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The Legal 500 Country Comparative Guides

Portugal

EMPLOYMENT & LABOUR LAW

Contributing firm

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This country-specific Q&A provides an overview of employment & labour law laws and regulations applicable in Portugal.

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PORTUGAL
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1. What measures have been put in place to protect employees or avoid redundancies during the coronavirus pandemic?

R: At this stage, no measures remain applicable.

2. Following the covid-19 pandemic, have new employee rights or protections been introduced in respect of flexible or remote working arrangements?

R: Yes. Employees with children under 8 are now entitled to work from home. In addition, employees who the Social Security has recognised as having the status of informal carers because they have someone in their household that needs assistance, are also entitled to work from home.

3. Does an employer need a reason in order to lawfully terminate an employment relationship? If so, state what reasons are lawful in your jurisdiction?

R: The employer does need a reason to lawfully terminate the employment relationship. It may be possible for an employer to dismiss an employee on the following grounds:

- Just cause: 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 constitutes just cause for dismissal:
    a. Illegitimate refusal to comply with instructions given by the employer;
    b. Violation of other employees' rights and guarantees;
    c. Regular conflicts with other employees;
    d. Continuously careless or negligent performance of duties;
    e. Damages to relevant financial interests of the employer;
    f. False justification of absence;
    g. 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;
    h. Wilful non-compliance with the rules concerning security or hygiene conditions at work;
    i. Criminal behaviour towards any other employee or officer of the employer;
    j. Non-compliance with or opposition to any judicial or administrative decision;
    k. Abnormal decrease in the employee's productivity.
- Redundancy due to:
    a. Definitive closure of the company; or
    b. Closure of one or more sections; or
    c. Reduction in staff for structural, technological or market reasons.
- Failure to adapt based on:
    a. Continued reduction in productivity.
    b. Repeated malfunctions of the equipment used by the employee;
    c. Risks to the health and safety of the employee and other persons.

4. What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned? How many employees need to be affected for the additional considerations to apply?

R: No compulsory additional consideration is applicable based on the number of employees impacted by

redundancy dismissals. However, it is common to negotiate enhanced severance packages with employees or employees' representatives in consideration of a comprehensive waiver of their rights issued by employees.

5. What, if any, additional considerations apply if a worker's employment is terminated in the context of a business sale?

R: No compulsory additional considerations are applicable where the dismissal is made in the context of a business sale.

6. What, if any, is the minimum notice period to terminate employment? Are there any categories of employee who typically have a contractual notice entitlement in excess of the minimum period?

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

a. employees with under one year of service: 15 days;
b. employees with between one year and under five years of service: 30 days;
c. employees with between five years and under 10 years of service: 60 days; or
d. employees with 10 or more years of service: 75 days.

7. Is it possible to pay monies out to a worker to end the employment relationship instead of giving notice?

R: No. The law provides specifically that notice periods cannot be waived.

8. Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during his notice period but require him to stay at home and not participate in any work?

R: Yes, it can. It can also force the employee to take vested untaken holiday days.

9. Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.

R: Yes. All the procedures are specifically provided for in detail in Portuguese law and must be followed. Failure to do so may invalidate the dismissal. The dismissal procedure varies depending on the type of dismissal to be executed.

If the employer wishes to dismiss an employee with just cause, it must begin a disciplinary procedure against the employee.

The procedure starts with the employer addressing a written statement of misconduct to the employee, and this statement must contain a full description of the relevant facts, particularly those that may be considered just cause for dismissal.

Within 10 working days of receipt of this document, the employee can 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 considered invalid.

After the conclusion of these proceedings, the employer must make a final decision within 30 days.

If the employer decides to dismiss, it pays no compensation to the employee for the termination of the employment contract, except the legal amounts due for the termination and in respect of the pro rata holiday pay and Christmas bonus due.

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

- the reasons given for the collective dismissal;
- a workforce table, broken down into the enterprise's organisational structures;
- an indication of the criteria serving as a basis for the selection of the employees to be dismissed;
- the number of employees 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 employees, over and above that provided for by law or by collective agreement,

At the same time the employer notifies the employees, it must also send a copy of the letter and the enclosures to the appropriate department of the ministry responsible for labour that deals with collective employment relationships.

Where there are no employees' 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 employees' representative committee of no more than three or five members, depending on whether the dismissal will cover up to or more than five employees.

In the 15 days following the date of receipt of the initial notice, the employee and/or the employees representatives may issue a non-binding opinion about the dismissal and propose alternative measures.

Twenty days after the initial notice has been received, if employment contracts are to be terminated, the company must inform each of the employees who are affected, in writing, of the decision to proceed with the redundancies. This written information must expressly include the grounds for termination and the date of termination of the employment contract.

10. If the employer does not follow any prescribed procedure as described in response to question 8, what are the consequences for the employer?

R: Failure to comply with the prescribed procedure will invalidate the dismissal. In such cases, the following remedies will apply:

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 (e.g., unemployment benefit) will be deducted from this compensation.

In lieu of reinstatement, employees can 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's service.

If companies have a maximum of 10 employees, or if the employees are directors or managers, the employer is entitled to oppose reinstatement provided it can justify that the return of these employees would seriously interfere with and prejudice the normal running of the company. The court must assess the grounds alleged by the employer.

11. How, if at all, are collective agreements relevant to the termination of employment?

R: Collective bargaining agreements may provide for specific procedures or terms and conditions associated with the termination of employment (e.g., severance).

12. Does the employer have to obtain the permission of or inform a third party (e.g local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?

R: No prior permission is required.

13. What protection from discrimination or harassment are workers entitled to in respect of the termination of employment?

R: Employees that are victims of discrimination or harassment can terminate employment for cause. They will be entitled to claim compensation of between 15 and 45 days of salary per year of service and an indemnity for any financial or non-financial loss or damage.

Victims of harassment cannot be dismissed except if their report was wilfully false.

14. What are the possible consequences for the employer if a worker has suffered discrimination or harassment in the

context of termination of employment?

R: Employees that are victims of discrimination or harassment can terminate their employment for cause. They will be entitled to claim compensation of between 15 and 45 days of salary per year of service and an indemnity for any financial or non-financial loss or damage.

In addition, discrimination or harassment may constitute very a serious administrative offence punishable with a fine with a maximum of EUR 61,200, depending on the severity of the conduct and the turnover of the company.

Ancillary sanctions such as publication, closure of facilities or prohibition on participating in public tenders may also apply.

15. Are any categories of worker (for example, fixed-term workers or workers on family leave) entitled to specific protection, other than protection from discrimination or harassment, on the termination of employment?

R: Pregnant women, parents on parental leave, or parents with breast-feeding rights can only be dismissed following the issuance of a favourable opinion by the Commission for Equality at Work (CITE). If the opinion is not in favour of the dismissal, the employee cannot be dismissed until an employment court confirms that there is cause for termination.

16. Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?

R: Acts of retaliation against any whistleblower are expressly prohibited. An action or omission is considered an act of retaliation if it occurs, directly or indirectly, in a professional context and is motivated by an internal or external complaint or public disclosure, provided that it causes or may cause the whistleblower unjustified financial or non-financial damage.

Threats and attempts of the acts and omissions referred to in the preceding paragraph will also be considered acts of retaliation.

Anyone who commits an act of retaliation must compensate the whistleblower for any loss or damage caused to the latter.

Regardless of any civil liability, the whistleblower may request the measures appropriate to the circumstances of the case in order to prevent the occurrence or aggravation of the loss or damage.

The following actions will be presumed to have been motivated by internal or external reports, or public disclosure:

a. Changes in working conditions, such as functions, hours, place of work or remuneration, non-promotion of the employee or breach of employment duties;
b. Suspension of an employment contract;
c. A negative performance evaluation or negative reference for employment purposes;
d. Failure to convert a fixed-term employment contract into an indefinite-term contract, whenever the employee had legitimate expectations of that change being made;
e. Non-renewal of a fixed-term employment contract;
f. Dismissal;

17. What financial compensation is required under law or custom to terminate the employment relationship? How is such compensation calculated?

R: Terminations on the grounds of redundancy or failure to adapt entitle the employee to a severance payment of 12 days' basic salary (salary: 30×12) per year of service capped to a maximum amount corresponding to 12 salaries. It is customary to offer enhanced severance packages either on the above dismissals in consideration of a comprehensive waiver of rights by employees or in the context of a mutual termination agreement. The terms and conditions vary depending on the sector of activity, the employee's position in the hierarchy of the company, length of service, and the financial situation of the company.

18. Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, describe any limitations that apply, including in respect of non-disclosure or confidentiality clauses.

R: Mutual termination agreements are very common in Portugal. These agreements may also include other

duties such as confidentiality, non-disclosure, non-defamation, or non-compete and, in the appropriate context, non-solicitation. Non-compete clauses are subject to specific legal requirements.

19. Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.

R: The post-employment non-compete duty is limited to activities performed by the employee that may cause damage to the previous employer. Although the legal wording is apparently provided in broad terms – for example, it is easy to see that if the employee starts working for a client, that may cause damage to the previous employer – the scope of this duty is limited. In fact:

- this duty can only apply to employees who have specific knowledge of the company and its activities, which, if placed at the service of a competitor, could be quite harmful to the former employer, in particular, regarding its turnover, financial objectives and/ or clientele base;
- it may only limit the working in the same area, targeting the same type of clientele, and offering products or services destined to fulfilling the same client needs;
- finally, the limitation may only apply within the geographic area in which the former employer operates;

The duration of the post-employment non-compete duty cannot exceed two years subsequent to the termination of employment. In cases of employees who hold positions that entail a special level of trust (e.g., management positions) or who have access sensitive information from a competition standpoint, the restricted period can be extended to a maximum of 3 years. Depending on the position and information access, it is common market practice to set a limitation period of between 6 months for more common positions to 18 months for high level management positions.

Portuguese law does not set a specific criterion to determine the compensation to be paid during the non-compete period. Constitutional Court case law follows the understanding that this compensation must be fair, adequate and proportional. This means that the non-compete duty remuneration must be sufficient to compensate the employee during the restricted period, taking into account his or her salary while employed by the company.

The general benchmark shows that compensation is set between 50% and 100% of the last basic salary.

Although the law leaves the parties some room to decide on the time of payment, the purpose of the compensation is to ensure that the employee can obtain a suitable income source **during** the restricted period. It is therefore recommended to pay the compensation on a monthly basis.

Any agreement that fails to provide for compensation or if the compensation is considered insufficient, the non-compete duty will be held to be null and void and the employee will thus be released from having to comply with it and the employer from having to pay the compensation.

We would finally like to highlight that the compensation may be changed in the following cases:

- It can be reduced if:
  - The previous employer invested significantly in the vocational training of the employee (this can only be assessed on a case-by-case basis); or
  - The employee finds a new job (compatible with the non-compete duty) by deducting the earnings of the employee from the non-compete compensation;
- It can be increased to an amount equivalent to the last base salary if the employee terminates with cause or is targeted by an unfair dismissal claim.

The non-compete duty does not ensure a significant protection of the employee's previous employing entity. In fact, if the employee chooses to breach the non-compete duty by, for example, entering into an employment contract with a competitor, said relation remains valid and enforceable, and the previous employer company is not entitled to prohibit the employee to continue to work for said competitor, nor claim an indemnity from the competitor (except in the event that this is inserted as an act of unfair competition).

The only consequence of the breach of the non-compete duty is that the employee is liable for any damage arising to the previous employer arising directly of said breach.

Please note the burden to claim the damages as well as to quantify and prove said damage falls exclusively on

the previous employer. This is particularly difficult as in many cases the damage arises of information leakage, which is not only immaterial, but also difficult to quantify and prove.

It is recommendable that the enforceability of such duty is strengthened by a penalty clause. This provision of this type clause has the following advantages:

a. It can accumulate with an indemnity award in the event the Company is able to quantify and evidence the damages arising of the breach by the employee;
b. In the event the Company is not able to quantity or evidence the damages, the penalty is always awarded (note that if the amount is excessive, the Court may reduce the amount);
c. It will constitute a strong disincentive for the employee to breach the duty.

We would also like to highlight that, once agreed, the non-compete duty cannot be unilaterally lifted by the company. In fact, although this limitation does not originate from the law, the case law of the employment courts has consistently held that, even if the agreement provides that the company is entitled to unilaterally lift the non-compete duty at the end of the contract, any such provision is null and void. The courts consider that such a provision would be abusive as the employee refrained, during his or her employment, from seeking another job with a competitor because they knew they would be prevented from doing so by the non-compete duty.

20. Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?

R: No. However, both parties may agree on a post-contractual confidentiality duty.

21. Are employers obliged to provide references to new employers if these are requested? If so, what information must the reference include?

R: No, there is no obligation to provide references. In fact, any information concerning a former employee may only be provided if the employer consents to and authorises this.

22. What, in your opinion, are the most common difficulties faced by employers in your jurisdiction when terminating employment and how do you consider employers can mitigate these?

R: The legislation on termination of employment is still quite formal and intricate, and dismissal depends on numerous requirements, which in many cases are interpreted differently by employment courts. In order to have a successful dismissal procedure, the following steps are essential:

a. Take time to prepare the documentation;
b. Prepare a sound communication strategy;
c. Prepare the negotiations to ensure that you reach an agreement that avoids litigation for the company and controls its budget.

23. Are any legal changes planned that are likely to impact on the way employers in your jurisdiction approach termination of employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?

R: No significant changes to the legislation on termination of employment are expected in the foreseeable future.

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