CUATRECASAS, GONÇALVES PEREIRA

NEWSLETTER | LEMPLOYMENT LAW

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I LEGISLATION HIGHLIGHTS

Law no. 120/2015 – D.R. no. 170/2015, Series I of 2015-09-01
Parliament

Law no. 120/2015 made the ninth amendment to the Labour Code, reinforcing parenthood rights. The amendments included the following:

Change/extension of parental leave:

- Increases the mandatory parental leave for the father to 15 working days;
- Establishes the possibility of simultaneous initial leave by both parents between 120 and 150 days;
- Makes the taking of the initial parental leave simultaneously by the mother and the father working in the same company dependent on an agreement with the employer, in case of a micro-company;
- Exclusive parental leave of 15 working days by the father becomes mandatory, taken consecutively or non-consecutively in the 30 days following the birth of the child, 5 of which to be taken consecutively immediately after the birth.

Telework:

- An employee with a child aged up to 3 years is entitled to work under a telework scheme, when compatible with the functions carried out, without the employer being able to oppose to such scheme.

Group adaptability and group working hours bank:

- Employees with children under the age of 3 who have not expressed their agreement, in writing, are excluded from the application of group adaptability scheme and group working hours bank.

Penalties:

- Failure to inform the Commission for Equality in Labour and Employment (CITE) of the non-renewal of a fixed-term contract of a pregnant employee, an employee who has recently given birth or who is breastfeeding will now be punished as a serious administrative offence.

These amendments to the Labour Code entered into force on 6 September, with the exception of those referring to the exclusive parental leave of the father, which will only enter into force with the next State Budget.

II LEGISLATION

Law no. 129/2015 – D.R. no. 172/2015, Series I of 2015-09-03
Parliament

Third amendment to Law no. 112/2009, of 16 September, which establishes the legal regime applicable to the prevention of domestic violence and to the protection of and assistance to victims, including the regime applicable to absences and transfers at the request of an employee victim of domestic violence and also covering provisions regarding collective bargaining agreements.

Law no. 133/2015 – D.R. no. 174/2015, Series I of 2015-09-07
Parliament

Creates a mechanism for protection of pregnant employees, employees who have recently given birth or who are breastfeeding, pursuant to which companies that, in the 2 years prior to an application for public subsidies, have been sentenced by a judgement with the force of *res judicata* for unlawful dismissal of a pregnant employee, employee who has recently given birth or who is breastfeeding, are prevented from benefiting from the aforementioned public subsidies.

Law no. 146/2015 – D.R. no. 176/2015, Series I of 2015-09-09
Parliament

Regulates the activities of seafarers on board of ships flying the Portuguese flag, as well as the responsibilities of the Portuguese state as flag or port state, in order to fulfil the mandatory provisions of the 2006 Maritime Labour Convention, of the International Labour Organization, transposes Council Directives 1999/63/EC of 21 June 1999 and 2009/13/EC of 16 February 2009, Directive 2012/35/EU of the European Parliament and of the Council of 21 November 2012 and Directive 2013/54/EU of the European Parliament and of the Council of 20 November 2013, and makes the second amendment to Decree-Laws no. 274/95, of 23 October, and 260/2009, of 25 September, and the fourth amendment to Law no. 102/2009, of 10 September, and repeals Decree-Law no. 145/2003, of 2 July.

III EXTENSION ORDERS

Area of Activity	Legislation
Precast Concrete	**Order No. 259/2015 D.R. no. 164/2015, Series I of 2015-08-24** Determines the extension of the scope of the collective bargaining agreement between ANIPB - National Association of Precast Concrete Producers and FETESE - Federation of Service Employees.
Offal Industry	**Order No. 260/2015 D.R. no. 164/2015, Series I of 2015-08-24** Determines the extension of the scope of the collective bargaining agreement between ITA - Portuguese Association of Offal Manufacturers and FESAHT - Federation of Unions in Food, Beverages, Hotels and Tourism of Portugal and between the employers association and the Union of Commerce, Offices, Services, Food, Hotels and Tourism (SinCESAHT).

IV CASE LAW

Judgment of the Court of Justice of the European Union of 09-09-2015 (Case C-160/14) - Concept of "transfer of undertaking" - Unlawful collective dismissal

This judgment concerns the winding-up of the company Air Atlantis ("AIA") in February 1993, which was followed by the collective dismissal of 97 people. From May 1993, Transportes Aéreos Portugueses, S.A. ("TAP"), which was the main shareholder of AIA, began to provide part of the flights already chartered by AIA, having used, for this purpose, four aircrafts and part of the office equipment of AIA, having also hired some of the employees of the closed AIA.

The employees in question challenged their dismissal and requested their reinstatement in TAP. The Court of First Instance concluded that this was a case of transfer of undertaking and consequently ordered the reinstatement of the employees in their corresponding categories and the payment of their severances.

The Lisbon Court of Appeal annulled the decision of the First Instance and the Supreme Court of Justice upheld the decision of the Court of Appeal, declaring that the collective dismissal was not unlawful. The Supreme Court observed that (***i***) for a transfer of undertaking to occur,

the "*simple pursuit*" of the activity is not sufficient , the identity of the business must also be maintained, and (***ii***) despite the request of the employees of a preliminary ruling from the Court of Justice of the European Union ("CJEU"), there were no significant doubts as to the interpretation of the EU law that might imply the aforementioned preliminary ruling.

The employees then brought an action alleging non-contractual liability against the Portuguese State in the Civil Courts of Lisbon. In this context, the Civil Courts asked the CJEU whether, in this situation, (***i***) the Supreme Court of Justice was required to submit a request for a preliminary ruling, and whether (***ii***) the concept of "*transfer of undertaking*" in the applicable European directive covered the situation of AIA employees.

The CJEU answered affirmatively to both questions, emphasising that, in the air transport sector, the transfer of equipment is an essential feature to consider the existence of a "*transfer of undertaking*" in the meaning of the directive and that maintaining a functional link of interdependence between the various factors transferred led to the possibility that TAP was pursuing the activity previously carried out by AIA, in an identical or similar fashion, albeit within a new organisational structure.

Judgment of the Court of Justice of the European Union of 10-09-2015 (Case C-266/14) - Travel times for employees without a fixed or habitual place of work - Concept of "*working time*"

The Court of Justice of the European Union ("CJEU") was called on to decide whether the time spent in travel by employees of a Spanish company is included in the concept of "*working time*" or of "*rest period*", in the meaning of the applicable European directive.

Under the terms of this directive, "*working time*" is defined as any period during which the employee is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice. Any period which is not working time is considered a "*rest period*".

In this case, the employees did not have a fixed or habitual place of work, their work including travel to various customers, located in different geographical areas, sometimes at a distance of more than 100 kilometres from the employees' homes.

The Court decided that, in this case, the time spent travelling between the employees homes and the customers was "*working time*", since it included the three elements of that concept:

1) During time spent travelling, the employees were carrying out their activities/duties, since, without a fixed or habitual place of work, the aforementioned travelling was a "*necessary mean of providing those customers' technical services*".

2) During that time, the employees were also at the employer's disposal, since it is the employer who determines the order of customers to be visited, in which case the employer can change that order, and cancel or add appointments with customers. In this context, the employees are required to be physically present at the place determined by the employer and cannot manage their time without major constraints, nor pursue their own interests.

3) During the time spent travelling, employees are working, because travelling is an integral part of being an employee. Under these terms, the place of work of such employees cannot be reduced to the physical areas of their work on the premises of their employer's customers and must include the travel times to these customers.

It was also emphasised that the objective of that directive is to protect the safety and health of employees, *i.e.* to guarantee a minimum rest period for employees, and it would be contrary to that objective if travelling to customers was interpreted as meaning a rest period.

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