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# Labor

Newsletter | Portugal

2nd Quarter 2021

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## Contents

- > *Laboratory*
- > Legislation
- > Extension orders
- > Portuguese case law
- > European Union case law



## I. *Laboratory*

The regulation of different areas of economic life affected by the COVID-19 pandemic continues to play a significant part in the context of labor law, with applicable exceptional regimes being prolonged and newly support measures being implemented, which we will address in this Newsletter.

While we are waiting for new legislative developments to be announced, we decided to study the judgment of the Constitutional Court about the petition to declare some of the regulations in Law 93/2019, amending the Labor Code, unconstitutional.

Law 18/2021 clarifies, perhaps more than it introduces, that the regime for transferring a company or establishment applies to situations of transfer by award of supply of services that are executed by a public bid, source-to-contract or any other means.

In the judgment reported in this Newsletter, the Lisbon Court of Appeal ruled on the limits of freedom of expression of an employee who is a trade union representative. This judgment is particularly significant, as it rules on statements made during trade union activity, when the employment agreement of the trade union representative was suspended.

Maria da Glória Leitão,  
Head of the Labor Law Department



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## II. Legislation

**Ordinance 80/2021 - Official Gazette of the Portuguese Republic No. 67, Series I of April 7, 2021**

**Regulates the conditions and procedures concerning the payment in installments to social security for regularizing contributions and payments due**

Independent contractors and contracting entities may request for payment in installments of any social security due for contributions and payments, with a legal payment deadline on or before December 31, 2021.

The conditions and procedures for paying in installments are regulated in Ordinance 80/2021.

The payment of any social security due may be authorized for up to six monthly payments. The period may be extended to 12 months when the total sum of the social security due covered by the decision exceeds EUR 3,060.00 for individuals, and EUR 15,300.00 for entities. A condition for accessing this regime is that the social security due to be regularized must not be subject to enforced recovery or involved in insolvency proceedings, for recovery or restructuring, special proceedings for payment arrangement, extraordinary proceedings for company viability, out-of-court regime for company recovery, financial consolidation or corporate restructuring contracts, contracts for the complete or partial acquisition of the capital of a company by technical staff, or by employees, with the intention of restructuring and modernizing the company.

The agreement must cover all the contributions, including contributions due resulting from assessment as contracting entity and default interest incurred and to be incurred.

**Law 18/2021 - Official Gazette of the Portuguese Republic No. 68, Series I of April 8, 2021**

**Extends the legal regime applicable for transferring a company or establishment to situations of transfer by award of supply of services that are executed by a public bid, source-to-contract or any other means, amending the Labor Code**

It determines that the regime for transferring a company or establishment set out in the Labor Code applies to situations of transfer by award of supply of services that are executed by a public bid, source-to-contract or any other means of selection, in the public and private sector, and specifically to the award of supply of security, food, cleaning or transport services, taking effect at the time of award. This rule also applies to public bids and other means of selection, in the public and private sector, taking place in 2021, including those whose award has already been finalized.



**Ordinance 102-A/2021 - Official Gazette of the Portuguese Republic No. 94, Series I of May 14, 2021**

**Regulates the new incentive for normalizing corporate activity, established in Portuguese Decree Law 23-A/2021 of March 24 and the simplified support for micro-enterprises and maintenance of work posts, established in Decree Law 46-A/2020 of July 30**

This ordinance regulates the procedures and conditions for accessing the following support to be granted by the Institute of Employment and Professional Training (IEFP - *Instituto do Emprego e da Formação Profissional, I. P.*):

- New incentive for normalization established in article 5 of Decree Law 23-A/2021 of March 24.
- Simplified support established in article 14-A of Decree Law 46-A/2020 of July 30, in its present wording.

**Decree Law 37/2021 - Official Gazette of the Portuguese Republic No. 99, Series I of May 21, 2021**

**Creates an exceptional measure for compensating the increase in the amount of the monthly national minimum wage**

The measure involves the grant of a one-time cash benefit, paid by the Institute of Support to Small and Medium Enterprises and Innovation (IAPMEI) or by the Institute of Tourism of Portugal (*Instituto do Turismo de Portugal, I. P.*), depending on the employer's main activity.

It applies to employers (entities or individuals), regardless of the number of employees, that:

- are up to date on contributions and taxes at the time the benefit is paid; and
- have presented in the remuneration returns for December 2020 full-time employees with a base remuneration equal to or greater than the monthly national minimum wage (“RMMG”) for 2020 and less than the RMMG for 2021.

The amount of the benefit concerned varies depending on the amount declared in the remunerations return for December 2020.



### III. Extension orders

Area of Activity	Order
Retail trade	<p><b>Ministerial Order 102/2021 - Official Gazette of the Portuguese Republic No. 93/2021, Series I of May 13, 2021</b></p> <p>Determines the extension of the collective bargaining agreement between Companies' Association of Alto Tâmega (ACISAT - <i>Associação Empresarial do Alto Tâmega</i>) and the Portuguese Federation of Trade Unions in Trade, Offices and Services (FEPCES - <i>Federação Portuguesa dos Sindicatos do Comércio, Escritórios e Serviços</i>).</p>
Trade in chemicals	<p><b>Ministerial Order 110/2021 - Official Gazette of the Portuguese Republic No. 103/2021, Series I of May 27, 2021</b></p> <p>Determines the extension of the collective bargaining agreement between the Association of Wholesalers of Chemicals and Pharmaceuticals (GROQUIFAR – <i>Associação de Grossistas de Produtos Químicos e Farmacêuticos</i>) and the Portuguese Federation of Trade Unions in Trade, Offices and Services (FEPCES - <i>Federação Portuguesa dos Sindicatos do Comércio, Escritório e Serviços</i>) and another party (wholesale trade in chemicals for industry or agriculture).</p>
Trade in chemicals	<p><b>Ministerial Order 111/2021 - Official Gazette of the Portuguese Republic No. 103/2021, Series I of May 27, 2021</b></p> <p>Determines the extension of the collective bargaining agreement between the Association of Wholesalers of Chemicals and Pharmaceuticals (GROQUIFAR - <i>Associação de</i></p>



	<p><i>Grossistas de Produtos Químicos e Farmacêuticos e a Federação de Sindicatos da Indústria, Energia e Transportes</i>) and the Federation of Trade Unions in Industry, Energy and Transport (COFESINT - <i>Federação de Sindicatos da Indústria, Energia e Transportes</i>) and another party (wholesale trade in chemicals for industry or agriculture).</p>
<p><b>Paper trade</b></p>	<p><b>Ministerial Order 112/2021 - Official Gazette of the Portuguese Republic No. 103/2021, Series I of May 27, 2021</b></p> <p>Determines the extension of the changes in the collective bargaining agreement between the Portuguese Association of Paper and Cardboard Manufacturers (FAPEL - <i>Associação Portuguesa de Fabricantes de Papel e Cartão</i>) and the Federation of Trade Unions in Industry and Services (FETESE - <i>Federação dos Sindicatos da Indústria e Serviços</i>).</p>
<p><b>Energy and telecommunications</b></p>	<p><b>Ministerial Order 113/2021 - Official Gazette of the Portuguese Republic No. 103/2021, Series I of May 27, 2021</b></p> <p>Determines the extension of the changes in the collective bargaining agreement between the Portuguese Association of Companies of the Electrical and Electronic Sector (<i>Associação Portuguesa das Empresas do Sector Eléctrico e Electrónico</i>) and Federation of Trade Unions in Industry and Services (FETESE - <i>Federação dos Sindicatos da Indústria e Serviços</i>), and others.</p>
<p><b>Chemicals</b></p>	<p><b>Ministerial Order 124/2021 - Official Gazette of the Portuguese Republic No. 119/2021, Series I of June 22, 2021</b></p> <p>Determines the extension of the collective bargaining agreement between the Association of Wholesalers of Chemicals and</p>



	<p>Pharmaceuticals (GROQUIFAR - <i>Associação de Grossistas de Produtos Químicos e Farmacêuticos</i>) and the Inter-Trade Union Federation of Metallurgical, Chemical, Electrical, Pharmaceutical, Cellulose, Paper, Graphical, Press, Energy and Mining Industries (FIEQUIMETAL - <i>Federação Intersindical das Indústrias Metalúrgicas, Químicas, Eléctricas, Farmacêutica, Celulose, Papel, Gráfica, Imprensa, Energia e Minas</i>) (management of pests and environmental health).</p>
<p><b>Industry and trade in confectionery products</b></p>	<p><b>Ministerial Order 132/2021 - Official Gazette of the Portuguese Republic No. 122/2021, Series I of June 25, 2021-</b></p> <p>Determines the extension of changes in the collective bargaining agreement between the Portuguese Association of Food Product Traders and Industrialists (ANCIPA - <i>Associação Nacional de Comerciantes e Industriais de Produtos Alimentares</i>) and the Trade Union of Service, Trade, Catering, and Tourism Workers and Technicians (SITESE - <i>Sindicato dos Trabalhadores e Técnicos de Serviços, Comércio, Restauração e Turismo</i>) (confectionery and fruit preservation – administrative).</p>
<p><b>Wholesale and retail trade and services</b></p>	<p><b>Ministerial Order 133/2021 - Official Gazette of the Portuguese Republic No. 122/2021, Series I of June 25, 2021</b></p> <p>Determines the extension of the changes in the collective bargaining agreement between the Association for Trade, Industry, Services and Tourism in the Region of Leiria (ACILIS - <i>Associação de Comércio, Indústria, Serviços e Turismo da Região de Leiria</i>) and others and the Trade Union of Trade, Office and Service Workers of</p>



	Portugal (CESP - <i>Sindicato dos Trabalhadores do Comércio, Escritórios e Serviços de Portugal</i> ).
<b>Healthcare</b>	<b>Ministerial Order 134/2021 - Official Gazette of the Portuguese Republic No. 122/2021, Series I of June 25, 2021</b> Determines the extension of the changes to the collective bargaining agreement between the Portuguese Private Hospital Association (APHP - <i>Associação Portuguesa de Hospitalização Privada</i> ) and the Trade Union of Portuguese Nurses (SEP - <i>Sindicato dos Enfermeiros Portugueses</i> ).

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## IV. Portuguese case law

### Judgment of the Constitutional Court of May 18, 2021

**Declared the 180-day trial period as unconstitutional, with general binding effect, but only when applicable to employees seeking their first job and provided they have been previously hired for a fixed term by other employers**

The Constitutional Court finally ruled on the petition to assess and declare as unconstitutional different regulations in Law 93/2019 of September 4, which introduced several changes in the Labor Code.

The petition for declaration of unconstitutionality covered the rules contained in:

- i. article 112 (duration of the trial period);
- ii. article 142 (special cases of employment agreement for very short duration); and
- iii. article 502 (termination of collective bargaining agreement).

In its judgment, the Constitutional Court ruled as unconstitutional the rule contained in article 112 of the Labor Code in the provision that extended the trial period from 90 to 180 days, but only in the part that refers to employees who “*are seeking their first job,*” when applicable to employees who have previously been hired by other employers for fixed terms of 90 days or more. The new rule remains valid with regard to the other changes introduced by Law 93/2019 of September 4.

The Constitutional Court refused to declare unconstitutional other rules whose validity was questioned.



## **Judgment of the Supreme Court of Justice of December 16, 2020**

### **The expiration of the collective employment regulation document only takes effect with regard to employees at the time at which the employer informs them in writing**

The Portuguese Supreme Court concluded that the expiration of a collective bargaining agreement does not depend on the publication of the notice established in article 502(6) of the Labor Code. However, when this is not published, the expiration can only be imposed on employees when the employer informs them of this expiration in writing under article 109(1) of the Labor Code.

As the employer failed to argue or establish having made this written communication of the expiration of the collective bargaining agreement to the employees at any time, and because the Directorate-General of Employment and Labor Relations (“**DGERT**”) did not publish the notices of expiration, the Supreme Court concluded that the employer still had to apply the collective employment agreement signed between the Association of Companies Providing Cleaning and Similar Services (*Associação das Empresas de Prestação de Serviços de Limpeza e Atividades Similares*) and the Trade Union of Services Workers in Reception, Security, Cleaning, Domestic Work and Other Miscellaneous Activities (STAD - *Sindicato dos Trabalhadores de Serviços de Portaria, Vigilância, Limpeza, Domésticas e Atividades Diversas*) and others.

## **Judgment of the Lisbon Court of Appeal of March 24, 2021**

### **Making incorrect public statements, which create insecurity and uncertainty and affect employees during a pandemic, cannot be considered freedom of expression, and is liable to make the continuation of the employment relationship untenable**

The Lisbon Court of Appeal upheld the employer’s initiation of disciplinary action against an employee, a trade union leader, whose employment agreement was suspended due to the exercise of trade union activity, given that, during the reduction or suspension of the agreement, the rights, duties and guarantees of the parties are not predicated on the effective provision of work, as is the case with the duty of loyalty.

The employee declared on social media a great increase in the number of employees infected with COVID-19 in stores owned by the employer, and that the necessary measures for ensuring their health and safety were not being taken.

She claimed her statements had been made under the right to freedom of expression in the employment and trade union context, and in the interest of the greater good, the right to health, and, ultimately, the right to life, and that the restrictions on freedom of expression in a work and trade union context needed to be interpreted very restrictively.

However, having verified that the employer complied with the recommendations of the DGS and contingency plan, the Lisbon Court of Appeal concluded that it was clear that “*the employee*



*was attributing to the employee defamatory acts that affected its image and name,” by generalizing a case, and stating “that the employer had infected employees, quarantined employees and employees waiting for test results at its stores, and that it did not test infected employees or do the tests it claimed to do.”*

While the fact that the employee was acting in the area of trade union activity was considered a mitigating factor, the Lisbon Court of Appeal ruled that this was a serious offense, culpable and liable to compromise the trust necessary for maintaining the employment relationship, emphasizing that *“the incorrectness of the public statements, made against the employee during a pandemic, creating insecurity and uncertainty and directly related to the pandemic, cannot be considered as protected under freedom of expression, only aggravates the impropriety of the employee’s actions, and is liable to make the continuation of the employment relationship untenable.”*

The Lisbon Court of Appeal concluded that the employee’s behavior represented a violation of employment duties and a disciplinary offense, and based on the facts proved with evidence and for purposes of precautionary proceedings, concluded on the serious probability of just cause.

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## V. European Union case law

### **Ruling of the Court of Justice of the European Union of March 17, 2021**

**When an employee signs different employment agreements with the same employer, the minimum rest period applies to the agreements considered together and not to each of the agreements considered separately**

The Court of Justice of the European Union (“CJEU”) ruled that it would not be possible to meet the requirement of the Working Time Directive, according to which each employee benefits daily from at least eleven consecutive hours of rest, if these rest periods are examined separately for each agreement binding that employee and his or her employer.

As a single period cannot be simultaneously classified as working time and rest period, the CJEU ruled that, when an employee has signed different employment agreements with the same employer, the minimum rest period applies to the agreements considered together and not to each of the agreements considered separately.



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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](#).

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