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Labour & Employment

in 43 jurisdictions worldwide

2009

Contributing editors: Barry A Hartstein and Tram-Anh T Frank

Published by
Getting The Deal Through
in association with:

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Advokatfirmaet Hjort DA
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Labour & Employment 2009

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Labour & Employment 2009
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd 2009

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ISSN 1744-0939

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Printed and distributed by
Encompass Print Solutions
Tel: 0870 897 3239

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Legislation and agencies

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

The main statutes relating to employment are the Portuguese Employment Code (approved by Law 7/2009 of 12 February 2009) and the Regulation of the Employment Code (Law 35/2004 of 29 July 2004) which is still in force notwithstanding the fact that parts have been revoked with the entry into force of the new Employment Code.

Within the Employment Code, the vast majority of the rules are mandatory and, therefore, can only be modified by agreement of the parties and only if such amendment is intended to improve the position or rights of the employees.

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

The Employment Code has implemented the principle of equal treatment as regards access to employment, vocational training, promotions and working conditions.

In view of this, any direct or indirect discrimination based on lineage, age, gender, sexual orientation, marital status, family situation, genetic heritage, reduced work capacity, disability, chronic disease, nationality, ethnic origin, religion or belief, political or ideological convictions or union affiliation is strictly prohibited.

Moreover, the Employment Code also foresees that harassment in the workplace is forbidden. Please note that, according to the applicable legal regime, harassment includes a wide spectrum of offensive behaviours, namely sexual harassment, discriminatory harassment other than sex and mobbing (emotional abuse).

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

The Employment Code enforces the right to privacy, namely regarding family, emotional and sexual life, as well as heath, political and religious beliefs.

As far as personnel data is concerned, the employer cannot require employees or job applicants' information regarding their private lives, except if such information is strictly necessary to assess their capability to perform their duties. Moreover, the employer must justify the need for such information by writing.

The Personal Data Protection Law (Law 67/98 of 26 October 1998) also foresees that all personal data processing must be notified to the Data Protection Authority (CNPD).

In some cases, data processing requires a prior authorisation of the CNPD and the data controller cannot carry out any data-processing operations before the CNPD issues its authorisation.

Furthermore, the right of access and correction of the data must be assured, at all times, to the employee.

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

The main entities responsible for the enforcement of employment statutes and regulations are: the Employment Authority; the Commission for Equality in Labour and Employment; the CNPD and the Immigration Office.

Worker representation

5 Is there any legislation mandating or allowing the establishment of a works council or workers' committee in the workplace?

In Portugal, the establishment of a works council is not mandatory. However, the employees have the right to create such councils, in order to defend their interests and exercise their rights.

Such right is foreseen not only in the Employment Code and its Regulation, but also in the Constitution.

Background information on applicants

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?

The general provision establishes that the employer cannot run, directly or through a third party, a background check on applicants regarding private personal information. Nonetheless, it is possible to do so if: such information is strictly necessary to assess the employees' capacity to perform their duties; or there is a written request justifying the need for such information.

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

The employer cannot require that the job applicants or the employees submit or present the results of their medical exams.

However, this rule has two exceptions, as the employer is allowed to require such exams if: they are intended for the protection and safety of the employee or third parties; or they are justified by the particular requirements of the activity (eg, football player, aeroplane pilot).

In any case, it is mandatory that the employer justifies, in writing, the need for such exams.

Moreover, the physician responsible for the medical exams cannot inform the employer of the specific results of such exams, but only if the employee is or is not fit for the job.

However, it is strictly forbidden to ask either the job applicant or the worker to submit to a pregnancy exam.

In line of the above and in practical terms, if the applicant refuses to submit to or to present the exams requested, the employer has

grounds not to hire him, considering that it was not able to assess the employees' capacity for the job.

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

It is only possible to test applicants for drug or alcohol use on the terms and conditions mentioned in question 7.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to particular people or groups of people?

The legal regime of prevention, rehabilitation and participation of people with disabilities, foresees that companies need to fulfil an employment quota of, at least, 2 per cent of workers with disabilities.

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

The general rule states that it is not mandatory that the employment agreement is entered into in writing. However, this rule has some exceptions, namely as regards to fixed-terms or foreign workers employment agreements.

Moreover, the employer is always obliged to inform, in writing, the employee of the applicable conditions to the agreement or the employment relationship.

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

According to the Employment Code, fixed-term employment agreements are only permissible if they are intended to satisfy temporary needs of the company and for the period strictly necessary to satisfy such needs.

The maximum duration of such agreements is three years, including renewals, and they cannot be renewed more than three times.

12 What is the maximum probationary period permitted by law?

Depending on whether it is a permanent or a fixed-term employment agreement, the probationary period determined by law varies. With a permanent employment agreement, the minimum trial period is 90 days (established for the vast majority of workers) and the maximum is 240 days (for senior management); with a fixed-term employment agreement, the minimum trial period is 15 days and the maximum is 30 days (for agreements that last six months or more).

Please note that such periods are mandatory and may not, therefore, be extended at the sole discretion of the employer.

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

Generally, post-termination covenants not to compete, solicit or deal may be enforceable on the following terms: if the development of activity in reference is, potentially, capable of causing damage to the employer; and if the employee is given compensation for the period in which his activity is restricted.

Moreover, they are only allowed for a maximum of two years after the termination of the employment agreement and they must be agreed in writing, either on the employment or on the termination agreement.

However, if the activity developed by employee is based on a relationship of trust or in the event that such activity grants the employee access to particularly sensitive information, the maximum period may be extended to three years.

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

The main difference between employees and independent contractors is that the employees are submitted to the authority, direction and disciplinary powers of the employer and independent contractors are not.

Moreover, the independent contractor is not included in the hierarchical organisation of the company, is exempted from observing working schedules and is not entitled to working instruments provided by the employer.

Foreign workers

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?

The law governing the entry, stay and deportation of foreign citizens (Law 23/2007 of 4 July) does not establish any numerical limitations on short-term visas.

This law also establishes the difference between short-term visas (*vistos de curta duração*), granted for leisure proposes, and short-stay visas (*vistos de estada temporária*), intended for medical treatments or scientific investigation.

Pursuant to article 55 of the above-mentioned law, it is possible to grant a temporary visa with grounds on the transfer of an employee from one undertaking to another undertaking of the same company or of the same group, so long as the undertaking located in Portugal provides the same services.

Please note that, as regards to EU citizens, the general principle is the freedom of circulation of people, which means that no EU citizen requires any visa prior to coming to Portugal.

16 Are spouses of authorised workers entitled to work?

The general rule is that spouses are not entitled to work. However, if the authorised workers apply for a family reunification and such application is accepted by the Portuguese authorities, spouses (as well as other relevant family members) are entitled to: access to education; access to employment and self-employed activity; access to vocational guidance, initial and further training and retraining.

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?

In order to employ foreign workers it is necessary that such workers have a residency permit.

Moreover, the employment agreement reached between the foreign worker and the employer must be made in writing and a copy submitted to the Portuguese Employment Authority.

Please note that a foreign worker is entitled to the exact same rights as the Portuguese worker and if the employer fails to comply with this rule, such conduct may be considered as a serious infraction.

Furthermore, the Portuguese legal regime regarding the entry, stay and deportation of foreign citizens (Law 23/2007 of 4 July) foresees that favouring or facilitating the entry or illegal traffic of foreign citizens is a criminal offence.

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

The applicable Portuguese legal regime foresees that granting a residency permit depends on the existence of job opportunities not fulfilled by Portuguese residents or workers of other EU countries.

Apart from a resolution that annually defines the number of predictable available job opportunities for foreign workers, the Portuguese Employment Centre also keeps an updated database of all information relating to job opportunities.

It is also necessary that the foreign worker has either an employment agreement or a promissory employment agreement with a Portuguese entity and also has the necessary skills and qualifications for the job.

Terms of employment

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

According to the Employment Code, the normal working period cannot exceed eight hours per day and 40 hours per week.

However, this rule has one exception: the exemption from working hours regime, which is applicable to senior management positions or to employees whose activity is usually developed outside of the employer's office.

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

All employees that perform overtime work are entitled to overtime pay.

Overtime during normal working days entitles the employee to 50 per cent of his or her hourly wage in the first hour and 75 per cent in the subsequent hours or fractions thereof.

Furthermore, overtime rendered either in mandatory or supplementary weekly rest days or on public holidays, entitles the employee, for each hour of work, to 100 per cent of his or her hourly wage.

Such hourly wage is calculated according to the formula '(Rm x 12) = (52 x n)', where 'Rm' is the monthly salary and 'n' is the average number of hours of the normal weekly working period.

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

The Employment Code entitles the employees to a minimum annual paid vacation period of 22 working days.

Furthermore, the employee is also entitled to public paid holidays, which in Portugal are currently 12 mandatory days, plus two optional days.

Apart from the specific rules that regulate the vacations period on the commencement and termination employment years, the right to annual vacations accrues on 1 January of each calendar year.

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

The laws that govern social protection in case of illness (Decree-Law 28/2004, of 4 February 2004 and Decree-Law 146/2005, of 26 August 2005) establish the right to sick leave.

Pursuant to such laws, the employee is entitled to:

- 65 per cent of salary – up to 90 days of sick leave; or
- 75 per cent of salary – more than 365 days of sick leave.

As regards to the maximum periods of paid leave, workers with an employment agreement are entitled to 1,095 days.

23 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?

Apart from maternity, paternity and student-worker leave, an employee may only take a leave of absence if such leave is mutually agreed upon with the employer.

Please note that the Employment Code does not define a minimum or a maximum period for the duration of such leave.

Moreover, the employee is not entitled to his or her salary during this leave of absence.

24 What employee benefits are prescribed by law?

Apart from labour accidents insurance, the Portuguese law does not prescribe any specific fringe benefits.

However, there are special benefits established for certain categories of employees, namely working students.

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

The general rule is that part-time or fixed-term employees have the exact same rights as permanent employees.

The only difference prescribed by law is that whilst part-time and fixed-term employees have on the job training, permanent employees should be granted a minimum of 35 hours per year of certified or on the job training.

Liability for acts of employees

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

Pursuant to the Portuguese Civil Code, the employer is always responsible for the acts or conduct of its employees.

Regardless of that, the employer has the right to claim back, from the employee, the amounts paid due to the misconduct of the employee.

Taxation of employees

27 What employment-related taxes are prescribed by law?

The only employment-related tax prescribed by law is the social security contribution, which, pursuant to Decree-Law 100/99, is currently 34.75 per cent of the employee's salary, 11 per cent of which is paid by the employees and the remaining 23.75 per cent by the employers.

Employee-created IP

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

The general regime applicable to such matters is established by the Intellectual Property Code (Law 16/2008 of 1 April 2008), which foresees that intellectual property created within the scope of a company belongs to the company.

Moreover, the employees rights related to the creation of software are foreseen in the software specific legal regime (Decree-Law 252/94 of 20 October of 1994), which establishes that the intellectual property rights of software created by an employee belong either to the company or, if the software was tailor made, to a specific client.

Both provide rules that are only applicable when the employer and employee do not agree otherwise, notably through specific clauses in the employment agreement.

Update and trends

The new Employment Code entered into force on 17 February 2009.

The main changes foreseen in the new Employment Code are focused on working time management and on a simplification of procedures concerning individual and collective dismissal.

Among the innovations foreseen in the new Employment Code are the possibility of creating 'hour banks', the possibility to concentrate working timetables and the creation of the permanent intermittent employment contract.

These 'hour banks', which must be foreseen in the applicable CBA, allow the employer to increase the daily working period of the employees for a maximum of four hours per day and it is limited to 200 hours per year.

The concentration of working timetables allows the employer to agree with the employee an increase of the daily working period by four hours and, therefore, concentrate the employee's weekly working period to only some days, thus giving the employees more days off away from work.

The intermittent employment contract is specially foreseen for companies that develop their activity in a discontinued or variable intensity, namely tourism, and allows the employer to reach an agreement with the employees by which they agree to render their work in an interspersed way with one or more periods of inactivity. In such situations, the rendering of work by the employee must last for no less than six months on fulltime, per year, of which at least four must be consecutive.

Finally, regarding the termination of employment, the new Employment Code simplifies the disciplinary proceeding required for dismissal for just cause and, at the same time, increases the legal protection of the parties during dismissal proceedings. Regarding this issue of increased protection, the new Employment Code also increases the protection granted to pregnant and nursing employees.

Business transfers

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

Pursuant to article 285 of the Employment Code, in the event of a transfer of an economic unit, the new employer is assigned with the legal position of the former as regards to the employment agreements of the employees transferred.

Therefore, the former employer's rights and obligations arising from an employment agreement or from an employment relationship existing on the date of the transfer, shall be, by reason of such transfer, transferred to the new employer.

Termination of employment

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

The employment agreement may be terminated by:

- expiry – in relation to permanent employment contracts, this will occur: once its term elapses; in the event of a subsequent impossibility of the employee to perform his work or of the employer to receive such work; or if the employee retires due to old age or illness. In general, fixed-term employment agreement expire at the end of its respective term;
- mutual agreement by the parties;
- unilateral rescission of the agreement by the employee, whether for just cause or not – where there is just cause an employee can terminate his contract immediately. Such rescission must be writing (with the reason for the rescission) and be delivered within 30 days of these reasons becoming known. An employee can also rescind the contract without just cause if such rescission is communicated in writing to the employer with 30 or 60 days' notice (depending of whether the length of employment is less than or more than two years, respectively). If the employee does not comply wholly or partially with these prior notice requirements, he must pay compensation to his employer equivalent to the remuneration he would have received during the relevant notice period;
- rescission of the agreement by either parties during a trial period – during a trial period, unless agreed otherwise, either party can rescind the agreement without prior notice and without the requirement of just cause, with no compensation payable as a result;
- collective redundancy procedure – collective redundancy occurs whenever, within a three-month period, an employer dismisses at least two employees if the employer has 50 or fewer employees, or five employees if the employer has more than 50 employees;
- individual redundancy procedure – such form of termination of the employment agreement must be motivated by a reduction of the employees due to a market, structural or technological reasons related to the company; and
- dismissal by the employer for just cause.

In order to dismiss an employee for just cause, the employer must first demonstrate that there is a material reason – namely a breach of the employment contract or of any other legal obligation by the employee – which can be considered as just cause for dismissal.

The Employment Code defines the concept of just cause as: 'Guilty behaviour on the part of the employee that, because of its gravity and consequences, makes it immediately and practically impossible to maintain the employment agreement.' In view of this, it has been commonly accepted that the concept of just cause requires the following elements: illegal behaviour on the part of the employee; guilt of the employee; and serious consequences for the employment agreement.

Furthermore, article 351/2 of the Employment Code foresees various situations that are considered as grounds for dismissal with just cause, including: unreasonable disobedience to orders given by a superior; continuous indifference to carrying out, with due diligence, the duties inherent to the job; or unjustifiable absence from work that results in serious damages or risks to the employer.

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

Notice of terminations must only be given, prior to dismissal, on individual or collective redundancy procedures. As such, the decision of redundancy must be notified, to each employee, with the following prior written notice, depending on the time of service of each employee:

- 15 days if the employee has been employed less than one year;
- 30 days if the employee has been employed one year or more but less than five years;
- 60 days if the employee has been employed five years or more but less than 10 years; and
- 75 days if the employee has been employed more than 10 years.

Failure to comply with such notice periods leads to the employer having to pay employees for the period in default.

It is also mandatory to give prior notice to the employee of the non-renewal of a fixed-term employment agreement.

Apart from the above situations, Portuguese law does not foresee any other cases of notice of termination.

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

As mentioned above, the dismissal of an employee requires not only the identification of the behaviour amounting just cause, but also compliance with procedural requirements of the Employment Code – namely, the need for a prior, properly conducted disciplinary proceeding in the case of dismissal with just cause.

Payment in lieu of notice per se is not foreseen in Portuguese law, although the penalty for failure to comply with such notice ends up having the same effect.

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

The Employment Code foresees that, in a redundancy process, the statutory severance payment that each employee is entitled to is one month's base salary per year of service. Fractions of years are calculated on a pro rata basis and the minimum amount of severance is three months' salary.

Moreover, as regards to dismissal with just cause, should such dismissal be considered unfair, the employer will not only have to pay the wages the employee ceased to receive after his dismissal up until the final decision, but also all the damages that the employee has suffered, including moral damages (which are court-awarded).

Furthermore, the employee also has the right to opt between being reinstated or to a financial compensation. The court could set such compensation between 15 to 45 days' pay for each year of service, with a minimum of three months' pay.

Finally, pursuant to article 349 of the Employment Code, the employer and the employee may terminate an employment contract by mutual agreement.

In such cases, although the law does not foresee the payment of any settlement amount, it is common practice to provide the employee with some financial compensation. Experience tells us that the amount of such compensation is currently around 1.5 months' pay per year of service or fraction thereof.

34 Are there any procedural requirements for dismissing an employee?

According to the Employment Code, to dismiss an employee, the employer must: demonstrate that a breach of contract or of any other legal obligations (that can be considered as just cause) has occurred; and conduct the correct disciplinary proceeding.

As far as collective redundancy procedures are concerned, it is mandatory that the employer notifies the competent section of the ministry of employment of its intention to terminate the employment contracts.

The employer is also obliged to notify the competent section of the ministry of employment of its decision to terminate an agreement through an individual redundancy procedure.

35 In what circumstances are employees protected from dismissal?

The causes of unfair dismissal are foreseen in article 381 of the Employment Code are: non-existence or invalidity of the disciplinary proceeding; dismissal based on political, ideological or religious reasons; and absence of valid reasons (just cause) in relation to the dismissal of the employee.

Should such dismissal be considered illegal, the employer will have to pay the wages the employee ceased to received after his dismissal up until the final decision, and the damages that the employee has suffered, including moral damages (which are court-awarded) and the employee has the right to be reinstated.

Please note that the employee can opt for a financial compensation instead of the reinstatement.

36 Are there special rules for mass terminations or collective dismissals?

In Portugal, redundancy is an extremely complex and bureaucratic procedure. It must be justified either through the closing-down of one or more departments or sections of the company or by market, structural or technological grounds.

The termination of an employment agreement under a redundancy process has to follow a legal procedure, which can be summarised in four steps:

- the employer gives written notice to the works council (or trade union representatives or to the workers themselves) of its intention to terminate the agreements;
- within five days of such notice being sent, a period of exchange of information and negotiation between the employer and the employees' representatives will take place;
- the employer notifies each employee of his or her dismissal; and
- the employer notifies the Ministry of Employment of such dismissal.

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Dispute resolution

37 May the parties agree to private arbitration of employment disputes?

According to Portuguese law, subjects that are not at the free disposal of the parties (such as unavoidable rights or mandatory provisions) may not be submitted to voluntary arbitration. All employment provisions that aim at protecting the employee are considered mandatory and unavoidable, therefore, their submission to voluntary arbitration is not allowed. As such, the submission to an arbitration court of an employment dispute will be restricted to a certain category of non relevant issues, such as interpretation of clauses, definition of the work place and definition of working time (not working period). Given this, arbitration clauses, although acceptable, are not common in employment agreements. Moreover, the right to resort to an employment court it is also an unavoidable right, therefore, the submission of the dispute to voluntary arbitration is no more than an option offered to the employee.

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

According to Portuguese law, the employee is not allowed to waive unavoidable rights or mandatory provisions.

In practical terms, since almost every employment provision is considered mandatory and unavoidable, it is not possible for the employees to waive any relevant rights.

39 What are the limitation periods for bringing employment claims?

In the redundancy procedures, the dismissed employees have the right to appeal to court within a six-month period after such dismissal.

As regards to all of the remaining cases, the right must be exercised within one year after the dismissal.

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 ISSN 1744-0939