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EMPLOYMENT LAW

EMPLOYER OF RECORD: LEGAL CHALLENGES OF INTERNATIONAL HIRING

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INTRODUCTION

The use of *Employers of Record* (EORs) has grown significantly in recent years and has become an increasingly common solution for multinational companies seeking to hire employees in different countries without having to establish a local entity. Under these arrangements, the Employer of Record formally enters into the employment agreement with the employee and assumes the employment, tax and social security obligations associated with employer status, while the employee works exclusively for another company, usually based in a different jurisdiction.

The growing use of this structure reflects the internationalisation of businesses, the expansion of remote work and the need to recruit talent on a global scale. However, the operational simplicity associated with Employer of Record arrangements does not eliminate the legal challenges they raise. On the contrary, as these structures become more widespread, questions concerning the allocation of responsibilities between the entities involved and how these arrangements fit within Portuguese employment law become increasingly relevant.

Until recently, the legal challenges associated with the use of Employers of Record were largely discussed in the abstract. More recently, however, the debate has moved beyond theory and begun to reach the Portuguese courts.

A decision by the Porto Labour Court last July was widely reported in the media after the Court found the dismissal of an employee hired through an international Employer of Record arrangement to be unlawful. According to publicly available information, the employee had entered into an indefinite-term employment agreement with Deel Portugal but worked exclusively for a US technology company. The dismissal was based on the alleged redundancy of the employee's position.

As the full reasoning of the judgment is not publicly known, definitive conclusions as to the legal grounds underlying the decision should be avoided. Nevertheless, the case is particularly relevant as it shows that Employer of Record arrangements are beginning to come under judicial scrutiny in Portugal and brings to the forefront some of the questions that these structures inevitably raise.

First, it is important to bear in mind that the use of an Employer of Record does not, in itself, constitute a distinct legal arrangement expressly provided for under the Portuguese Labour Code. Rather, it is a contractual structure designed to facilitate international hiring, under which a local entity formally assumes the position of employer while another company benefits from the employee's work.

Although Portuguese law recognises situations in which the entity benefiting from an employee's work is not the formal employer – as occurs in temporary agency work or outsourcing arrangements – Employer of Record structures have specific characteristics that do not fit neatly within any of these traditional legal frameworks. There is currently no specific legal framework governing this type of arrangement in Portugal, which raises a number of employment law questions for which Portuguese legislation does not yet provide clear answers.

It is precisely this separation between the formal employer and the company that actually benefits from the employee's work that gives rise to some of the most significant legal challenges associated with Employer of Record arrangements.

Who actually exercises direction and control over the employee? Who sets the employee's objectives, assesses performance or decides on promotion? In the event of a business reorganisation, who actually determines that a particular position should be eliminated: the Employer of Record or the company benefiting from the employee's work? And could this contractual structure affect the legal requirements applicable under Portuguese employment law to the termination of employment?

The questions do not, however, end with identifying the entity that effectively exercises the employer's powers. The structure of Employer of Record arrangements also raises questions as to the enforceability of contractual provisions intended to protect the interests of the client company - such as confidentiality, intellectual property, non-compete and non-solicitation clauses - as well as the allocation of liability between the different entities involved when employment disputes arise.

The answer to the fundamental question should be clear: the mere use of an Employer of Record arrangement does not, in itself, displace the mandatory provisions of Portuguese employment law or reduce the degree of judicial scrutiny applicable to employment decisions. On the contrary, all indications are that the courts will continue to focus on the substance of the employment relationship, seeking to identify who effectively directs, organises and controls the employee's work.

This becomes particularly important in the context of business reorganisations and termination of employment. The increasing internationalisation of businesses does not remove the need to properly substantiate dismissal decisions, nor does it allow responsibilities to be diluted or fragmented through increasingly sophisticated contractual structures.

One conclusion nevertheless seems clear: Employer of Record arrangements are no longer raising purely theoretical questions and are now beginning to come under scrutiny before the Portuguese courts. The number of disputes involving these contractual structures is likely to increase in the coming years, requiring companies, employees and courts to address questions that the Portuguese legislature has not yet expressly regulated.

Hiring has become global. Employment law responsibilities, however, still require local, transparent and legally robust answers. The future of Employer of Record arrangements in Portugal will largely depend on achieving the right balance between organisational flexibility and employee protection.

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