NEW LEGAL FRAMEWORK FOR PORTUGUESE LABOUR CODE – DECENT WORK AGENDA

Law 13/2023, of 3 April, introduced measures to tackle labour insecurity, foster social dialogue and collective bargaining, and promote gender equality in the labour market for both women and men.

The Decent Work Agenda entered into force with Law 13/2023, of 3 April, which amended the Portuguese Labour Code and other connected legislation.

The main changes to the Portuguese Labour Code are the following:

- **Economically Dependent Employees**

Economically dependent self-employed employees who provide an activity to the same beneficiary and receive more than 50% of the proceeds of their activity from that beneficiary are now entitled to a set of rights, including: (i) representation of their social and professional interests by trade union associations and employees' councils, even if they are not members; (ii) negotiation of specific Collective Bargaining Agreements through trade union associations; (iii) application of existent and negotiated Collective Bargaining Agreements to employees, as provided for in their terms; (iv) administrative extension of a Collective Bargaining Agreement or arbitration award; and (v) establishment of minimum working conditions (article 10-A).

Specific legislation will further define the right of economically dependent self-employed employees to collective representation.

- **Digital Platforms**

An employment agreement presumption can be established between self-employed activity providers and digital platform operators if certain indicators are present, as follows: (i) the platform operator setts the activity provider's remuneration; (ii) the platform operator manages the provider's actions and presentation; (iii) the platform operator controls the activity provided, particularly through electronic means or algorithmic management; (iv) the platform operator restricts the activity provider's autonomy with regard to work organization, the ability to accept or refuse tasks, the use of subcontractors, the choice of clients, or providing activity to third parties via the platform; (v) the platform exercises labour powers over the provider, such as deactivating their account; and (vi) the work equipment and tools used by the provider belong to the digital platform operator or are operated by it through a lease contract.

The presumption, which may be rebutted, is applicable to the activities of digital platforms, including those regulated by specific legislation on remunerated passenger transportation in private vehicles from an electronic platform (article 12-A (12)).

- **Algorithms and Artificial Intelligence**

Collective Bargaining Agreements can only regulate the use of algorithms, artificial intelligence, and associated technologies in a way that is more advantageous to employees (article 3 (3)). Legal

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rules on equality and non-discrimination are now applicable to decision-making based on algorithms or other artificial intelligence systems (article 24(3)). Employers must inform job applicants about the use of algorithms and artificial intelligence (article 106).

- **Discriminatory Practices**

The grounds for claiming discrimination practices in access to employment, vocational training, or working conditions is expanded, particularly related to the exercise of parental rights, other rights regarding work life balance and caregivers' rights (article 25 (6)).

Remuneration-related discrimination related to the award of attendance and productivity bonuses, as well as unfavourable assignments in terms of evaluation and career progression, are now considered "discriminatory practices" (25 (7)).

- **Parental Protection**

Exemption from work is now established in the context of adoption and foster care procedures (article 35 (1) (j)).

Parents now have the option, after enjoying 120 consecutive days of initial parental leave, to combine the remaining days of leave on a part-time basis each day.

It is compulsory for the mother to take 42 consecutive days of leave following childbirth (article 41).

The mandatory leave for the father is extended from the current 20 business days to 28 days, either consecutively or interpolated periods of at least 7 days, within the first 42 days following childbirth. Of the 28 days, 7 must be taken consecutively after childbirth (article 43 (1)).

An additional right is established for the father to take 7 days of leave, consecutive or interpolated, if they are taken simultaneously with the mother's initial parental leave (article 43 (3)).

Parents now have the right to complementary parental leave, in the form of part-time work for three months, with a normal workload equal to half the full-time, for assistance to a child or adopted child not older than six years, provided that the leave is fully exercised by each parent (article 51 (1) (c)).

- **Adoption and Foster Care**

There are no longer time restrictions on employees pursuing for adoption or foster care (article 45 (1)).

Absences for adoption and foster family processes do not determine the loss of any rights and are considered as effective work, except as to remuneration (article 65 (1) (k)).

Absences due to gestational mourning, as well as absence for assisted reproduction consultation or prenatal visits, breastfeeding or lactation will not determine the loss of any rights and will be considered as effective work (article 65 (2)).

- **Caregiver Employee**

A caregiver employee is someone who has been recognized as an informal non-primary caregiver, in accordance with the applicable legislation, upon presentation of the respective proof (article 101-A).

Caregiver employees are entitled to annual leave of five consecutive business days, without pay (article 101 (B) (1) (6)).

During the leave, the caregiver employees cannot perform subordinate work or provide continuous services outside their usual residence (article 101 B (4)).

The caregiver employees are entitled to request part-time work, in a consecutive or interpolated manner, for a maximum period of four years (article 101-C), with flexible working hours, in a consecutive or interpolated manner (article 101-D), and are not required to perform overtime work for as long as assistance/caregiving is required (101 (G)).

The termination of fixed-term employment agreements (Article 143°/3) and dismissal (101°-F) of caregiver employees depends on the prior opinion of the Commission for Equality in Labour and Employment ("CITE").

- **Duty to Inform Employees**

The employer's duty to provide information to employees is expanded. The employee is now entitled to be informed of: (i) the identification of the user company in case of a temporary employee; (ii) the individual right to continuous training; (iii) in the case of intermittent work, the information provided for in the legally established framework; (iv) the parameters, rules, and instructions on which the algorithms or other artificial intelligence systems are based; (v) the duration and conditions of the probationary period, if applicable; and (vi) the method of payment of the remuneration, including the breakdown of its constituent elements (article 106 (3)).

It is not necessary to include all the elements in the employment agreement; given that if the deadlines are met, some of them may be the subject of later written or electronic communication to the employee.

The employer must ensure the conservation of proof of transmission or receipt of the information provided, which must be presented to the labour inspection service upon request (article107 (5) and (6)).

- **Information Concerning the Provision of Work Abroad**

The employee who carries out his activity in the territory of another State for a period exceeding one month is entitled to the following information: (i) remuneration to which he is entitled under the law applicable in the host State, in situations of posting; (ii) allowances related to posting and reimbursement of travel, accommodation and meal expenses; and (iii) official website of the host State (article 108(1)).

- **Probationary Period**

Employees seeking their first job or who have been unemployed for a long time will have their probationary period reduced or excluded depending on the duration of their previous fixed-term employment agreement (celebrated with a different employer) being equal to or greater than 90 days (article 112 (5)).

The probationary period may be reduced if the duration of a professional internship with positive evaluation for the same activity and a different employer has been equal to or greater than 90 days in the past 12 months (article 112 (6).

When the probationary period is longer than 120 days, the termination of the employment agreement by the employer becomes subject to a 30-day prior notice (article 114 (3)).

In the case of termination of open-ended employment agreements of employees seeking their first job or long-term unemployed, the termination is subject to communication to the Authority for Working Conditions ("ACT") within 15 days after the termination (114 (6)).

Abusive terminations (in abuse of right) will be subject to the regime of the effects of unlawful dismissal, particularly with regard to the employee's right to claim: (i) compensation for damages (material and non-material); (ii) reinstatement in the company or compensation in lieu; and (iii) compensation for interim remuneration.

- **Fixed Term Employment Agreements**

In unfixed term employment agreements the expected duration of the agreement must now be included.

Compensation for the expiry of term employment agreements (both for fixed and unfixed term) is increased to 24 days of basic pay and seniority allowance for each complete year of service (articles 344 (2) and 345 (4)).

- **Teleworking**

The employment agreement and the applicable collective bargaining agreement must now determine the compensation, fixed or variable, due to the employee for additional expenses related to teleworking/hybrid work arrangements (article 168 (3)).

In the absence of an agreement on a fixed amount, additional expenses are deemed to be those corresponding to the acquisition of goods and/or services that the employee did not have before teleworking or working in a hybrid work arrangement, as well as those determined by comparing the corresponding expenses in the last month of face-to-face work (article 168 (4)).

The compensation is considered an expense for the employer and does not constitute work income for tax purposes up to the limit to be defined by ministerial order (article 168 (6)).

- **Temporary Work**

After reaching the maximum duration of the temporary work employment agreement, the succession in the same job or professional activity by a temporary employee or an employee hired for a fixed term, concluded with the same employer or company that is in a relationship of control or group relationship, or maintains common organizational structures, is prohibited. The prohibition applies before the expiration of a period equal to one third of the duration of the agreement, including renewals (article 179 (1)).

A fixed-term temporary employment agreement may now be renewed only 4 times (article 182 (2)).

The duration of subsequent temporary work agreements between different users concluded with the same employer or company in a controlling or group relationship or with a common organizational structure, cannot exceed 4 years; otherwise, the agreement will be converted into an open-ended employment agreement for temporary assignment (article 182 (8) and (9)).

- **Overtime Work**

Overtime work exceeding 100 hours per year must be paid at the hourly rate of pay with the following increases:

(a) 50 % for the first hour or fraction thereof and 75 % per subsequent hour or fraction thereof, on a working day;

(b) 100% for each hour or fraction thereof, on a mandatory or complementary weekly rest day or on a public holiday (article 268 (2)).

- **Employee's Credits**

In the event of termination of the employment agreement by any means, the employee can no longer waive the credits arising from the employment agreement (e.g. holiday and Christmas allowances, holiday pay and training credit hours), except if such waiver is made through a judicial transaction (article 337 (3)).

- **Compensation in Case of Collective Dismissal**

Compensation in case of collective dismissal is now 14 days' base pay and seniority payments for each full year of seniority (article 366 (1)).

In addition, the employee may also activate the labour compensation guarantee fund (article 366 (3)).

- **Outsourcing**

In outsourcing, the applicable collective bargaining agreement of the beneficiary of the activity also applies to the service provider, when more favourable, after 60 days of activity in favour of the acquiring company (article 498-A (1)).

Before that, the service provider is entitled to the minimum remuneration provided for in the collective bargaining agreement that binds the beneficiary of the activity (article 498-A, (3)).

It is not permitted to resort to the acquisition of external services through third-party entities to meet needs that were provided by an employee whose agreement was terminated in the previous 12 months due to collective dismissal or job position extinction.

- **Collective Labour Relations**

Even if there are no unionized employees, trade union activity can still be exercised in the company under specific applicable conditions, if it does not affect the normal functioning of the productive activity (article 460 (2)).

If an employee is already covered by an extension ministerial order, they can no longer choose a collective bargaining agreement (article 497 (5)).

In case of termination of a collective bargaining agreement, the recipient party may request arbitration from the President of the Economic and Social Council to assess the grounds for the termination, preventing the agreement from entering a survival regime (article 500-A).

- **Application in Time and Entry into Force**

This Decent Work Agenda Law shall enter into force on 1 May 2023, except for matters relating to the termination and expiry of collective bargaining agreements and the arbitration process, which entered into force on 4 April 2023.

Employment agreements concluded before the entry into force of this law shall be subject to this framework, except for the regime applicable to the validity of the employment agreement and/or its effects, in which case the previously applicable regime shall remain in force.

Collective bargaining agreements clauses that contradict the new rules must be amended in the first revision that takes place within 12 months following the entry into force of this law, under penalty of nullity. However, a transitional period, until 1 January 2024, was established for the amendment of collective bargaining agreement clauses contrary to the new regime for payment of overtime work.

The new framework is not applicable to fixed-term employment agreements concluded before the entry into force of this law, regarding their admissibility, renewal, and duration, as well as the renewal of temporary employment agreements.

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