



PORTUGUESE EMPLOYMENT LAW GUIDE



MACEDO VITORINO & ASSOCIADOS
Sociedade de Advogados, RL

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Introduction

As in other European countries, Portugal has dealt with several relevant employment law changes in most recent years aiming at the flexibility the employment protection law and thus the attraction foreign investment.

According to the World Economic Forum's Report 2016-2017, currently the Portuguese employment legislation is less rigid than that many European countries (namely Germany and France), although still more rigid than that of the benchmark countries.

The labour reform approved in 2009 and the changes introduced after Portugal's international bailout in 2011 have contributed to reduce the level of rigidity of employment rules. Nowadays Portugal is also better ranked in OECD'S EPL (Employment Protection Legislation) Index.

Several aspects of the legislation have been revised since the adoption of the 2009 Labour Code, which adopted more employer-friendly legislation as regards the organisation of its workforce. For instance, working schedules may now be managed in a more flexible way without increasing labour costs. The Labour Code also contains flexible rules that allow the employer to unilaterally change the place of employment and the employee's functions.

According to the WEF Report, the changes in the labour regime has put Portugal 0.3 points behind the EU average, but ahead of larger European countries such as Spain and France.

After Portugal's international bailout in 2011, Portugal simplified the termination procedures, reduced the severance pay, decreased the holiday leave period and suspended some public holidays.

Of course the elimination of some public holidays, rest days after overtime were not consensual, even though viewed as necessary by the Troika at the time.

After the general election of 2015, the suspension of the public holidays was removed in 2016 but no relevant changes to the labour legislation were made. Portugal believes that the system now strikes the right balance between securing employees' acquired rights and benefits and the level of flexibility required by employers.

This translates into a low level of employment disputes. According to Pordata, an independent database of socioeconomic data, the average number of working days lost through industrial action by employee in 2014 was 1.7 against 1.1 in 2013, despite the harsh austerity measures imposed in Portugal in the last years.

Hiring employees

Hiring in Portugal is subject to the mandatory rules and statutory limits on several matters, such as remuneration, working hours, holiday rights or duration of contracts.

Employment contracts. In general, employment contracts do not need to be in writing. Only for some types of contracts the law requires a written document, including, but not limited to, fixed-term contracts, part-time contracts, contracts with foreign employees, and secondment contracts.

Regardless of the type of contract, the employer must inform in writing the employee on working conditions, including, workplace, job position, term and relevant grounds, employee's pay, collective bargaining instrument (if any), employer's accident insurance policy and employee's compensation fund, and within 60 days from the effective date of the contract.

Salary. Employees are entitled to a minimum monthly salary set out by the Portuguese Government. In addition, employees are entitled to receive Christmas bonus and holiday bonus.

Working hours. The maximum regular working period is of forty hours per week, eight hours per day.

Employees are entitled to a minimum rest period of eleven consecutive hours between two successive daily work periods, as well as to one day of rest per week. An additional half or full day of rest (in all or in certain weeks of the year) may be also given other than the rest day required by law.

Holidays. Employees are entitled to twenty two working days of paid holiday per year, and to national public holidays.

Under collective bargaining agreements, employers may be obliged to grant two optional public holidays: Carnival/Shrove Tuesday and the local municipal holiday.

Health and safety. The employer must ensure employees health and safety conditions at work and hence comply with a set of general principles and duties aiming at the prevention of work accidents and professional illnesses.

Employers are obliged to ensure: (i) technical work accident preventive measures; (ii) employee training, information and consultation on workplace safety; (iii) internal or external health and safety services. The employer must also contract an insurance to cover work accidents risks for each employee.

Social Security. The Social Security contribution is a tax levied on the labour income, which is charged to employers and employees at the rates of 23.75% and 11% respectively.

Types of employment contracts

Fixed-term contracts. Contracts that are in force for a pre-established period set according to employer's temporary needs, which must be specified in the contract, and expire at the end of the agreed term, unless they are renewed; fixed-term contracts cannot be renewed for more than three times and have a maximum duration of three years.

Term employment contracts must contain a detailed description of the relevant grounds and there must be a clear connection between the relevant grounds and the term. Otherwise, the employer may be subject to fines and the term contract could be legally converted into an open-ended employment contract.

Unfixed-term contracts. Contracts that are not subject to a pre-established period, but expire after the completion of the employer's project or when the reason for which the employee was hired ceases to exist; unfixed-term contracts have a maximum duration of six years.

Open-ended contracts. In case the parties do not agree a term (fixed or unfixed), the employment contract is deemed to be entered into for a permanent period of time, which means that the contract can only cease upon termination by one of or both parties under the law, namely in case of just cause for dismissal.

Probation period. The probation period is the period during which either party may unilaterally terminate the contract without prior notice and without cause, during which no compensation required.

The maximum probationary period is:

- a. For open-ended contracts:
 - i. 240 days for employees with management or senior positions;
 - ii. 180 days for employees with job positions of technical complexity, high degree of responsibility or which require special qualifications, and for employees who perform duties of confidence; and
 - iii. 90 days for other employees;
- b. For fixed and unfixed-term contracts:
 - i. 30 days for contracts with a duration equal or higher than six months; and
 - ii. 15 days for contracts with a duration of less than six months.

Salary

Employees are entitled to a minimum salary, which is set by the Portuguese Government and updated annually based on the cost of living, national productivity and the government's prices and incomes policy.

Portugal's minimum salary is calculated based on a flat monthly rate. The national minimum salary in Portugal in 2017 is €557 per month (based on 14 payments a year). For certain jobs and professions, the minimum salary may be agreed by collective bargaining agreements, which could not however provide for an amount fewer than the minimum salary legally set out by the Government.

The salary must be paid on a regular and permanent basis and may be fixed, variable or mixed (comprising fixed and variable components).

In addition to the salary, employees are entitled to:

- i. Christmas bonus: equal to one month salary payable until 15 December of each year; and
- ii. Holiday bonus: equal to one month salary payable before the holiday leave period.

Employers may not offset credits held over employees against any salary or make any discounts or deductions from employees' salary during the period the employment contract is in force.

There are however exceptions (and up to certain limits), including:

- i. Deductions in favor of the State, Social Security or other entities ordered by law, court decision or mediation settlement, provided that such decision or settlement has been notified to the employer;
- ii. Compensation determined by a court decision or a mediation settlement;
- iii. Monetary penalties resulting from a disciplinary procedure;
- iv. Repayment of capital and payment of interest on loans granted by the employer to the employee;
- v. Prices of meals at the work place, use of telephones, supply of assets, petrol or materials, when requested by the employee, as well as other costs incurred by and with the employer's consent on behalf of the employee; and
- vi. Subsidies or payments made in advance and on account of the employee's salary.

Holiday rights

Employees are entitled to 22 working days of paid holiday per year. The holiday right is mandatory, which means that holiday entitlement may not be replaced by any compensation, financial or otherwise, even if upon employee's approval. Employees may however waive the part of their holiday rights exceeding 20 working days.

In the same working year, the holiday leave period cannot exceed 30 working days, save as otherwise established by collective bargaining agreement or other instrument.

The holiday right becomes due on January 1 of the following year, except:

- i. In the hiring year and after six months of work, the employee is entitled to two working days of holiday per each complete month of work up to the maximum of 20 working days. If the end of the year is reached before this period or before the employee takes his/her holiday, the employee may enjoy the holiday leave period until June 30 of the following year;
- ii. In case of employment contracts up to six months, the employee is entitled to two working days of holiday per each complete month of work;
- iii. In case of employment contracts up to 12 months or ending in the year subsequent to the hiring year, employee is entitled to a holiday leave period pro rata to the duration of the employment contract.

As a rule, the holiday leave period should be taken in the year it becomes due. In exceptional cases, employees may take the holiday leave period afterwards insofar this takes place until April 30 of the subsequent year and upon employer's agreement.

The schedule of the holiday leave period should be agreed between the employer and the employee. In case this agreement fails, the employer must schedule the holiday leave period and give the employee the right to take the holiday between May 1 and October 31.

Regardless of agreement between the employee and the employer, employees are entitled to, at least, take 10 consecutive working days of holiday leave period.

Employer's failure to comply with the holiday's schedule constitutes a serious administrative offence and may entail which vary according to the employer's turnover.

In addition, employees are entitled to take the day off in public holidays. Presently, the public holidays in Portugal are: January 1, Easter, Good Friday, April 25, May 1, Corpus Christi, June 10, August 15, October 5, November 1, December 1, 8 and 25.

Parental protection rights

Portuguese employment law establishes several statutory rights to puerperal, pregnant and nursing women, as well to parents.

Pregnant employees' rights. In case employees' work duties entail clinical risks to a pregnant employee or to her unborn child, the employer will either:

- i. Provide the pregnant employee with alternative working conditions;
- ii. Replace the employee to a workplace compatible with her pregnant condition; or
- iii. Avoid pregnant employee's exposure to risks for as long as necessary.

Pregnant employees are exempt from performing night shifts, working overtime or in hour banks or in concentrated working schedules. They are also entitled to a work leave to attend prenatal medical appointments and, after the birth, to breastfeed the baby.

Initial parental leave. Employees (mothers or fathers) are entitled to an initial parental paid leave of 120 or 150 consecutive days and corresponding to 100% or 80% of the salary, respectively.

If both parents share the initial parental leave, the leave period may be increased by 30 days. In this case, and after the mandatory six-week period to be taken by the mother after childbirth, both parents must take 30 consecutive days or two periods of 15 consecutive days.

Mother's parental leave. All female employees must take a six-week period leave immediately after childbirth and may take 30 days before birth, in which case the employer must be informed within at least 10 days in advance (or as soon as possible, in case of a medical emergency) and receive a doctor's statement with the expected due date.

Father's parental leave. An employee who becomes a father is entitled to take a paid leave of up to 20 working days, as follows:

- i. 10 mandatory working days, five of which must be consecutive and taken immediately after childbirth and the remaining five days in the following 25 days; and
- ii. The remaining 10 working days are not mandatory and may be taken successively or alternately after the mandatory period above and along with the mother's initial parental leave.

The termination of an employment contract of a puerperal, pregnant or nursing woman requires a prior legal opinion of the Commission for Employment Equality (*Comissão para a Igualdade no Trabalho e no Emprego*).

Failure to comply with parental protection rights is deemed a very serious offense which may lead to fines.

Restrictive covenants

As a general rule, restrictive covenants during employment or after its severance are void. However, it is possible to include non-compete and non-termination covenants in certain conditions.

Exclusivity and non-compete covenants. Exclusivity clauses (during employment) and non-compete agreements (after termination) are allowed if the following requirements are met:

- i. The non-compete covenant is agreed in writing (for instance, under the employment contract);
- ii. The performance of a competing activity by the employee is likely to cause harm to the employer;
- iii. Compensation amount is agreed and payable to the employee; and
- iv. The non-competition covenant may not exceed two years after termination of the contract or, in some exceptional cases, up to three years if the activity performed entails a special relationship of trust or access to sensitive information.

Except for these cases, restrictive covenants agreed in employment contracts or those settled in collective bargaining agreements could be considered null and void insofar they limit employees' freedom of work.

Non-termination covenant. In order to compensate the employer for high expenses incurred with the employee's professional training, employees may also agree non-termination covenants, whereby the employee undertakes not to terminate the contract during a period of no more than three years.

The employee may in any case anticipate the end of this period by reimbursing the employer for the relevant expenses incurred.

To enforce restrictive covenants after termination of the employment contract, the agreement must state either the compensation amount payable to the employee or its calculation criteria.

This compensation could be paid in instalments during the term of the agreement or all at once. The parties may also agree on contractual penalties applicable in case of breach of restrictive covenants.

Garden leave. In the context of pending disciplinary proceedings, garden leaves are permitted under law, particularly after the accusation note has been served to the employee. In turn, when resigning or when having been served a prior notice for dismissal (e.g. collective dismissal), employers could not impose the employee to cease performing his/her work role until the prior notice period is completed. In this scenario, the best option is the employer to instruct employees to use any unused holiday leave period.

Termination of employment contracts

Expiration of term employment contracts. Term employment contracts expire at the end of their initial or renewal term, provided that serves a termination notice to the employee as follows:

- i. In fixed-term contracts, 15 days prior to the term of the contract; and
- ii. In unfixe-term contracts, 7, 30 or 60 days prior to the relevant date if the employment contract has lasted for less than six months, from six months to two years, or more than two years, respectively.

Collective dismissal. A collective dismissal is possible if the employer intends to dismiss a minimum of two employees (in companies with less than 50 employees) or five (in companies with 50 or more employees) within a three month period. Collective dismissal must have one of the following grounds:

- i. Market structure reasons;
- ii. Organization-related and economic reasons; and/or
- iii. Technological reasons.

Mutual agreement. Employee and employer may freely agree in writing to terminate the employment contract. The termination agreement may be revoked by the employee within seven days from the effective date, except if the agreement is executed towards a public notary.

Redundancy. In case the number of employees involved does not allow a collective dismissal, termination on the ground of redundancy could be an alternative. Redundancy must be justified on the same grounds as collective dismissal and meet the following requirements:

- i. The reasons for the termination do not relate to an intentional behaviour of the parties; and
- ii. The same tasks are not being executed by employees hired under a term employment contract.

Employee's ineptitude. The employer may terminate the employment contract when the employee demonstrates ineptitude or inability to perform the assigned tasks, provided that such ineptitude occurs in the course of the performance of the functions.

Breach. The employer may terminate the employment contract under disciplinary grounds following by a disciplinary procedure carried out towards the employee.

In case of failure to comply with specific termination rules and formal procedures required by law, the termination could be deemed as unlawful and the employee entitled to (i) compensation for damages; (ii) the employee's salary (including holiday and Christmas bonuses) from the dismissal date until the court's final decision; and (iii) choose between reinstatement or compensation to be ruled by the court.

Severance compensation

Employees subject to collective dismissal, redundancy or employee's ineptitude are entitled to severance compensation, which varies depending on the employee's seniority period and execution date of the employment contract.

For open-ended contracts entered into before 1 November 2011, the severance compensation will be calculated as follows:

- i. Until 31 October 2012: one monthly base salary and seniority per each year of employment;
- ii. Between 31 October 2012 and 30 September 2013: 20 days of monthly base salary and seniority per each year of employment; the amount of the monthly base salary and seniority may not be higher than 20 times the minimum monthly salary;
- iii. After 1 October 2013: 18 days of monthly base salary and seniority per each year of employment in the first three years of the contract, and 12 days of monthly base salary and seniority per each year of employment in the following years (the New Rules).

If the compensation calculated for the period until 31 October 2012 is equal or higher than 12 monthly base salaries and seniority or 240 of minimum monthly wage (Relevant Threshold), the period after 31 October 2012 will not be taken into account; if that compensation is less than the Relevant Threshold, the total compensation may not exceed the Relevant Threshold. The minimum compensation is three monthly base salaries and seniority.

For term contracts entered into before 1 November 2011, the severance compensation will be as follows:

- i. Until 31 October 2012: three or two days of base salary and seniority per each month of employment, if the term of the employment is lesser or higher than six months, respectively, with a minimum of three monthly base salaries;
- ii. After 31 October 2012 and until 30 September 2013: 20 days of monthly base salary and seniority per each year of employment; the amount of the monthly base salary and seniority may not be higher than 20 times the minimum monthly salary;
- iii. After 1 October 2013: it is applicable the New Rules; and
- iv. Minimum compensation is three monthly base salaries and seniority.

For employment contracts entered into on or after 1 November 2011, the severance compensation will be calculated in accordance with the New Rules and the severance compensation may not exceed the Relevant Threshold. No minimum severance compensation amount is imposed by law.

In addition to the severance compensation, employees are entitled to all other existing labour credits, including outstanding amounts owed prior to the termination date (e.g. overtime work) and the proportional amounts of Christmas bonus and of the holiday leave period.



APPENDIX

Our Employment Practice

Our employment practice

In today's competitive global market, Macedo Vitorino & Associados can provide a comprehensive commercial and corporate law advice to domestic and foreign clients.

Macedo Vitorino & Associados has strong relationships with many of the leading international firms in Europe, in the United States and in Brazil, which enable us to handle cross-border transactions effectively.

Since the incorporation of the firm we have been involved in several high profile transactions in all of the firm's fields of practice, including banking and finance, capital markets, corporate and M&A, etc.. We have also acted on many complex disputes and corporate restructurings.

We are mentioned by The European Legal 500 in twelve of fifteen practice areas, including Banking and Finance, Capital Markets, Project Finance, Corporate and M&A, Tax, Telecoms and Litigation.

Our firm is also mentioned by IFLR 1000 in Project Finance, Corporate Finance and Mergers and Acquisitions and by Chambers and Partners in Banking and Finance, Corporate and M&A, TMT, Dispute Resolution and Restructuring and Insolvency.

Our employment group advises national and international clients in all employment and social security matters.

Our employment practice includes advising clients on:

- Collective bargaining
- Employment contracts
- Hiring of foreign employees, visa applications and renewal of work permits
- Labour litigation
- Labour audits (standalone or included in M&A transactions)
- Outsourcing
- Restructuring and staff reduction processes
- Social security and work accidents

Companies need day-to-day advice on their legal and contractual obligations arising from individual and collective employment agreements.

If you want to find out more about Macedo Vitorino & Associados please visit our website at www.macedovitorino.com



Guilherme Dray
gdray@macedovitorino.com

Rua do Alecrim 26E | 1200-018 Lisboa | Portugal
Tel.: (351)21 324 19 00 | Fax: (351)21 324 19 29
www.macedovitorino.com