



EMPLOYMENT & LABOUR LAW

THE NEW SALARY GUARANTEE FUND

The social guarantee system was set up by Decree-Law 50/85 of 27 February. Its aim was to guarantee workers the pay due to them but not paid by an employer whose business was closed or declared bankrupt or insolvent.

Following the recent amendments introduced by Decree-Law 59/2015 of 21 April, the new rules on the Pay Guarantee Fund (*Fundo de Garantia Salarial*) have been approved.

The key points are:

I. LEGISLATIVE EVOLUTION

- The social guarantee system was set up by Decree-Law 50/85 of 27 February. Its aim was to guarantee workers the pay due to them but not paid by an employer whose business was closed or declared bankrupt or insolvent.
- Decree-Law 219/99 of 15 June was introduced to revise this system and it created the **Social Guarantee Fund**, aimed at ensuring the payment of amounts due to employees in the event the employer defaulted.

As a consequence, this Decree-Law brought greater protection for salaried employees in the event of the insolvency of the employer. It provided that the point that determines the intervention of the guarantee fund is the initial procedural phase, which also covers company recovery processes, and it eliminated the requirement for the contracts of employment to be terminated. It also widened the range of payments guaranteed.

- The **Social Guarantee Fund** is currently provided for in article 336 of the Employment Code, approved by Law 7/2009 of 12 February. However, it is regulated by various specific pieces of legislation that are provisional in nature. These are Decree-Law 139/2001 of 24 April and articles 316 and 326 of the Employment Code Regulation of 2006, approved by Law 35/2004 of 29 July, amended by Law 9/2006 of 20 March, by Decree-Law 164/2007 of 3 May and by Law 59/2008 of 11 September.
- Decree-Law 59/2015 of 21 April unified the **Social Guarantee Fund** legal framework and repealed the earlier legislation.

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II. THE NEW RULES

The **Social Guarantee Fund** (“SGF”) is an autonomous fund that is not part of the social protection guaranteed by the social security system. Its management and operation are carried out by the Social Security Institute of Financial Management (*Instituto de Gestão Financeira da Segurança Social* - IGFSS, I.P.) and the SGF is financed by the employers.

STANDARDISATION OF THE EUROPEAN LEGISLATION

The new Portuguese law implements Directive no. 2008/94/EC, of the European Parliament and of the Council of 22 October 2008.

In this context, the SGF is extended to also cover those employees who work or who have habitually worked in Portugal but in the service of an employer operating in two or more Member States, even if the employer is declared insolvent by a court or authority in another Member State of the European Union or European Economic Area.

In these situations, the SGF must ask the competent authority of the Member State in question for the information pertinent to deciding on the application for payment of salaries owed.

Finally, the SGF must exchange information with the public authorities and/or other institutions in the other Member States that are responsible for these guarantees.

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PAYMENTS COVERED

The object of the SGF is to ensure that employees receive the **payments due to them under the contract of employment and its breach or termination**. These include salaries, holiday, Christmas and meal subsidies, and compensation.

On this point, it is important to note that:

- The payment of the amounts owed to any employee is only guaranteed when the application is made within one year of the day following the one on which contract of employment terminates;
- The maximum amount guaranteed by the SGF is three times the minimum guaranteed monthly pay (currently €1,515.00); and,
- In cases where the amounts owed to employees correspond to various payments, the payment of the base salary and seniority payments (*diuturnidades*) have priority over any others.

SITUATIONS COVERED

The payment of the amounts owed to employees is guaranteed by the SGF in one of three situations:

- When a court declares the **insolvency** of the employer;
- When a judge makes an order appointing a provisional judicial administrator, in the case of a **PER**;
- When an order is made accepting the application made by the IPAMEI, I.P., in the context of the **SIREVE**.

This change in the legislation demonstrate that adaptation of the SGF to the Revitalise Programme (*Programa Revitalizar*), established by Law 16/2012 of 20 April (Special Revitalisation Process - PER) and by Decree-Law 178/2012 of 2 August, amended by Decree-Law 26/2015 of 6 de February (Out-of-court Company Recovery System - SIREVE).

This means the new rules guarantee that the amounts owed to employees in companies subject to these revitalisation and recovery plans are also covered by the SGF.

Despite payment of the amounts owed to employees being guaranteed by the SGF, the employer continues to be responsible for compliance with its tax and social security obligations.

ANTI-ABUSE RULES

The new rules allow the SGF to:

- Refuse payment of the amounts owed to guaranteed employees in cases of abuse, including collusion or sham transactions;
- Reduce the amounts owed to employees in situations where the amounts requested are not in line with the amounts appearing in the salary declarations for the 12 months preceding the date of the application, when those declarations refer to the salary actually earned.

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The new law also establishes a [link](#) between the **SGF** system and the funds created by Law 70/2013 of 30 August - the Work Compensation Fund (*Fundo de Compensação do Trabalho* - FCT) and Work Compensation Guarantee Fund (*Fundo de Garantia de Compensação do Trabalho* - FGCT).

In these terms, the **SGF** is only responsible for the payment of the compensation due to the employee for termination of the contract of employment that is calculated under the terms of article 366 of the Employment Code, with the exception of the part for which the above mentioned funds may be responsible.

Provision is also made for the exchange of information between the **SGF**, the FGCT and the FCT.

Despite payment of the amounts owed to employees being guaranteed by the SGF, the employer continues to be responsible for compliance with its tax and social security obligations.

III. ENTRY INTO FORCE AND PERIODS TO WHICH THE LAW APPLIES

The new unified **SGF** framework comes into force on 4 May 2015 and applies to all applications submitted after this date.

Besides this, employees who have made applications during the course of a PER or between 1 September 2013 and 4 May 2015 (the date the legislation in question comes into force), also have access to the **SGF**, as long as they are covered by an insolvency plan approved by a court in insolvency proceedings. The application of the **SGF** is therefore broadened upon review of the processes.

Any applications submitted to the **SGF** at an earlier date where the decision is still pending are dealt with in accordance with the law applicable at the date of submission.

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 Iberian Law Firm of the Year
The Lawyer European Awards 2015, 2012

 Portuguese Law Firm of the Year
Who's Who Legal 2015, 2011-2006
Chambers European Excellence Awards 2014, 2012, 2009

 Top 50 - Most Innovative Law Firms in Continental Europe
Financial Times - Innovative Lawyers Awards, 2014-2011