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Portugal: Law & Practice

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PLMJ

PORTUGAL

Law and Practice

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1. Employment Terms

1.1 Employee Status

There is no legal distinction between blue-collar and white-collar workers as employment law does not include any classification of workers, although specific provisions or protection are applicable to:

- workers employed on fixed-term contracts;
- part-time workers;
- young workers; and
- working students.

Categories of worker based on the different duties and responsibilities are usually set by collective agreements.

1.2 Employment Contracts

An employment contract is a contract whereby a person undertakes, in return for payment, to work for another person or other persons under its/their authority and direction. Offer and acceptance are traditional elements of contract formation and are rarely a source of disagreement. The acceptance of an offer may be implied (notably by performance) or expressed.

Employment contracts are not subject to any special form unless otherwise provided for by law. However, the following contracts, among others, must be made in writing:

- promissory employment contracts;
- fixed-term employment contracts;
- employment contracts for foreign workers save as otherwise provided by law;
- employment contracts for high management positions (service commission);
- secondment agreements;
- multiple employer employment contracts;
- part-time employment contracts;
- early retirement contracts; and
- contracts to loan labour.

Terms and conditions of employment need not be expressly agreed and are governed by statutory provisions, collective agreements, work regulations or established practices.

1.3 Working Hours

Maximum Working Hours

Regular working hours may not be more than eight hours per day or 40 hours per week.

Flexible Arrangements

Average working hours rules

By collective agreements, regular working time may be defined as an average, within a reference period. In this case, the limits on working hours may be increased by a maximum of four hours, provided the weekly working time does not exceed 60 hours, not including overtime worked for reasons of force majeure. The average working time is calculated by reference to the period established in the applicable collective agreement, but cannot exceed 12 months, or, if the agreement makes no such provision, by reference to periods of no more than four months.

Exemption from the working hours rules

The exemption from working hours rules may be applicable to some specific jobs, such as managerial positions and commercial jobs, as well as to employees working remotely. A proper written agreement is legally required (this agreement can be part of the employment contract, as recommended).

Employees exempt from the working hours rules are entitled to an additional pay equivalent to no less than one overtime hour per day (general law). The additional pay can be paid separately or included in the monthly remuneration – in the latter case, this has to be specifically addressed in the written agreement (or in the employment contract).

Other flexible arrangements can also be set out in collective bargaining agreements.

Part-time contracts

A proper written contract is legally required and must contain certain minimum terms. The normal weekly working period is shorter than the one worked by full-time employees. This reduction can be achieved:

- by reducing the number of working days per week or month; or
- by reducing the daily working time.

Part-time employees are entitled to the same conditions as full-time employees on a pro rata basis, and have the right not to be discriminated against due to their status.

Overtime

Work done over the maximum weekly and daily limits qualifies as overtime. Overtime work is only admissible when requested by the employer if it is needed to face extraordinary circumstances, an increase in workload or the work is to prevent or repair damage to assets. However, there are some limits depending on the number of employees and type of contract. A collective bargaining agreement (CBA) may establish higher ceilings.

Overtime work entitles the employee to additional pay. This is a rate of 25%, of the ordinary hour, during the first hour and 37.5% during the following hours on the normal working days; and 50% on public holidays and rest days. Overtime worked over 100 hours per year is paid at the rate of 50% for the first hour or part thereof and 75% for each additional hour or part thereof worked on a normal working day; 100% for each hour or part thereof worked on public holidays and rest days. It also entitles them to time off equivalent to one full day in the case of overtime on mandatory rest day (usually Sunday). CBAs may establish a more beneficial treatment for the employee.

1.4 Compensation

There is a minimum national salary (EUR760 for 2023) set by law. Collective labour agreements may set out higher salaries in a specific sector, group of companies and/or company.

In Portugal, there are 14 payments, 12 salaries, one holiday bonus and one Christmas bonus. It is optional to pay variable salaries and companies are free to set out their own terms and conditions as long as they ensure these are objective and non-discriminatory.

1.5 Other Employment Terms

Annual Leave (Holidays)

All employees are entitled to a minimum of 22 working days' annual leave. During the first year of employment, employees are entitled to two working days for each month of the duration of their contract, up to 20 working days, which may be taken after six months' full performance of the contract.

During holiday periods, employees are entitled to their normal monthly remuneration plus a holiday allowance, typically of the same amount.

Parental Leave

Upon the birth of their child, both parents are entitled to initial parental leave of 120 or 150 consecutive days, to be shared between mother and father. The leave can be enjoyed simultaneously by both parents between the 120th and 150th days.

The leave may be increased by 30 days if each of the parents enjoys, exclusively, a period of 30 consecutive days, or two periods of 15 consecutive days, following the mandatory period of six weeks following the childbirth to be enjoyed exclusively by the mother. In case of multiple births (eg, twins), the duration of the initial parental leave is increased by 30 days for each child beyond the first one.

Fathers are entitled to take parental leave after birth of 28 days (consecutive or in interpolated periods of at least seven days), within 42 days of the birth (seven of which must be taken immediately after the birth). The paternity leave may be extended for seven more days provided it is taken at the same time as the mother's initial parental leave.

During the parental leave, the employer is not obliged to pay remuneration, as the Social Security pays an allowance. This period of leave cannot prejudice the position of the woman concerning any of the remaining entitlements, notably those dependent on attendance at work.

Parents are entitled to extended parental leave, up to three months, to be taken after the initial parental leave. Following this extended leave, parents are also entitled to leave within the first two years of the child's life to provide assistance to the child. There is no mandatory payment of the employer during these leave periods.

Employees with children under 12 years of age or, irrespective of age, with a disability or chronic illness who live with the employee and are under their care and employees with the status of non-formal caregivers are entitled to work part-time or to work under flexible working hours arrangements.

Sick Leave

Employees are entitled to time off from work for illness or injury, which is paid by the Portuguese Social Security protection schemes, provided they meet all the eligibility requirements. The Social Security protection schemes pay sick pay to employees who are absent from work as

a result of illness or injury. The employee can receive sick pay for a total of 1,095 days. Sick pay is calculated based on the employee's remuneration reference for Social Security purposes and varies between 55% and 75% depending on the period of illness.

The sickness leave suspends the employment contract as of 30 days and has no maximum period. Employees have the obligation to communicate absences due to sickness as soon as possible and may be required to present medical documentation proving the sickness. In some cases, CBAs provide specific rules covering employee illness or injury.

Protection of Confidential Information

During the employment relationship, employees are bound by a confidentiality duty. The parties may also agree upon a confidentiality duty after termination.

2. Restrictive Covenants

2.1 Non-competes

Portuguese employment law allows restrictive covenants, notably confidentiality, non-competition (and in that context, non-solicitation) and/or minimum stay obligations. The duration of the post-employment non-compete duty cannot exceed two years from the termination of employment.

In cases of employees who hold positions that entail a special level of trust (eg, management positions) or that have access to sensitive information from a competition standpoint, the restricted period can be extended to a maximum of three years. The minimum stay duty can be set at a maximum of three years.

Employees covered by a post-contractual non-compete duty must receive financial compensation during the restricted period. Portuguese law does not set a specific criterion to determine the compensation to be paid during the non-compete period. The Constitutional Court case law follows the understanding that the compensation must be fair, adequate and proportional. This means that the non-compete duty financial compensation must be sufficient to support the employee during the restricted period, taking into account their salary while employed by the company. Although the law leaves the parties some room to establish the time of payment, the purpose of the compensation is to ensure the employee can obtain a suitable income source during the restricted period. It is therefore recommendable that the payment of the compensation be made on a monthly basis during the restricted period.

If any agreement fails to provide for compensation, or if the compensation is considered insufficient, the agreement will be null and void, and thus release the employee from complying with it and the employer from paying the compensation. The amount of compensation may be reduced in cases where the employer has expended large sums on the employee's vocational training.

The remedies for a non-compete breach are limited to the possibility of seeking compensation from the former employee. The burden of argument, and the quantification and proof of the damage, falls solely on the former employer. In many cases, it is quite hard to quantify the damage as the value of information is difficult to measure. In addition, it is quite difficult to prove damage which arises as a result of the employee's behaviour. In order to mitigate this risk, it is usual for the parties to agree on a penalty award.

2.2 Non-solicits

Non-solicitation clauses are null and void under Portuguese employment law. No specific penalty is provided in the law concerning these agreements.

In addition, non-solicitation agreements also constitute a breach of competition law, as this type of agreement is deemed limiting and disruptive to competition and therefore illicit. Companies may be penalised with fines that may amount to 10% of the turnover of the company.

3. Data Privacy

3.1 Data Privacy Law and Employment

In Portugal, personal data processing is governed by the GDPR and Law 58/2019 of August 8th, which incorporates the GDPR into Portuguese law. When it comes to employees' personal data, special category data may be collected, processed and used by employers when necessary to meet obligations and exercise rights under employment, social security and social protection law or a CBA.

The Portuguese data protection law establishes that the consent given by an employee does not constitute a legitimate legal basis for processing their personal data if such processing results in a legal or economic advantage for the employees, except as otherwise specified by law. However, the Portuguese supervisory authority (the *Comissão Nacional de Proteção de Dados* – CNPD) holds that this provision is not compliant with EU law.

Transfers of personal data to third countries in and outside the EU (including Norway, Liechtenstein and Iceland) are only permitted if the conditions set under the GDPR are met. Furthermore, transfers to third countries (outside Europe) are also permitted if appropriate safeguards (eg, binding corporate rules and standard contractual clauses) are provided by the controller or processor of personal data and only if enforceable rights and effective legal remedies are available for the data subject. In any case, the transfer of personal data must observe the main data quality principles established under the GDPR: lawfulness; fairness and transparency principle; purpose limitation principle; data minimisation principle; accuracy principle; storage limitation principle; and the integrity and confidentiality principle.

4. Foreign Workers

4.1 Limitations on Foreign Workers

A proper written contract is legally required when hiring foreign employees, except for citizens from the EU or from a state with which there is a treaty between states. This contract can only be executed after the employee has obtained the proper visa and a copy of that visa must be annexed to the contract – this will not prevent a company from signing an offer letter or a promise of employment contract to be effective after the visa is obtained.

4.2 Registration Requirements for Foreign Workers

No specific registration requirements apply.

5. New Work

5.1 Mobile Work

The law allows the full remote working and hybrid regimes (when the employee carries out some days of remote work from their home or co-working space, and on other days they work

physically on company premises). As a rule, remote work is implemented by written agreement, which shall contain, most notably, the place of telework, the identification of the owner of any working equipment, as well as responsibility for its installation and maintenance, and the terms and periods the employee should physically attend company premises to work to avoid isolation from the company and their colleagues.

The following categories of employees are entitled to remote work:

- with a child up to the age of three or, irrespective of age, disabled, chronically ill or suffering from an oncological disease, who lives with them in the same household, and the employer has the resources and means to do so;
- with a child aged up to eight years, and the employer has the resources and means to do so (except for micro-company employees), in the following cases:
  (a) when both parents meet the conditions to exercise the activity in telework, provided that it is exercised by both in successive periods of equal duration within a maximum reference period of 12 months; or
  (b) single-parent families or situations in which only one of the parents, demonstrably, meets the conditions to exercise a teleworking activity;
- who are victims of domestic violence and have verified the conditions for transfer to another workplace; or
- who have the status of non-formal caregivers.

The capture and use of images, sound, writing or history, or the use of other means of control that may affect an employee's right to privacy, are prohibited.

Powers of direction and control over the provision of remote work are exercised, in principle, by means of the equipment and communication and information systems allocated to the employee's activity, in accordance with procedures previously known by the latter and compatible with respect for their privacy.

The employer is obliged to carry out health examinations at work before the implementation of remote work and, subsequently, annual examinations to assess the employee's physical and mental aptitude to carry out the activity, the repercussion of the activity and the conditions in which it is provided on the employee's health, as well as the appropriate preventative measures. Furthermore, the employer has the duty to evaluate and control the health and safety conditions at work in the place where the employee carries out their activity and to ensure that it complies with the health and safety conditions set by law.

5.2 Sabbaticals

Employees are entitled to unpaid leave of over 60 days to attend educational or vocational training. The employer can only refuse to grant such leave in the following cases:

- when, in the previous 24 months, the employee has been given appropriate vocational training or leave for the same purpose;
- in the case of an employee with less than three years of seniority;
- if the employee has not applied for an unpaid leave at least 90 days before it is due to start;
- in the case of a micro or small business and if it is not possible to adequately replace the employee if necessary; and
- in the case of employees performing managerial, supervisory or qualified roles, who cannot be replaced during the leave without causing serious loss to the operation of the business.

Apart from this case, the employee does not have a legal right to take unpaid leave, which means that it will be up to the employer to decide whether or not to grant the unpaid leave.

The unpaid leave determines the suspension of the employment contract. All the rights, duties and guarantees of the parties that do not presuppose the actual provision of work remain in force and the time of suspension is considered for seniority purposes.

5.3 Other New Manifestations

There are no new manifestations to mention for this jurisdiction.

6. Collective Relations

6.1 Unions

Trade union organisations are entitled to:

- negotiate and settle collective labour agreements;
- provide financial and social services to their members;
- participate in the drafting of employment laws;
- represent their affiliated workers at company level and appoint union representatives;
- participate in dismissal proceedings that concern their affiliated workers; and
- receive information and be consulted about:
  (a) recent and probable future evolution of the company's activity;
  (b) probable evolution of employment;
  (c) any decision that may entail a material change in the work organisation of employment contracts; and
  (d) participating in company restructuring processes, particularly where training measures or changes in working conditions are planned.

6.2 Employee Representative Bodies

The employees of a company may (although it is not mandatory) take the initiative to set up the following representative bodies.

- Works council – the members are appointed by the employees and their purpose is to represent the interests of the employees of that company. In most companies in Portugal, there is no works council; they are only found in larger companies.
- Union delegates – elected by employees affiliated with a specific union; there can be more than one union with representation in a company.
- Security and health representatives – to supervise issues relating to security and health. They are not common in Portugal.
- European Works Council (EWC).

Representatives of employees are entitled to time off to perform their duties and may convene general meetings of employees either outside or within working hours (in the latter case, for a maximum 15 hours a year).

Works councils have information and consultation rights such as:

- the right to obtain information on some matters of relevance for the company/employees;
- the right to consultation on some specific matters of relevance for the employees, as defined by the law, but they do not have the right of veto in respect of any employer's decisions;
- the right to meet periodically with the management; and

- the right to negotiate a collective labour agreement specific to the company provided that the unions representing the company's employees delegate that power to the works council (this is not common).

6.3 Collective Bargaining Agreements

At the industry level, CBAs are common in almost all sectors. Since CBAs usually provide more favourable employment conditions than the Employment Code, they will prevail. However, there are some specific matters where the law is mandatory and the CBA cannot overrule them. These matters mainly involve termination of employment contracts.

Employment contracts cannot, in principle, provide conditions that are less favourable than the ones established by a CBA. The parties to a collective agreement may agree that a particular provision is one from which there can be no derogation.

7. Termination

7.1 Grounds for Termination

The employer may be entitled to terminate the employment contract by dismissal:

- with just cause;
- on grounds of redundancy; or
- on grounds of failure to adapt.

In addition, during the trial period, either employer or employee may terminate the contract without prior notice (save if the trial period has lasted more than 60 days, in which case the employer must give prior notice of seven days) or just cause. There is no right to any compensation unless otherwise agreed in writing.

Term contracts lapse at the end of their term provided the employer or the employee respectively notifies the other in writing of the intention to terminate the contract, 15 or eight days prior to the end of the term.

All methods of termination require compliance with specific procedures provided in the law.

The legal grounds for collective dismissals are as follows:

- definitive closure of the company;
- closure of one or more sections; or
- reduction in staff for structural, technological or market reasons.

If the dismissal is made on the grounds of redundancy, the employer must notify its intention, in writing, to the works council, if there is one, or otherwise to either the inter-union committee or the union committees. The notice must contain:

- the reasons given for the collective dismissal;
- a workforce table, broken down into the company's organisational structures;
- indication of the criteria serving as the basis for selection of the workers to be dismissed;
- the number of workers to be dismissed and occupational categories covered by the dismissal;
- the period of time over which the dismissal is to be made; and
- the method to calculate any redundancy payments to be awarded to the redundant workers, over and above that provided for by law or by collective agreement.

At the same time as the employer notifies the workers, it must also send a copy of the letter and the enclosures to the appropriate department of the ministry responsible for employment

that deals with collective employment relationships.

Where there are no workers' representative bodies, the letter must be sent to each of the employees who may be affected by the collective redundancies. Within five business days of the date of receipt of the initial notice, the employees may appoint, from among themselves, a workers' representative committee of no more than three or five members, depending on whether the dismissal will cover up to or more than five workers. In the 15 days following the date of receipt of the initial notice, the employee and/or the workers' representatives may issue a non-binding opinion about the dismissal and propose alternative measures.

If employment contracts are to be terminated, the company must, within 20 days after the initial notice has been received, inform each of the workers who are affected, in writing, of the decision to proceed with the redundancies, expressly stating the grounds for termination and the date of termination of the employment contract.

7.2 Notice Periods

Only employees who are dismissed on grounds of redundancy or on grounds of failure to adapt must be given notice of termination as follows:

- employees with under one year of service – 15 days;
- employees with between one year and under five years of service – 30 days;
- employees with between five years and under ten years of service – 60 days; or
- employees with ten or more years of service – 75 days.

7.3 Dismissal for (Serious) Cause

Dismissals without just cause are not permitted. In general, any wilful behaviour on the part of the employee, which, given its significance and consequences, makes any continuation of the employment relationship immediately impossible, constitutes just cause for dismissal.

In particular, any of the following conduct by the employee is deemed to constitute just cause for dismissal:

- illegitimate refusal to comply with instructions given by the employer;
- violation of other employees' rights and guarantees;
- regular conflicts with other employees;
- continuously careless or negligent performance of duties;
- damage to significant financial interests of the employer;
- false justification of absence;
- unjustified absence causing any damage or serious risks to the employer or unjustified absence for five consecutive days or ten non-consecutive days per calendar year;
- wilful non-compliance with the rules concerning security or hygiene conditions at work;
- criminal behaviour towards any other employee or officer of the employer;
- non-compliance with or opposition to any judicial or administrative decision; and
- abnormal decrease in the employee's productivity.

In order to dismiss an employee with just cause, the employer has to begin a disciplinary procedure against the employee.

The procedure starts with the employer addressing a written statement of misconduct to the employee containing a full description of the

relevant facts, particularly those that may be considered just cause for dismissal. Within ten working days of receipt of this document, the employee may present a written defence and request that the relevant evidence, such as witness statements, be examined. The employer must accede to the requests made in the written defence, or risk the disciplinary procedure being held invalid.

After conclusion of these proceedings, the employer must make a final decision within 30 days. Should the employer's decision be of dismissal, the employer pays no compensation to the employee for the termination of the employment contract, except the legal amounts due for such termination and in respect of the pro-rata holiday pay and Christmas bonus due.

7.4 Termination Agreements

Employers and employees may terminate employment contracts by means of a mutual agreement. Termination agreements take the form of a document to be signed by both parties, in two originals, with one to remain with each party. This document should expressly include, at least, the date on which the agreement was signed and the date on which it is effective. The parties may agree on other effects, provided these are not contrary to the law.

Should the parties agree to the employee being paid overall pecuniary compensation, it is assumed that they have included all the credits having matured on the date of the employment contract termination or being payable in reason thereof.

The effects of employment contract termination agreements may be revoked at the employee's initiative by notice in writing within seven days of the date on which they were signed. The notice of revocation of termination will only take effect if, together with the notice, the employee delivers or in any way places at their employer's disposal the entire amount of the pecuniary compensation possibly paid pursuant to the agreement or by reason of the termination of their employment contract. The revocation notice provisions do not apply to duly dated employment contract termination agreements when the signatures on them have been certified in the presence of a notary.

7.5 Protected Categories of Employee

Any dismissal of pregnant employees as well as employees who have recently given birth or are breastfeeding and employees with the status of non-formal caregivers always requires the prior opinion of the equal opportunities authority. If this opinion is not in favour of the dismissal, the employer is only permitted to continue with the dismissal following a court finding of just cause.

In addition, the dismissal of any employee who is a workers' representative is presumed to be made without just cause.

8. Disputes

8.1 Wrongful Dismissal

The employee may apply to the Employment Court for a declaration of unlawfulness of the dismissal. The court should declare the unlawfulness of the dismissal in the following situations:

- failure to follow a procedure prior to the dismissal;
- the dismissal was motivated by political, ideological, ethical or religious grounds;
- absence of cause for termination; or

- invalidity due to non-compliance with the legal requirements.

When a dismissal is declared unlawful, employees are entitled to compensation for financial and personal damage arising from the unlawful dismissal, reinstatement without prejudice to their category and length of service, and to the earnings they did not receive from the time they were dismissed until the time the court decision becomes final. Any sums they may have received as a result of the termination of their employment contract, which they would not have received were it not for their dismissal (eg, unemployment subsidy), will be deducted from this compensation.

In lieu of reinstatement, employees may choose to receive a compensatory award, the amount of which is established by the courts and is equivalent to between 15 and 45 days of basic pay and length of service payments for each full year or fraction of a year of service.

If companies have a maximum of ten workers, or if the workers are directors or managers, the employer is entitled to oppose reinstatement provided it can justify that the return of these workers would seriously interfere with and prejudice the normal running of the company. The court must assess the grounds alleged by the employer.

8.2 Anti-discrimination

The grounds for anti-discrimination claims include any direct or indirect discrimination that privileges, benefits, wrongs, deprives of any right or exemption from any duty based notably on ancestry, age, sex, sexual orientation, marital status, family situation, genetic heritage, decreased work capacity, handicap, chronic disease, nationality, ethnic origin, religion, political or ideological convictions, or union affiliation.

Employees who seek to enforce discrimination rights may lodge judicial claims. They must indicate the employee with whom they consider themselves to be discriminated against. The employer must prove that the different treatment between the two employees is based on non-discriminatory reasons.

Employees may be entitled to compensation and, to the extent possible, to be placed in an equal position with their colleagues compared with whom they consider themselves to be discriminated against.

8.3 Digitalisation

There are no new regulations with regards to the digitalisation of employment disputes.

9. Dispute Resolution

9.1 Litigation

The Portuguese judicial system has specialised courts specifically dedicated to labour and employment cases. Portuguese law does not specifically allow class action cases related to employment and labour cases. However, unions are entitled to represent their affiliate works in judicial proceedings seeking to defend collective rights of employees.

9.2 Alternative Dispute Resolution

Arbitration is, currently, not possible in Portugal in employment disputes.

9.3 Costs

Nominal compensation will be awarded to the prevailing party for attorney's fees incurred, to be paid by the non-prevailing party. This com-

pensation corresponds to 50% of the legal fees and other costs associated with the legal action paid by both parties to the court during the judicial procedure.

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