Labour & Employment 2019

Contributing editors
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Getting The Deal Through

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Published by
Law Business Research Ltd
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London, W11 1QQ, UK
Tel: +44 20 3780 4147
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First published 2006
Fourteenth edition
ISBN 978-1-83862-115-5

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Morgan Lewis & Bockius LLP

Lexology Getting The Deal Through is delighted to publish the fourteenth edition of *Labour & Employment*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Armenia, Finland, Indonesia, Brazil, Bangladesh, Greece, Egypt and Portugal.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing Matthew Howse, Sabine Smith-Vidal, Walter Ahrens, K Lesli Ligorner and Mark E Zelek of Morgan Lewis & Bockius LLP, for their continued assistance with this volume.

LEXOLOGY
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London
April 2019

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This article was first published in June 2019
For further information please contact editorial@gettingthedealthrough.com

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Portugal

Joana Almeida

Morais Leitão, Galvão Teles, Soares da Silva & Associados

LEGISLATION AND AGENCIES

Primary and secondary legislation

1 What are the main statutes and regulations relating to employment?

The main statutes and regulations relating to employment are the Labour Code, approved by Law No. 7/2009 of 12 February 2009, which has been amended several times, and the Labour Code Regulation, approved by Law No. 105/2009 of 14 September 2009, also amended. Specific areas of regulation, such as health and safety at work, work accidents and occupational diseases and labour misdemeanours, or special types of contract of employment (eg, working from home, sports work, work in ports, on board ships, showbusiness or domestic service) are governed by specific statutes.

Protected employee categories

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Discrimination and harassment in employment are forbidden by law, both at general and specific level: there is a general prohibition of both discrimination and harassment in the Labour Code, supplemented by specific legislation (eg, and most recently, Law No. 60/2018 of 21 August 2018, which approves measures to promote equal pay between men and women). As of 2009, the Labour Procedural Code, approved by Decree-Law No. 480/99 of 9 November 1999, as amended, contains one specific injunction in matters of sex-related equality and non-discrimination.

At the level of the Labour Code, employers are prevented from either privileging or harming employees or applicants on the basis of factors as varied as ancestry, age, sex, sexual orientation, gender identity, marital status, family situation, economic situation, education, origin or social conditions, genetic heritage, reduced work capacity, disability, chronic disease, nationality, ethnic origin or race, territory of origin, language, religion, political or ideological beliefs and trade union membership. Despite its width, the list is not exhaustive.

Enforcement agencies

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The primary government agency responsible for the enforcement of employment statutes and regulations is the Authority for Working Conditions, which is a central service of the Ministry of Solidarity, Employment and Social Security currently governed by Regulation Decree No. 47/2012 of 31 July 2012. Other specialised services of the same Ministry have important responsibilities at the level of employment; the General Directorate for Employment and Work Relations, for example, operates in the field of collective dismissals, collective bargaining and strikes.

WORKER REPRESENTATION

Legal basis

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

There is no legislation mandating the establishment of employees' representatives in the workplace but various forms of employment representation are allowed. The law rules, in particular, works councils, members of trade union management, trade union representatives at company level and their organisation in committees, European Works Councils and employees' representatives in the field of health and safety.

Powers of representatives

5 What are their powers?

The powers of employees' representatives vary in accordance with their nature. The entity with the widest powers is the works council, followed by union representatives at company level. Other representatives, such as those in the field of health and safety, have powers in their area of expertise. The powers of European Works Councils derive, for the most part, from the respective by-laws, as the legal framework essentially only deals with the appointment of members.

Works councils and union representatives at company level have the right to be informed and consulted on a number of issues; depending on the subject, consultation is to take place prior to the management decision being taken. They are also entitled to participate in company restructuring, hold meetings in the workplace (during or outside working hours) and post information. Works councils must be given adequate premises in which to operate; the same applies to union representatives where the company or establishment has 150 employees or more. Both works council and union representatives are entitled to paid time out and to take justified absences (without pay) to carry out their duties as employees' representatives.

Despite the fact that the Labour Code elects the works council as the employer's main counterparty (eg, where there is a works council, the employer need not engage with the trade union during the collective dismissal procedure), certain powers are constitutionally reserved to trade unions, such as collective bargaining. It is also trade unions who are entitled to call a strike, although an assembly of employees sufficiently represented (as defined by law) may do so as well.

BACKGROUND INFORMATION ON APPLICANTS

Background checks

6 | Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Background checks on applicants must respect their right to privacy and be limited to what is strictly relevant to assess their capability to work. Personal data collected are subject to data protection legislation, so that (for example) applicants have a right of information, access, correction and update. Where the data are collected by a third party, such third party is a data processor for data protection purposes.

Medical examinations

7 | Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Prospective employers may only request applicants to undergo medical tests and exams where they are aimed at the protection and safeguard of employees or third parties, or when particular requirements of the activity so justify. The request must be grounded in writing and the doctor may only communicate to the employer if the candidate is able to work. In no circumstance may the employee be asked to take a pregnancy test.

Drug and alcohol testing

8 | Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There are no express legal restrictions or prohibitions against drug and alcohol testing of applicants. There are, however, guidelines issued in 2010 by the National Data Protection Authority, according to which (most importantly) such testing is necessarily linked to occupational health and limited to employees whose activity may endanger them or third parties.

HIRING OF EMPLOYEES

Preference and discrimination

9 | Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

The general prohibition of discrimination present in the law applies to all stages of the contract of employment, including hiring. In very specific cases, certain categories of employees are to be given preference in hiring; for example, those working under fixed-term employment contracts have priority in occupying permanent positions that become available.

10 | Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

As a rule, employment contracts do not need to be entered into in writing. However, certain types of contracts of employment must take a written form, such as fixed-term employment contracts, contracts with multiple employers, part-time work, remote work, agency work and intermittent work (where periods of work are followed by periods of inactivity).

Despite the rule that no written form is required, employers are under the obligation to provide written information on terms and conditions of employment, including:

- employer's identification and group company and head office details;
- workplace or places;
- professional category or a brief description of the functions;
- date the contract is entered into and becomes effective;
- likely duration of the contract, if entered into for a fixed-term;
- duration of annual vacation or criteria to determine such duration;
- notice periods applicable to employer and employee, or criteria to determine the duration of such;
- amount and periodicity of pay;
- daily and weekly average period of work, specifying where it is to be determined on average terms;
- work accidents' insurance policy and insurance company;
- applicable collective bargaining agreement, if any; and
- the applicable work compensation fund and work guarantee compensation fund.

This being the case, most employers choose to enter into the contract in writing.

11 | To what extent are fixed-term employment contracts permissible?

Fixed-term contracts are permissible in three main situations:

- where the employer faces a temporary need (eg, to replace an employee who is temporarily absent, to conclude construction work or to respond to an exceptional increase in activity);
- if the company launches a new activity, begins operation or opens up a new establishment (provided the company has less than 750 employees); or
- to hire employees seeking their first job or those in long-term unemployment; in these cases, this is a measure of employment policy.

The maximum duration of such contracts depends on the motive for concluding the contract. Fixed-term contracts based on temporary needs are subject to a maximum duration of three years. The corresponding maximum duration is two years for the launch of activity, operation or establishment and the hiring of long-term unemployed persons, and 18 months for the hiring of first-job seekers.

Regardless of the type of ground, fixed-term employment contracts are subject to a maximum number of three renewals.

In June 2018, changes in the law were announced, including:

- the reduction to two years of the maximum duration of fixed-term contracts based on a temporary need;
- eliminating the possibility of hiring first-job seekers as fixed-term workers; and
- limiting the possibility of hiring fixed-term workers on the basis of the start of a new activity or establishment for companies with less than 250 employees.

Probationary period

12 | What is the maximum probationary period permitted by law?

The maximum probationary period permitted by law depends on the type of contract of employment and the employee's job position.

Type of contract	Duration of probationary period
Fixed or non-fixed term employment contracts that have been entered into for 6 months or more, or are expected to last more than 6 months	30 days
Fixed or non-fixed term employment contracts that have been entered into for less than 6 months, or are expected to last less than 6 months	15 days
Open-ended contracts of employment	90 days as a rule 180 days for employees who hold positions of technical complexity or a high degree of responsibility, which require particular qualifications or are based on a relationship of trust 240 days for management positions

Collective bargaining agreements and individual agreements between employer and employee may reduce the duration of the probationary period but only the parties (in writing) may eliminate it altogether. Previous agreements in force between the parties for the same job position reduce or eliminate the admissible duration of the probationary period in a subsequent contractual relationship.

Classification as contractor or employee

13 What are the primary factors that distinguish an independent contractor from an employee?

The primary factor that distinguishes an independent contractor from an employee is subordination: employees work under the employer's authority and supervision.

There is a provision in the law whereby a contract of employment is presumed to be in place whenever two or more of the following characteristics are present:

- the activity is carried out in a place belonging to the beneficiary or indicated by the beneficiary;
- the work equipment and tools belong to the beneficiary;
- the provider observes hours to start and end the work, determined by the beneficiary;
- the provider is paid a guaranteed amount, with a given periodicity; or
- the provider carries out management or supervision tasks in the company's organisation.

It is up to the presumed employer to prove otherwise.

Temporary agency staffing

14 Is there any legislation governing temporary staffing through recruitment agencies?

Agency work is governed by the Labour Code with respect to the employment contract being entered into between the worker and the agency and the services agreement being entered into between the agency and the end-user, including – particularly in what concerns the latter – admissible grounds to resource to agency work and its maximum duration. The incorporation and requirements (including the permit) of agency companies are governed by Decree-Law No. 260/2009 of 25 September 2009, as amended, which also addresses private recruitment agencies acting as intermediates between prospective employers and employees.

FOREIGN WORKERS

Visas

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Short-term visas are issued in situations that do not warrant the granting of another visa (eg, tourism). They may be issued for one year and allow for multiple entries; however, the total duration of the stay may not exceed 90 days per semester, consecutively or successively, counted from the first time an external border (so any member state's) is crossed.

There are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction. The transfer must take place between establishments of the same company or companies' group that render equivalent services; both employees and partners may be transferred, provided they are with the transferor (member of the World Trade Organisation) for at least one year and either exercise management powers, hold highly specialised knowledge or will be given training.

Spouses

16 Are spouses of authorised workers entitled to work?

The law does not provide a clear answer to this question. Arguably, spouses of authorised workers in possession of a residence permit are entitled to work.

General rules

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

The essence of the regime on foreign workers (other than nationals of EU and European Economic Area member states, countries with which Portugal has concluded an agreement providing for the free movement of persons, refugees, beneficiaries of subsidiary or temporary protection and members of the family of a Portuguese citizen or one of the above-mentioned foreign individuals) is that only employees in possession of a specific visa or permit are authorised to render subordinated work. The contract to be entered into must contain specific references (such as the beneficiaries in the event of death), and the documents attesting the compliance with the relevant framework (eg, the residence permit) are to be attached thereto. The hiring of the foreign worker must be communicated to the Authority for Working Conditions prior to the start of activity.

Sanctions for employing a foreign worker that does not have a right to work in Portugal range from criminal to misdemeanour liability, including accessory sanctions, such as the obligation to return public financing. Employers, end-users and contractors are jointly and severally liable for employment claims, sanctions and expenses with the stay and removal of the foreign worker. Where the infraction is committed by a legal entity, members of its board of directors are jointly and severally liable for the payment of the fine.

Resident labour market test

18 Is a labour market test required as a precursor to a short or long-term visa?

Labour market tests are required as a precursor to the granting of a residence permit enabling the foreign worker to render subordinated

work in Portugal. The report on work opportunities is to be approved annually by the Cabinet, following an opinion by the Standing Committee for Social Concertation. There are, however, exceptions, aimed at retaining a flexible labour market (eg, visa granted to a foreign worker in possession of a work contract where the job offer was not fulfilled by candidates with a pre-emption right).

Despite the wording of the law, the report was last approved in 2010.

TERMS OF EMPLOYMENT

Working hours

19 | Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The maximum daily and weekly period of work is eight and 40 hours, respectively. An employee may opt out of such limits to concentrate work into four days per week or agree (or be required to, for example, under a collective bargaining agreement) to have his or her working hours determined on average during a given reference period, so that periods of more work are compensated with periods of less work (or other forms of compensation, depending on the relevant time-banking system). Particular provisions apply to particular types of employees; for example, those who work exclusively when other employees take their weekly rest may work up to 12 hours.

Likewise, employees in management positions and those with autonomous decision-making power whose work is not timetabled are excluded from most restrictions on working hours set forth in the law; for example, such employees may work more than six consecutive hours without taking the rest break and need not rest a minimum of 11 hours in between working days.

Overtime pay

20 | What categories of workers are entitled to overtime pay and how is it calculated?

All categories of workers are entitled to overtime pay. Typically, those whose work is not timetabled do not render overtime work when they exceed the maximum periods of work during working days (but do render overtime work and are entitled to overtime pay when they work during weekends or bank holidays).

Overtime pay increase is to be calculated pursuant to the applicable collective bargaining agreement or, in the absence thereof, the law. Presently, the pay increases set forth in the law are the following:

- on working days: 25 per cent in the first hour or fraction thereof and 37.5 per cent thereafter; or
- on weekly days of rest and bank holidays: 50 per cent for each hour or fraction thereof.

The increase is (in principle; ie, in the absence of a collective agreement stating differently) calculated over base remuneration and seniority premiums.

21 | Can employees contractually waive the right to overtime pay?

Employees cannot contractually waive the right to overtime pay. Employees in management positions whose work is not timetabled can contractually waive the right to the pay increase due for working exempted from timetable; however, as explained, when such employees work on weekends or bank holidays, they render overtime work and are entitled to the corresponding overtime pay.

Vacation and holidays

22 | Is there any legislation establishing the right to annual vacation and holidays?

The Labour Code sets the minimum annual vacation at 22 working days. Special provisions apply to the year of hire or to situations where the contract lasted less than six or 12 months or ended in the year following the year of hire. In the year of hire, or where the contract lasted for less than six months, the employee is entitled to two working days of vacation for each month of duration of the contract. If the contract lasted less than 12 months or ended in the year following the year of hire, the duration of annual vacation is proportional to the duration of the contract.

Annual vacation becomes due on 1 January each year and (except for the year of hire) refers to the work rendered in the previous year. It is to be taken – in principle – until 31 December of the year in which it became due, so that the law limits the situations where the employee can carry forward (in whole or in part) the leave of one year into the following year.

Sick leave and sick pay

23 | Is there any legislation establishing the right to sick leave or sick pay?

Employees who are sick are entitled to be absent and those absences are justified. Provided the employee is covered by the social security in the event of sickness, no remuneration is due. Where the absences last for more than a month (or as soon as it becomes clear that that will be the case), the contract suspends by operation of law and no pay is due as a result.

Sick pay is governed by Decree-Law No. 28/2004 of 4 February 2004, as amended. Provided the employee meets the remaining criteria (eg, has a minimum period of six months of contributions to the social security, 12 days of which fell in the four months preceding the illness), sick pay is due – as a rule – as of the fourth day of absence, the respective amount increasing with time.

Leave of absence

24 | In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Employees may take leaves of absence for parental reasons or to attend a training or degree. Leaves for parental reasons are subject to a maximum duration: two years as a rule, three years in the event of a third child or four years if the child is disabled or has a chronic disease. Leaves for educational purposes are not subject to a maximum duration (but rather minimum: 60 days); however, in certain circumstances, the employer may refuse to grant it (eg, the employee had been given adequate training or a similar leave in the previous 24 months, has less than three years of service or did not request the leave at least 90 days in advance).

Student employees are entitled to request, from their employer, up to 10 working days' leave each year.

Pay is not due during these leaves (those for parental reasons are subsidised by the state).

Mandatory employee benefits

25 | What employee benefits are prescribed by law?

Employees are entitled to paid annual vacation and (except in the service of employers exempted from the obligation to close on Sundays) to 13 mandatory bank holidays per year, also paid. They are paid holiday allowance and Christmas allowance, in a total of 14 months of pay per year.

Part-time and fixed-term employees

26 | Are there any special rules relating to part-time or fixed-term employees?

There are special legal rules ensuring that part-time and fixed-term workers are entitled to equal treatment.

Likewise, the employer must advertise existing vacant full-time and permanent positions and fixed-term workers have a right of preference – up to 30 days after the termination of their contract – in being hired under an open-ended contract of employment for the exercise of functions identical to those that they previously carried out. Failure to observe this preference entitles the fixed-term worker to an indemnity equivalent to three months of pay.

The hiring and termination of fixed-term workers must be communicated to employee representatives and the Authority for Working Conditions. Where the relevant employee was pregnant, within 120 days of giving birth or breastfeeding, the motive for not renewing the fixed-term contract must be communicated to the equality commission within five working days.

Public disclosures

27 | Must employers publish information on pay or other details about employees or the general workforce?

Employers must publish information about several employment-related topics:

- internal regulations in force (including those on harassment, which is mandatory for employers with at least seven employees);
- information on parental rights and equality and discrimination; and
- information regarding various other topics, such as vacant full-time and permanent positions, timetables, existing remote means of surveillance (eg, cameras), applicable collective bargaining agreements.

POST-EMPLOYMENT RESTRICTIVE COVENANTS

Validity and enforceability

28 | To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Post-termination covenants not to compete are valid provided they are agreed to in writing, the activity is likely to cause damage to the former employer and the employee is paid adequate compensation during the restricted period. The maximum duration of such covenant is two years, extended to three if the employee's activity was based on a particular relationship of trust or gave him or her access to particularly sensitive information from a competition point of view.

Other than of employees, there are no legal provisions on the soliciting of, or dealing with, customers or suppliers. Undertakings not to hire employees or to pay an indemnity in the case of hire are null and void (hence, not enforceable), as they are viewed as an inadmissible limitation to the constitutional right to work.

Post-employment payments

29 | Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

In order to be valid and enforceable, post-employment covenants not to compete mandate the payment of adequate compensation (which may be reduced where the employer incurred significant expense in providing the employee's occupational training). The law does not define 'adequate' compensation; its only existing legal reference allows for the interpretation that it may be lower than the employee's pay while employed.

LIABILITY FOR ACTS OF EMPLOYEES

Extent of liability

30 | In which circumstances may an employer be held liable for the acts or conduct of its employees?

Employers are generally liable for the acts or conduct of their employees, including in matters of misdemeanour liability. Accordingly, and for example, the request for an injunction to avoid an offence to the employee's personality or to mitigate the effects of offences already committed is filed against both the author of the threat or offence and the employer, and there are court decisions condemning the employer to pay an indemnity for damages resulting from harassment committed by the employee's supervisor.

TAXATION OF EMPLOYEES

Applicable taxes

31 | What employment-related taxes are prescribed by law?

The most typical employment-related taxes prescribed by law are those that subject employment income to personal income tax and social security contributions. Social security contributions are due by both employer and employee, usually at the rate of 23.75 per cent and 11 per cent, respectively. The employer is under the obligation to withhold on source for both personal income tax and social security purposes.

As of 1 October 2013, in relation to employees hired henceforth, employers are also obliged to make a contribution of 1 per cent of the employee's remuneration to the work compensation fund and work guarantee compensation fund (or similar mechanisms).

EMPLOYEE-CREATED IP

Ownership rights

32 | Is there any legislation addressing the parties' rights with respect to employee inventions?

Employee inventions and designs are ruled by the Industrial Property Code, approved by Decree-Law No. 36/2003 of 5 March 2003, subsequently amended. This statute will be replaced by a new Industrial Property Code, approved by Decree-Law No. 110/2018 of 10 December 2018, on 1 July 2019.

Provisions regulating employee creations are essentially contained in the Copyright and Neighbouring Rights Code, approved by Decree-Law No. 63/85 of 14 March 1985, as amended. The Code includes special rules for certain artistic works (eg, photographs) and professions (eg, journalists), which, in the case of journalists, are reinforced by their own specific statute (Law No. 1/99 of 1 January 1999, amended by Law No. 64/2007 of 6 November 2007).

Although software is generally protected by copyright in Portugal, the ownership of employee-created software is covered by specific legislation, namely Decree-Law No. 252/94 of 20 October 1994.

Trade secrets and confidential information

33 | Is there any legislation protecting trade secrets and other confidential business information?

Portugal has implemented Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of trade secrets, by including the relevant provisions in the upcoming Industrial

Property Code. Although the majority of the legal provisions of the new Code will only come into force on 1 July 2019, the provisions on trade secrets derived from the Directive came into force on 1 January 2019.

DATA PROTECTION

Rules and obligations

34 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The Labour Code has a number of provisions on employee privacy and personal data, which essentially rule:

- the employee's right to the intimacy of his or her private life;
- protection of personal data;
- biometric data;
- medical tests and exams;
- means of remote surveillance; and
- the employee's right to confidentiality in terms of private correspondence (eg, via email) and internet access.

Specifically in the matter of personal data, the Labour Code refers to the general legislation on the protection of data privacy, currently Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (the General Data Protection Regulation).

BUSINESS TRANSFERS

Employee protections

35 Is there any legislation to protect employees in the event of a business transfer?

As a member state of the European Union, Portugal has implemented Council Directive 2001/23/EC of 12 March 2001 on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. As such, contracts of employment of employees engaged in the relevant business transfer to the acquirer, by operation of law (although employees have the right to refuse to transfer, by either choosing to remain with the transferor or terminating the contract with allegation of cause and entitlement to severance pay). In addition, transfers of undertaking trigger a complex system of information and consultation duties before employee representatives and employees directly, the transfer being effective only when a minimum of seven working days have passed since an agreement is reached or at the end of consultation without an agreement.

This being said, the regime on transfers of undertakings applies only where, as a result of the transfer, the identity of the employer changes. Accordingly, share deals are not covered thereby, despite the fact that they may have an identical or even greater impact in terms of conditions of employment as a business transfer. Be that as it may, share deals may also give rise to information (and potentially, consultation) obligations regarding the works council and union representatives at company level. Likewise, employees must be informed in writing about changes to group relations.

TERMINATION OF EMPLOYMENT

Grounds for termination

36 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Other than during the probationary period or at the end of fixed or non-fixed term employment contracts, the rule is that an employer may only dismiss an employee if there is cause. Cause is either subjective (ie, based on a guilty conduct of the employee, the seriousness of which makes it immediately impossible to maintain the employment relationship (such as dismissal for disciplinary grounds)); or objective (ie, for company-related reasons (such as collective dismissal and dismissal based on the extinction of job positions, both of which may be based on the shutdown of company sections or market, structural or technological motives)). The law also contemplates dismissals based on the employee's failure to adapt to the job position, as a result of changes to the job position or otherwise or in situations where someone in a management position has failed to meet objectives previously agreed to in writing; the regime, however, is so complex that it is rarely used.

One particular type of contract of employment – that entered into under the *comissão de serviço* regime, which is restricted to management positions and their personal assistants and other functions contemplated in collective bargaining agreements, the nature of which is also based on a particular relationship of trust – entitles the employer to terminate the contract at will, by giving notice and paying severance.

Notice

37 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Other than in dismissals for disciplinary reasons or during a probationary period that lasted up to 60 days, notice of termination prior to dismissal is due. The duration of notice depends on the type of contract, dismissal or period in which the termination takes place, as follows:

- probationary periods:
  - of between 61 and 120 days: 7 days' notice; or
  - of more than 120 days: 15 days' notice;
- fixed-term contract: 8 days' notice;
- non-fixed term contract:
  - contract of up to six months: 7 days' notice;
  - contract of between six months and two years: 30 days' notice; or
  - contract of more than two years: 60 days' notice;
- collective dismissal, dismissal based on the extinction of job positions or dismissal based on the employee's failure to adapt:
  - less than one year of service: 15 days' notice;
  - between one and five years of service: 30 days' notice;
  - between five and 10 years of service: 60 days' notice; or
  - employee with at least 10 years of service: 75 days' notice;
- contracts entered into under the *comissão de serviço* regime:
  - if the *comissão de serviço* lasted up to two years: 30 days' notice; or
  - if the *comissão de serviço* lasted for more than two years: 60 days' notice; and
- fixed-term contract with employees who have retired or turned 70 years old without retiring: 60 days.

It is only during the probationary period or at the end of a non-fixed term employment contract or a contract entered into under the *comissão de serviço* regime that the employer may pay in lieu of notice.

38 | In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

The only situation where the employer may dismiss an employee without giving notice or paying in lieu of notice is where the probationary period has not reached 60 days of duration.

Severance pay

39 | Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Dismissals during the probationary period or on disciplinary grounds do not give right to severance pay. The same applies to the expiry of fixed-term contracts with employees who have retired or turned 70 years old without retiring. In termination agreements, severance pay is not mandatory but is frequently agreed upon (with no minimum amount being due; just as the parties are free to agree on the contract's termination, they are free to agree on the severance pay due).

All other forms of termination of employment decided by the employer entitle the employee to severance pay, with the law setting the minimum amount due. In all cases, the basis of severance pay is base remuneration and seniority premiums for each complete year of service; fractions of years of service are compensated proportionally:

- fixed-term contract: 18 days' severance pay; or
- non-fixed term contract:
  - in the first three years: 18 days' severance pay; or
  - after three years: 12 days' severance pay.

As severance pay has been decreasing in recent years, a complex transitory system is now in place in the event of other forms of termination (such as, collective dismissal), as follows:

- employment commenced prior to 1 November 2011:
  - for the period of the contract to 31 October 2012: one month's severance pay;
  - for the period of the contract between 1 November 2012 and 30 September 2013: 20 days' severance pay; and
  - for the period of the contract from 1 October 2013: 12 days' severance pay (18 days' pay during the first three years of the contract if, by 1 October 2013, the contract had not reached three years);
- employment commenced between 1 November 2011 and 30 September 2013:
  - for the period of the contract to 30 September 2013: 20 days' severance pay; and
  - for the period of the contract from 1 October 2013: 12 days' severance pay (18 days' pay during the first three years of the contract if, by 1 October 2013, the contract had not reached three years); and
- employment commenced after 1 October 2013: 12 days' severance pay.

Procedure

40 | Are there any procedural requirements for dismissing an employee?

Each dismissal has its own procedural requirements, the complexity of which depends on the type of dismissal.

To end a contract during the probationary period or at the end of a fixed or non-fixed term employment contract, the employer must issue a simple, written communication.

Other forms of dismissal trigger more complex procedures. For example, dismissals on disciplinary grounds comprise three stages: accusation, defence (where the employee may request probative diligence) and decision. During the process, employee representatives may be asked to issue a prior, non-binding opinion.

In collective dismissals, employers are required to provide written information and consult with the employee representatives prior to issuing the final decision; representatives of the Ministry of Employment are present during the negotiations. In dismissals based on the extinction of job positions, negotiations are replaced by the employee opposing the dismissal in writing and requesting the Authority for Working Conditions to assess specific requirements of the dismissal (eg, if there are no fixed-term contracts to perform similar functions).

Other than in the circumstances referred to in question 41, no prior approval from a government agency is required.

Employee protections

41 | In what circumstances are employees protected from dismissal?

Employees are protected from dismissal on parental grounds, in the sense that the dismissal (of any kind) of an employee who is pregnant, within 120 days from giving birth, breastfeeding or taking parental leave, is subject to a prior, favourable opinion of the equality commission. Where such opinion is unfavourable to dismissal, the employer must seek the court's prior authorisation to dismiss.

Mass terminations and collective dismissals

42 | Are there special rules for mass terminations or collective dismissals?

There are special rules for collective dismissals, governing its admissible grounds, specific procedure and employees' entitlements.

Class and collective actions

43 | Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Class actions are not contemplated in the employment field. Employees, however, may bring claims together, where the petition and cause of action are similar. In certain lawsuits (eg, challenge of collective dismissal), the employer is under the obligation to call all employees who were dismissed, even if they had no intention of opposing the dismissal.

Mandatory retirement age

44 | Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Employers are prevented from imposing a mandatory retirement age. However, the contract of employees who have retired or reached the age of 70 without retiring converts into a six-month, fixed-term contract by operation of law, with the employer having the option to expire the contract by giving 60 days' notice.

DISPUTE RESOLUTION

Arbitration

45 | May the parties agree to private arbitration of employment disputes?

The parties may agree to private arbitration of employment disputes, provided the dispute does not refer to unavailable rights (eg, rights

concerning work accidents) or matters that must be referred to the judicial courts (eg, unlawful dismissal).

Employee waiver of rights

46 | May an employee agree to waive statutory and contractual rights to potential employment claims?

During the contract of employment, the employee is, in principle, prevented from waiving statutory and contractual rights to potential employment claims, notably pay. In the context of a termination agreement where the employee is paid global severance pay, there is a presumption that all employment claims are included in the severance pay (however, the employee may prove otherwise).

Limitation period

47 | What are the limitation periods for bringing employment claims?

The statute of limitation for bringing employment claims is one year counted from the day following the day of termination of the contract. However, challenges of individual dismissal (communicated to the employee in writing) and collective dismissals must be filed within 60 days and six months of dismissal, respectively. Claims concerning breach of annual vacation, indemnity for abusive sanction or payment of overtime work due more than five years previously must be proved by means of adequate documentation.

UPDATE AND TRENDS

Emerging trends

48 | Are there any emerging trends or hot topics in labour and employment regulation in your jurisdiction?

The topics currently in discussion relate to announced changes to the Labour Code, particularly in terms of forms of temporary employment, working time and collective regulation. National legislation supplementing the General Data Protection Regulation is also under discussion.

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ISBN 978-1-83862-115-5