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COVID-19 and Labour Law: Portugal

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Abstract

Covid-19 is changing the world of labour. On the one hand, we are probably facing the first massive worldwide experience on teleworking, with intensive use of technologies (eg. videoconference). However, it is perhaps the most challenging moment to do it. In fact, the workers are forced to stay at home, but simultaneously to provide assistance to their parents or grandparents (groups at risk), to take care of their children and to provide the necessary means for the "school at distance" and to assist their children to continue studying remotely. On the other hand, we are dealing with several layoffs by mean of reduction of working time or suspension of the employment contract, affecting more than 500 thousand workers (above 10% of the workforce in Portugal). The collective redundancies, non-renewal of fixed-term contracts and the termination during the trial are also increasing, along with the lack – or substantial reduction – of the activity of self-employed workers. If the crisis lasts for a couple of months, the majority of the micro and small companies will conceivably disappear.

Keywords: Covid-19; Labour Law; Remote work; Layoffs.

1. General Framework.

The state of emergency was declared on last 18th of March and renewed on the 2nd of April[1]. Recently, the President of the Portuguese Republic publicly expressed his view on maintaining the state of emergency, at least, until May 1st. The Government has adopted legislation prior to the state of emergency[2] and after to execute the necessary provisions to implement the state of emergency[3]. Since the 2nd of March, more than 120 laws, ordinances and decrees were published to face the problems caused by Covid-19 in our society. The legislator is carrying out a really hard and unpleasant task: to create rules for an unprecedent crisis that requires urgent and effective measures. Companies and workers are dealing with instability and legal uncertainty caused by several regimes, approved, revised, revoked and replaced on a daily basis. Some provisions are not coherent and lead to discriminatory or unjustified measures and solutions.

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[1] Cf. President Decree no. 14-A/2020, of 18 of March, Parliament Resolution no. 15-Z/2020, of 18 of March, President Decree no. 17-A/2020, of 2nd of April, Parliament Resolution no. 22-A/2020, 18 of 2nd of April.

[2] Cf., for example, Decree Law no. 10-A/2020, of 13 of March, Ordinance no. 71-A/2020, of 15 of March.

[3] Cf., for example, Decree no. 2-A/2020, of 20 of March, Decree-Law no. 10-G/2020 and Decree-Law no. 10-K/2020 of 26 of March, Decree no. 2-B/2020, of 2nd of April.

2. Labour law measures: examples and questions.

Several measures were taken. Firstly, a simplified layoff was approved by the Decree-Law no. 10-G/2020, which aims to provide immediate support to employers and workers during the crisis caused by Covid-19. Under this new regime, the employer (i) decides on the reduction of the normal working time or the suspension of the employment contract, (ii) informs the workers concerned and their representatives and (iii) applies before the Social Security System for financial support. This regime has a more restrict concept of company crisis, when comparing with the standard layoff established in the Labour Code (articles 298 et seq. of the Labour Code). In fact, this limited concept entails the following cases: a) full or partial shutdown of the company or establishment due to the legal duty; b) full or partial shutdown of the activity of the company or establishment in result of the interruption of supply chains, suspension or cancellation of orders; c) the abrupt and severe drop of at least 40% of the turnover in the 30 days prior to the submission of the simplified lay-off request to the Social Security, comparing to (i) the average of the 2 months prior to the submission, or (ii) with the same period in the previous year or (iii) if the business started less than 12 months before the submission, comparing with the average turnover of the whole period of activity (article 3 (1) of the Decree-Law no. 10-G/2020).

During the layoff (either simplified or standard, the employee is entitled to a monthly compensation corresponding to 2/3 of his/her monthly normal gross salary with a minimum threshold of a national minimum wage (EUR 635.00) and a maximum threshold of three times the national minimum wage (EUR 1.905.00). The employer is responsible to pay such monthly compensation and has the right to apply for a public support given by the Social Security by means of reimbursement of 70% of the monthly compensation (article 6 (4) and (5) of the Decree-Law no. 10-G/2020).

The simplified layoff has a special provision prohibiting dismissals during the layoff, as well as in the 60 days following its termination (article 13 of the Decree-Law no. 10-G/2020). The employer cannot terminate any employment contract – even if not covered by the layoff – due to collective dismissal or elimination of positions. The non-compliance leads to the obligation to return the public funds received plus default interest. Such rule aims to avoid or discourage dismissals due to economic reasons. However, its outreach is quite limited. It does not cover the termination of fixed-term or temporary contracts, the termination within the trial period or the revocation by mutual agreement. Besides, it could have increased collective redundancies prior to the beginning of a layoff measure. Finally, such rule cannot prevent companies' insolvency. Therefore, to maintain a couple of employment contracts, it is likely that we are promoting the entire closure of many companies by way of bankruptcy.

Recently, the Labour Inspection (*Autoridade para as Condições do Trabalho*) was granted powers to suspend – or even to revoke – dismissals (article 24 (1) and (2) of the Decree no. 2-B/2020, of 2nd of April). This is an odd precautionary mechanism that could be considered unconstitutional, due to the violation of the principle of the separation of

powers and other fundamental principles and rights. Please note that the suspension or revocation emerges automatically from the notification of the labour inspection to the employer. Apparently, it operates even before any preliminary hearing of the employer.

Secondly, other important measure is the obligation to adopt telework, regardless the modality of employment relationship, provided that the tasks and responsibilities can be performed remotely by the worker (article 8 of the Decree no. 2-B/2020, of 2nd of April). Definitely we have a great opportunity to develop, to test and to improve the telework and, as a second step, the so called *smartworking*. This is the first massive worldwide experience on teleworking, with intensive use of technologies (eg. videoconference) but it is also a really challenging moment to do it. First, companies and workers were not prepared for an intensive use of new technologies widespread throughout workers domiciles. Are the systems prepared for example to fight against cybercrime? How can the employer ensure the data protection, the confidentially obligations or the fulfil of legal duties of secrecy, if it is not possible to guarantee who will have access to the information (eg. the misuse of wireless connections, parents, spouses and children may *have a look* on what the worker is doing on his/her professional notebook, the need to share the same notebook with the children for the school homework). Besides, workers are forced to stay at home, but also to provide assistance to their parents or grandparents (groups at risk), to take care of their children and to provide the necessary means for the "school at distance" and to assist their children to continue studying remotely. Another question is being discussed: is the teleworker entitled to the meal allowance, given that there is no need to have a meal outside?

3. Final remarks.

Several other measures were taken, such as (i) closure or suspension of non-essential activities that could spread the virus, (ii) social distance between workers in their workplaces, regular washing of hands and periodic disinfection of the work tools/utensils, isolation rooms, among others, (iii) limitation to the freedom of movement, in particular during the Easter period, (iv) extension of unemployment benefits, (v) credit lines to support companies and families, (vi) special regime for authorised absences caused by Covid-19 (eg. illness, isolation and quarantine, childcare during the school closures), (vii) social protection for independent workers and company directors of micro or small companies.

The normal procedure to hear the social partners before the approval and publication of labour provisions could not be followed, because it is urgent to act and solve immediately the problems caused by Covid-19. Therefore, when the state of emergency was renovated on the 2nd April, the derogation of such general procedure was allowed. In any case, as far as we are aware, the Government is still discussing each measure with the social partners, which is definitely a good practice in times of an unprecedent crisis.

We believe that we will learn important lessons to revise and update the labour standards.

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