumption of employment; (c) digital platforms; (d) right to equality in access to employment and at work; (e) prohibition of discrimination; (f) protection in parenthood; (g) adoption; (h) caregiver employee; (i) absences due to death of a family member; (j) rights and duties of information; (l) rights, duties and guarantees of the parties; (m) trial period; (n) fixed-term contracts; (o) teleworking; (p) temporary work; (q) increments for overtime work; (r) employee's credits; (s) compensation in case of collective dismissal; (t) waiver of notice of termination; (u) outsourcing; and (v) collective labour relations.

These amendments will come into force on 1 May 2023, with the exception of the amendments related to collective labour relations, which came into force on 4 April 2023.

I. Situations assimilated to an employment contract

When the work provider is under economic dependency of the beneficiary of the activity, the collective bargaining regulation instruments (hereinafter "CBA") of the same sector of activity, professional and geographic will be applied to the provider.

The situation of economic dependency is measured by the product of the activity developed by an individual through the direct provision of services and, as a rule, without the intervention of third parties to the same beneficiary from whom he obtains more than 50% of the total value of the self-employed employee's activity under the terms of Portuguese Contributions Code.

The activity is considered to be provided to only one beneficiary whenever the provider works for several beneficiary group companies or under relationship of reciprocal participations, dominance or which share common organisational structures.

Individuals under the situation of economic dependence become entitled to:

(a) representation of their social-professional interests by a trade union association and by a works council.

(b) negotiation of specific CBA for self-employed employees, through trade union associations;

(c) application of already existing CBA applicable to employees, under the terms foreseen therein;

(d) administrative extension of the regime of a collective agreement or an arbitration decision, and the administrative fixing of minimum working conditions.

II. Presumption of Employment

(i) Sanctions applicable to the employer

The accessory sanctions applicable to the employer in case of recurrence of the application of the regime of presumption of an employment contract have been strengthened and now include the prohibition to participate in public procurement tenders for a period up to two years.

It is clarified that the exclusion of the right to supports, subsidies or benefits granted by a public entity or service includes benefits of a tax or contributory nature or arising from European funds.

(ii) Digital platforms

The work performed on digital platforms is now regulated.

A digital platform is defined as a legal person that provides or makes available services at the distance, through electronic means, at the request of users and which involves the organisation of work performed by people against payment, under the terms and conditions of a business model and a brand of its own.

Some additional indicators are defined that allow the presumption of the existence of an employment contract, regardless of the denomination that the parties have attributed to the respective legal relationship, namely:

(a) the settlement of a salary or the definition of maximum and minimum limits for the work carried out by the digital platform;

(b) the exercise of any powers of direction by the digital platform, in particular, in relation to the presentation of the activity provider, its conduct towards the service user or the provision of the activity;

(c) the monitoring and supervision of the provision of the activity by the digital platform, including in real time, or by checking the quality of the activity provided, in particular by electronic means or algorithmic management;

(d) the restriction of the provider's autonomy as to the organization and method of the provision of the work;

(e) the exercise of labour powers over the activity provider, including disciplinary action and prevention from future activity in the platform through deactivation of the account; and

(f) the ownership or operation of the work equipment and tools by the digital platform through a lease agreement.

The presumption of the existence of an employment contract also applies to the activities of digital platforms for the remunerated individual transport of passengers in non-characterised vehicles from an electronic platform.

The digital platform may rebut the presumption of the existence of an employment contract in general terms, namely by the prove that the activity provider operates with effective autonomy without being subject to the control, power of direction and disciplinary power of the person who hires the services.

III. Right to equality in access to employment and at work and prohibition of discrimination

The provisions regarding the right to equality in access to employment and at work are now applied to the cases of decision-making based on algorithms or other artificial intelligence systems.

Practices related to the exercise of general parental rights and other rights related to work life balance and the rights foreseen for carer employees are now expressly included as grounds for allegation by the employee of discriminatory practices.

The cast of discriminatory practices is now extended to the ones related with the granting of assiduity and productivity bonuses, as well as to detrimental allocations in terms of evaluation performance and career progress.

IV. Parental Protection

Significant changes have been introduced to parental rights, as follows:

(i) Pregnancy loss

In the cases where the abortion leave does not apply, the employee is entitled to paid time off, up to three consecutive days off, which are deemed as effective provision of work.

When the employee benefits from the abortion leave or from the pregnancy loss leave, the father is entitled up to three consecutive days of time off.

For either purpose a declaration from the hospital, health centre or a medical certificate must be presented to the employer.

(ii) Adoption and foster care

The entitlement to time off applicable to adoption has been extended to employees applying to a foster parent status, within the context of foster families.

In either cases of adoption and foster care families, employees are now entitled to unlimited time off, aimed to carry out evaluation tests and to comply with the obligations and procedures required to said effects.

These absences to work do not determine the loss of any rights and are deemed, to any effects (except for remuneration) as effective provision of work.

In the case of adoption of a child under 15 years old, it is now provided that the employee candidate to adoption is entitled to take father's exclusive parental leave.

Moreover, during adoption's transition and monitoring period, the candidate to adoption may now take a parental leave of up to 30 days.

The adoption leave regime is now also applicable to foster families.

(iii) Parental leave

In the case where parents take an initial parental leave of 120 or 150 days, are also entitled, after 120 consecutive days, to jointly cumulate each of the remaining days of leave under a part-time schedule.

The duration of the mandatory mother's exclusive parental leave is now counted as 42 consecutive days, instead of the current 6 weeks, to be taken immediately after the birth.

Likewise, the mandatory exclusive parental leave of the father is now counted as 28 calendar days, instead of the current 20 business days. The leave must be taken within the subsequent 42 days to the birth (7 of which immediately after) in consecutive or alternated minimum periods of 7 days.

After completion of the mandatory period, the father remains entitled to an additional period, now counted as 7 calendar days (instead of the current 5 business days), to be taken in consecutive or alternated terms, but in any case, during the exclusive within the parental leave of the mother.

Employees in one of the following situations are excluded from the application of group adaptability and group bank of hours schedules:

(a) with child aged less than 3 years old or, irrespective of age, affected by disability or chronic disease, save if agreed in written by the employee; and

(b) with child aged between 3 and 6 years old, provided that the other parent has professional activity and is prevented from providing assistance, duly certified by written declaration delivered to the employer.

(iv) Additional parental leave

The extent of the additional parental leave comprises now the provision of work during 3 months under a part-time schedule, with a regular working hours period equivalent of the half of the full time schedule, provided that the leave is taken in full by both parents.

V. Carer employees

Implementing the Directive (EU) 2019/1158 of June 20 on work-life balance for parents and carers, a new set of provisions are established in respect to carer employees.

A carer employee is defined as the individual, legally certified as non-principal informal carer, i.e., which provides personal care or support to a relative (spouse and relatives by consanguinity or by affinity up the direct or collateral 4th degree), on a regular and non-permanent basis, whether paid or not.,

The carer employee cannot cumulate the rights provided under said status with parental rights that may be entitled to in relation to the assisted relative.

(i) Rights of carer employees

These employees are entitled to an annual unpaid leave of 5 consecutive business days to assist the relative, which does not affect any other rights.

They also entitled to 15 days off per year, if necessary to provide immediate and indispensable assistance to the relative due to illness or accident

Carer employees are entitled to opt for a part-time working schedule up to a maximum of 4 years, consecutive or not. While the need to provide assistance to the relative so justifies it, carer employees are also entitled to work under a flexible working hours schedule, in consecutive or alternated terms.

Also, while such assistance is required, the carer employee is not obliged to render overtime work.

(ii) Protection in case of termination by the employer, non-renewal of fixed-term contract and termination in the trial period

The termination of the carer employee – whether by dismissal with cause or by individual and collective redundancy – requires the previous consultation and opinion of the governmental agency for equal opportunities between men and women ("CITE").

Furthermore, the disciplinary dismissal is deemed as being concluded without cause.

The employer must notify CITE of the non-renewal of the fixed-term employment contract of carer employee, including the respective reasons.

The termination in the trial period of a carer employee must also be communicated to CITE.

VI. Absence for decease of relatives

in the case of decease of non-separated spouse or equivalent, son and stepson, the duration of the bereavement leave is extended to 20 consecutive days.

VII. Rights and duties of information

Following the transposition of Directive (EU) 2019/1152, regarding transparent and predictable working conditions, the contents of the duty of information of the

employer to the employee has been extended, both in relation to the elements subject to information but also to the development of elements already covered by the same duty, thus including the obligation to inform about:

(a) the term stipulated or the foreseeable duration of the contract, in the case of a fixed-term or uncertain-term contract, respectively;

(b) the formal requirements to be observed by the employer and the employee for termination of the contract;

(c) the method of payment of the remuneration and identification of its constituent elements;

(d) the regime applicable in case of overtime work and shifts work;

(e) the designation of the entities that entered into the CBA;

(f) identification of the work compensation guarantee fund, provided for in specific legislation;

(g) identification of the user, in the case of temporary work;

(h) the duration and conditions of the trial period, if applicable;

(i) the individual right to continuous training;

(j) the relevant information concerning intermittent work, if applicable;

(k) social protection regimes, including benefits which are complementary or substitutive to those provided under the general social security regime; and

(l) the parameters, criteria, rules and instructions on which algorithms or other artificial intelligence systems affecting decision-making on access to and retention of employment, and working conditions, including profiling and job monitoring, are based.

Also, the content and scope of the information that the employer must provide to an employee who is going to work in the territory of another State for a period of more than one month has been extended, namely:

(a) identification of the State or States where the work shall be provided;

(b) identification of benefits in kind, where applicable;

(c) possibility of returning and conditions thereof;

(d) remuneration to which is entitled under the law applicable to the host State, in situations of secondment;

(e) allowances related to the secondment and reimbursement of travel, accommodation and subsistence costs, where applicable; and

(g) official website of the host State, set up in accordance with the specific legislation applicable to secondment.

Also, within the scope of the Directive, it is now foreseen that information must be communicated to the employee in hard copy or in electronic format, within 7 or 30 days (depending on the elements in question) after the effective start of the provision of work.

VIII. Trial period

If, until the 7th day after the beginning of the contract the employer does not inform the employee (in hard copy or electronic format), of the applicable trial period, it shall be deemed that the parties agreed to exclude the trial period.

The trial period is also reduced or excluded in the case of permanent contracts concluded with first-time job seekers and long-term unemployed employees who

were previously employed by another employer for 90 or more days under fixed-term contract.

The trial period is also reduced or excluded when the employee, in the last 12 months, has successfully completed a professional traineeship of 90 or more days, for the same activity and different employer.

In case where the trial period has lasted more than 120 days, the notice period for termination of the contract by the employer is now extended to 30 days.

It is now mandatory to communicate to the Labour Authorities ("ACT") the termination in the trial period of employment contracts of first-job seekersand long-term unemployed individuals, submitted electronically within 15 days after the termination.

It is foreseen that termination in the trial period shall me deemed as unfair if arising from abuse of right. In such a case, the general provisions governing the effects of unfair dismissal shall apply.

IX. Rights, duties and guarantees of the parties

The transposition of the Directive on transparent and predictable working conditions also created a new guarantee for the employee, which determines that the employer cannot prohibit the employee from performing, outside the regular working hours schedule, another professional activity, unless such prohibition is based in objective grounds, such as health and safety or professional privileged information.

Without prejudice to the duty of loyalty, the performance of another professional activity prevents the employer from a detrimental treatment to the employee.

X. Term contracts

In the same context of the duty to provide information, it is now mandatory to include in the uncertain-term contract the mention to its the predictable duration.

The prohibition of successive fixed-term employment contracts is extended, not only to the case where the new admission or allocation is aimed for the same job position, but also in the case where said new admission or allocation is directed for the same professional activity.

The compensation for termination of a fixed or uncertain term contract, which does not result from the initiative of the employee, is increased to 24 days of base salary and seniority allowance per each full year of seniority.

XI. Teleworking

(i) Right to teleworking

The right to teleworking includes now the case of employee with a child affected by disability or by chronic or oncological diseases, irrespective of the child's age and provided that the former is part of the employee's household.

(ii) Compensation for additional expenses

It is expressly provided that the employer and the employee can agree on a fixed amount of the compensation for additional expenses.

It is also provided that such amount can be settled in the applicable CBA.

In the absence of agreement on a fixed amount, the compensation shall be calculated by reference to the employee's expenses in the previous month to the start of the teleworking schedule.

(iii) Taxation of the compensation for additional expenses

It is provided that the compensation is not considered as income of the employee up to the exemption limit on Personal Income Tax ("IRS") (to be defined in specific regulation).

XII. Temporary Work

(i) Temporary employment contract or utilization contract of use with non-licensed Temporary Employment Agency ("ETT")

Temporary work resulting from the intervention of an unlicensed ETT is deemed to be provided to the user under a permanent employment contract (and not to the ETT, as it was the case until now).

(ii) Extension of the scope of the prohibition of succession of temporary employees in the same job position

Once the maximum duration of the utilization contract is reached, the prohibition of succession in the same job position before a period equivalent to 1/3 of the duration of the contract, now includes previous service agreements entered for the for the same object or activity.

In any case, previous temporary work contracts, fixed term employment contracts and services agreements entered, not only with the same employer, but also with a company with which the latter has a group of controlling corporate relation or if share common organizational structures are also relevant.

Violation of the prohibition of succession of contracts determines that the contract is considered to be concluded for an indefinite period between the employee and the user, and all the time worked in the user under successive contracts counts for seniority.

(iii) Reduction in the limit for renewals of temporary employment contracts

In the case of fixed-term temporary employment contracts, the maximum number of renewals is reduced from 6 to 4.

(iv) Reduction of the total duration of successive temporary employment contracts

A limit of 4 years is stipulated for the duration of successive temporary work contracts in different users, concluded with the same employer or company in a group or dominating relationship, or with a common organizational structure.

Failure to comply with this limit determines the conversion of the temporary work contract into an employment contract of indefinite duration for temporary assignment.

(v) Entitlement to holidays and calculation of holiday and Christmas allowances

The duration of holidays and the calculation of holiday and Christmas allowances, as well as other regular and periodic benefits, will no longer be indexed, in proportional terms, to the duration of the temporary employment contract.

XIII. Overtime work pay

(i) Differentiated additional pay according to the annual hours of overtime work performed

Until 100 hours per year:

a) 25% for the first hour or fraction and 37.5% per each subsequent hour or fraction, in business days

b) 50% per each hour or fraction, in mandatory or complementary weekly rest day or in public holidays.

Over 100 hours per year:

a) 50% for the first hour or fraction and 75% per each subsequent hour or fraction, in business days;

b) 100% per each hour or fraction, in mandatory or complementary weekly rest days or in public holidays.

XIV. Employee's credits: waiver

It is no longer permitted, even after the termination of the employment contract, that the employee, by agreement with the employer, waives any credits arising from the execution, breach or termination of the employment contract.

The extinction of such credits by waiver is only permitted under a judicial agreement.

XV. Compensation for termination of employment contracts

The amount of the compensation for termination by initiative of the employer is increased from 12 to 14 days of base salary and seniority allowance for each full year of seniority.

This reference is applicable, namely, to the termination by individual or collective redundancy.

Elimination of the employer's right to reimbursement from the labour compensation guarantee fund of the compensation paid to the employee.

XVI. Exemption from notice period termination

The termination by employee acknowledged as victim of domestic violence is not subject to notice period.

XVII. Outsourcing

It is prohibited to acquire external services from a third-party contractor to satisfy needs that have been assured by an employee terminated in the previous 12 months by individual or collective redundancy.

In the case of acquisition of external services to a third-party contractor for activities corresponding to the corporate scope of the beneficiary company, the CBA applicable to the latter shall also apply to the individual services provider, if more favourable to the latter and after 60 days of provision of the services.

The individual services provider is defined as the individual providing the contracted services agreement, whether as counterparty of the beneficiary company or if the latter's counterparty is another legal entity, irrespective of the nature of the agreement entered by them.

XVIII. Collective Labour Relations

Within the scope of the of the right to trade union, the right to set up employees' meetings at the workplace, the right to post and distribute in the company trade union information and the right of the trade union delegate to information and consultation also apply to companies where there are no unionised employees.

A non-unionised employee will no longer be entitled to opt for the applicable CBA if another CBA in the same sector of activity, occupation or geographical area already applies further to a governmental extension decree.

A new arbitration procedure was created for assessment of the grounds invoked by a contracting party in the case of unilateral termination of a CBA.

XIX. Relevant changes to related labour legislation

(i) Traineeship agreements (Decree-Law n. 66/2011 of June 1)

The minimum amount of the internship allowance is now indexed to the Minimum Monthly Guaranteed Wage applicable to trainees (equivalent to 80% of the national minimum wage) and not to the Social Support Index.

It is now mandatory to include the trainee in an insurance policy for labour accidents instead of insurance policy for personal accidents.

For social security purposes, the relationship arising from the internship agreement is now included in the legal framework applicable to employees.

(ii) Portuguese Contributions Code (Law n. 110/2009, of September 16)

- ✓ **Communication of admission of employee**

Failure to comply with this obligation has the effect to be deemed that the employee was admitted in the first day of the 12th month prior to the month where said breach was detected.

The breach of this obligation continues to constitute the practice of an administrative offence, which is now aggravated as very serious if the obligation is fulfilled more than 24 hours after expiry of the legal deadline.

In the cases of recurrent infractions by an employer, in addition to a fine, accessory penalties may be applied, such as the exclusion of the rights to public support and subsidies and to participate in public tenders, in both cases for up to two years.

Failure to comply with this obligation within 6 months is now also considered as a criminal offense.

- ✓ **Contracting entities**

The definition of contracting entity is extended to include the ones which, in the same calendar year, benefit from an activity representing more than 50% of the total income, not only from an individual services provider, but now also from an individual entrepreneur or from the owner of limited liability individual establishment.

(iii) Regulation of the Labour Code (Law n. 105/2009 of September 14)

The economic and technological reasons that can justify the governmental authorization to extend the company's operation period, including to 24/7 schedule are now detailed, though in non-exhaustive terms.

For either purpose, needs resulting from the temporary or extraordinary increase in activity or orders are also now relevant.

(iv) Labour Compensation Funds (Law n. 70/2013 of August 30)

The obligation to adhere to the Labour Compensation Guarantee Fund ("FCGT") and to pay the respective contributions is suspended throughout the execution of the Medium-Term Agreement for the Improvement of Income, Wages and Competitiveness, i.e., until 2026.

The obligation to adhere to the Labour Compensation Fund ("FCT") and pay the respective contributions is suspended until entry into force of the amendments to the respective legal framework.