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# Labor

Newsletter | Portugal

1st Quarter 2021

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## I. *Laboratory*

We highlight two aspects of this newsletter:

Regarding legislation, the raise of the standard age for accessing old-age pension to 66 years and 7 months (planned for 2022).

We will see if the rising trend of this threshold is inverted in 2023, even if it is not done for the best reasons.

As far as case law is concerned, the ruling of Guimarães Court of Appeal on attributing liability to employers for providing compensation to employees in harassment situations, highlighting the uprise of the relevance of the combating of harassment situations.

The importance of this matter is clear in the legal regime, which places serious obligations for action on the employer, both i) preventive, such as imposing codes of good conduct for preventing and fighting harassment; and ii) responsive, such as obliging employers to start disciplinary proceedings when they learn of alleged harassment situations. The employer is held liable for breaching those duties, not only through applying administrative sanctions, but also through obliging it to compensate victims of harassment.

The importance of this matter is also clear in the increasing number of cases being reported, investigated, and punished.

It is crucial for companies to be proactive by adopting clear codes of conduct and sharing them effectively with their employees through training activities that serve to embed them into their corporate culture.

Maria da Glória Leitão,  
Head of the Labor Law Department



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## **II. Legislation**

**Decree Law 16-A/2021 - Official Gazette of the Republic of Portugal 39, Series I of 02/35/2021**

**Amends the welfare regime in events of disability and old age for beneficiaries of the general social security regime**

This decree law introduces, amongst others, the following amendments to the welfare regime in events of disability and old age for beneficiaries of the general social security regime:

- i. The contribution periods met under other social security regimes, in the part where those periods do not overlap with the contribution periods met under the general social security regime, now serve for meeting the conditions for accessing early retirement pension when the individual has contributed to social security for a long period.
- ii. When the application of the rules for updating the beneficiary's remuneration for obtaining his or her reference remuneration results in a negative update of the revaluation coefficients: **(a)** the annual update is suspended and the revaluation coefficients applicable in the previous year remain in effect; and **(b)** the effects of devaluation that took place are deducted from the revaluation of the remuneration in following years, until such devaluation is offset.
- iii. The exercise of an activity, accumulating work income with absolute disability pension, now entails, in addition to the loss of the right to the pension, a compulsory disability evaluation by the competent disability verification service.
- iv. Automatic assignment of either the provisional old-age pension or the provisional disability pension.
- v. Once 10 years have elapsed from the date disability or old-age pensions are deferred, barring some exceptions, it is no longer possible to change the calendar years for the guarantee period or any other conditions for accessing the pension and other annual remunerations considered in calculating the pension. Once the 10-year period has ended, those elements are considered consolidated and permanent.

**Law 11/2021 - Official Gazette of the Republic of Portugal 47/2021, Series I of 03/09/2021**

**Suspends, on an exceptional basis, periods associated with post-validity and expiration of collective bargaining agreements**

From March 9, 2021, the post-validity periods of collective bargaining agreements to be applied following their termination are suspended for 24 months.



**Ministerial Order 53/2021, of March 10 - Official Gazette of the Republic of Portugal 48, Series I of 03/10/2021**

**Establishes the normal age for accessing old-age pension under the general social security regime in 2022**

Establishes that the normal age for accessing old-age pension under the general social security regime in 2022 will be 66 years and 7 months.

**Regional Legislative Decree 6/2021/M - Official Gazette of the Republic of Portugal 51, Series I of 03/15/2021**

**Approves the amount of the minimum monthly wage in effect in the Autonomous Region of Madeira**

Establishes the amount of the minimum monthly wage in effect in the Autonomous Region of Madeira at EUR 682.00.

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### III. Extension orders

Area of activity	Order
<b>Hospitality and tourism</b>	<p><b>Ministerial Order 9/2021 - Official Gazette of the Republic of Portugal 4, Series I of 01/07/2021</b></p> <p>Determines the extension of the collective bargaining agreement between the Association of Hotels and Tourist Developments of Algarve (AHETA – <i>Associação dos Hotéis e Empreendimentos Turísticos do Algarve</i>) and the Union of Workers and Service Technicians, Trade, Restaurants and Tourism (SITESE - <i>Sindicato dos Trabalhadores e Técnicos de Serviços, Comércio, Restauração e Turismo</i>).</p>



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## IV. Labor obligations

### **Deadline for approving and placing the vacation schedule map**

The deadline for approving and placing the vacation schedule map was extended until May 15, 2021.

### **Deadline for delivering the 2020 Employment Report**

The Employment Report for 2020 must be delivered between April 16 and June 30, 2021.

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## V. National case law

### **Ruling of the Lisbon Court of Appeal of May 27, 2020**

**The dismissal of a female employee who was breastfeeding on the date the disciplinary proceedings were started, regardless of her status on the date of the notice of fault, is unlawful, in the absence of an opinion from the Portuguese Commission for Equality at Work and in Employment (CITE)**

The female employee, a cashier, was dismissed with just cause. Although she was a nursing mother on the date the disciplinary proceedings were started, this was no longer the case on the date the notice of fault was prepared. For this reason, the employer did not request the CITE for its opinion after the investigation.

The Lisbon Court of Appeal confirmed that the principle of reinforced protection applied to employees who are breastfeeding stems from a special vulnerability associated with that period.

The Court decided that what mattered was that the female employee was breastfeeding during the period of the acts covered by the investigation or when the disciplinary proceedings were started, for which reason it was necessary to request the CITE for its opinion. As the employer failed to do this, the dismissal was ruled unlawful.

### **Ruling of the Guimarães Court of Appeal of December 17, 2020**

**In a compensation claim for harassment, the defendants may either be the president of the employer's board of directors, if actions were not taken that could have stopped the harassment situation, or the employer of the employee performing the harassment**

In this case, two employers shared the premises in which the female employee of one of the companies was a victim of harassment by an employee of the other company. After receiving the victim's complaint, the employer (in this case, understood to be the president of the



board of directors) failed to take the necessary actions to bring an end to the harassment situation. Consequently, the female employee had to continue sharing the workplace with the harasser.

The female employee attempted to claim compensation for damages against i) her employer, ii) the president of her employer's board of directors, and iii) the harasser's employer.

The Court of First Instance ruled that neither the harasser's employer nor the president of her employer's board of directors could be defendants, as it considered that the claim for compensation in question had to be based solely on the employment contract of the victim with her employer.

The Guimarães Court of Appeal, on the contrary, ruled that the female employee could sue the three respondents.

In first place, concerning the employer of the harassed employee, the Guimarães Court of Appeal considered that the liability arose from that party's capacity as employer, and from the fact of not having immediately carried out the actions necessary for stopping the harassment situation.

In second place, concerning the president of the employer's board of directors, the Guimarães Court of Appeal ruled that it was possible to sue the hierarchical superiors in actions that protect employees' rights relating to personality, insofar as those superiors are responsible for conduct that damages the dignity and psychological health of their employees.

Lastly, concerning the harasser's employer, the Guimarães Court of Appeal concluded that it could also be sued, because, as a third party, this company by inaction and knowingly permitted one of its employees to harass another individual because of its failure to act.

In short, the Guimarães Court of Appeal ruled that, in a claim founded on the violation of rights relating to personality and workplace harassment, the defendants may include, in addition to the harassed party's employer, the perpetrator of the threat or offense, whether this is a hierarchical superior, a work colleague or even a third party, provided the aggression takes place during the labor relationship.

### **Ruling of the Lisbon Court of Appeal of January 27, 2021**

**Article 334 of the Portuguese Labor Code (*Código do Trabalho*), which establishes the joint and several liability of a company in reciprocal shareholdings, control or group relationship with the employer for outstanding labor credits, is not applicable to venture capital funds or other entities without legal personality**



After the employer's statement of insolvency, the employees, after terminating their employment contracts due to lack of remuneration, filed a claim against a venture capital fund that exercised a dominant influence over the employer, claiming that this fund should be held joint and severally liable for the payment of outstanding labor credits, under Article 334 of the Labor Code.

After analyzing whether Article 334 of the Labor Code, which establishes the joint and several liability of a company in reciprocal shareholdings, control or group relationship with the employer, is applicable to venture capital funds, the Court of First Instance ruled that it is.

However, the Lisbon Court of Appeal ruled that Article 334 of the Labor Code only applies to the types of companies to which legal provisions regarding affiliated companies are applicable. In other words, the provision in question is solely applicable to limited liability companies (*sociedades anónimas*), private limited companies (*sociedades por quotas*), and limited partnerships with a share capital (*sociedades em comandita por ações*).

The Court of Appeal further stated that the exceptional nature of the legal provision in question prevented its application by analogy, specifically to funds or other entities without legal personality, even when they exercised a dominant influence over the employer.

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## VI. European Union case law

### **Ruling of the Court of Justice of the European Union of March 9, 2021**

**European Union law must be interpreted as meaning that a stand-by period in a continuous availability regime, when employees can only be contacted by telephone and must reach their workplace within one hour, only represents work time, in its entirety, if the constraints imposed on the employees are such as to affect their ability to freely manage the time during which their professional services are not required and to devote this time to their own interests**

The employee, a technician who specializes in transmission centers, due to the nature of his work, carried out his duties remotely between his workplace and residence. Due to the periodic difficulties in accessing the centers he services, he was forced to stay in the vicinity of his workplace in a building that his employer provided. In addition to his normal working hours, he had to provide a stand-by period to ensure continuous availability. The employee filed a claim for these stand-by hours to be paid as regular work.

Such a stand-by system meant that the employee had to be permanently contactable by telephone and, if necessary, travel to his workplace within one hour. Only urgent jobs needed to be executed immediately, while other jobs could be executed the next day. The period the



employee spent under this regime was paid for with an allowance corresponding to 20% of his basis remuneration. However, if the employee had to work during that same period, this would be remunerated as regular work.

The referring court placed the following question to the Court of Justice of the European Union (“CJEU”): *Must EU law be interpreted as meaning that, in circumstances such as those of these proceedings, a stand-by period according to a stand-by system be considered as working time, during which the employee performing his or her work activity at a transmitting station must, for the period in which he does not work and when his physical presence at the workplace is not required, be contactable by telephone and, if necessary, reach the workplace within one hour?*

In response to this question (as well as in another ruling it issued on the same day), the CJEU ruled that EU law must be interpreted as meaning that a stand-by period according to a stand-by regime only represents working hours, in their entirety, if, after a comprehensive assessment of all the circumstances of the case (e.g., the consequences of the time-limit the employee had to reach his or her workplace or the average frequency of activity during that period) it can be concluded that the constraints imposed on the employee were such as to affect his or her capacity to freely manage the time during which his or her professional services are not required and to devote this time to his or her own interests.





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Cuatrecasas has set up a Coronavirus Task Force, a multidisciplinary team that constantly analyses the situation emerging from the COVID-19 pandemic. For additional information, please contact our Task Force by email [TFcoronavirusPT@cuatrecasas.com](mailto:TFcoronavirusPT@cuatrecasas.com) or through your usual contact at Cuatrecasas. You can read our publications or attend our webinars on our [website](http://www.cuatrecasas.com).

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