
Legal Update – 4th Quarter 2022

Labor Newsletter



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Laboratory

In addition to legislative output, during the last quarter of 2022, Portuguese and European courts issued many rulings that had a significant and practical impact on companies.

In a groundbreaking decision, the Supreme Court ruled that the flexitime regime also applies to weekly rest days and allows employees who benefit from this regime to choose their own rest days. However, the Supreme Court recalled that achieving a work-life balance is not an absolute right, and the employer may reject the flexitime request if it has a valid justification (which it did not in this case). The courts and the Commission for Equality in Labor and Employment are responsible for determining whether the reason is valid. Therefore, companies should carefully analyze flexitime requests to understand their implications for the organization and whether accepting them is feasible.

In another major decision, the Porto Court of Appeals ruled that CCTV images can be used for disciplinary purposes, even if criminal proceedings have not yet started, provided the facts being investigated could give rise to criminal liability. This judgment contradicts narrower interpretations of article 28.5 of Law 58/2019 of August 8—which implemented the General Data Protection Directive in Portugal—that suggest that using images for disciplinary purposes is only allowed if criminal proceedings have already been started.

At the European level, the Court of Justice of the European Union ruled—as it did in 2017—that a company's internal neutrality rule prohibiting employees from wearing any visible symbols of political or religious beliefs in the workplace does not constitute direct discrimination against the religion or beliefs of a female employee who wishes to wear a headscarf.

In two cases concerning Portuguese court rulings, the European Court of Human Rights ruled that the Portuguese courts did not violate the right to freedom of speech or the right to private life (respectively) when they considered that (i) the statements that an employee made to the media regarding alleged retaliation through imposing a previous disciplinary penalty were sufficient to constitute just cause for dismissal; and (ii) the use of data collected by a satellite navigation system in a company vehicle, which enabled the detection of serious breaches of work duties, was lawful for disciplinary purposes.

Rui Vaz Pereira,
Partner in the Labor Law Practice Area



Legislation

Ordinance 292/2022 of December 9

Establishes the normal age for retirement pensions in 2024.

This ordinance provides that the normal retirement age for a general social security pension in 2024 will be 66 years and 4 months.

Ordinance 293/2022 of December 12

Effects the third amendment to Ordinance 206/2020 of August 27, which regulates the ATIVAR.PT Internships measure. This measure provides support for integrating young people into the employment market or for retraining the unemployed.

This ordinance reinforces the criteria for approving applicants, adapting the target beneficiaries and the financial copayment increases based on the composition of families with children in a vulnerable situation and creating an obligation to maintain the employment contract and the level of employment for 12 months, plus the non-completed internship time in cases where the internship finishes early.

Ordinance 298/2022 of December 16

Sets the annual update for the social support index ("IAS").

The IAS for 2023 is set at €480.43.

Ordinance 301/2022 of December 20

Approves the development of the "Four-Day Week" pilot program. The aim of the program is for companies and their employees to adopt a reduced four-day working week on a trial basis.

This is a voluntary pilot program for employers and employees who wish to reduce the number of hours worked without any corresponding reduction in pay.

Participating employers will be assessed before, during and after the program. The Institute for Employment and Vocational Training will be responsible for implementing and managing the program.

Decree-Law 85-A/2022 of December 22

Updates the guaranteed minimum monthly salary for 2023.

The approved guaranteed minimum monthly salary as of January 1, 2023, is €760.



Ordinance 307/2022 of December 27

Approves the monthly remuneration declaration (“MRD”) and completion instructions.

This ordinance revokes Ordinance 34/2021 of February 12 and approves the new MRD form and completion instructions. It provides that the MRD must be sent electronically, and that entities and individuals may do so using the Tax Office website or the Social Security website.

This ordinance entered into force on January 1, 2023.

Social Security notice of December 27

Extends the period for updating information on current contracts until the end of the first quarter of 2023.

To ensure all existing contracts are updated, the Social Security Department extended the information updating deadline to the end of the first quarter of 2023. Employers or their authorized representatives can update and register the contract data for active employment relationships that have already been reported to the Social Security Department.

Law 24-D/2022 of December 30

Reduces the deadline for informing Social Security about new employee admissions.

The law amends the deadline established in article 29.2 of the Social Security Contributions Code for informing the pertinent Social Security institution about new employment contracts. This information must now be provided 15 days before the employment contract begins. According to the previous wording, employers were required to send this information 24 hours before the employment contract began.

Extension ordinances

Activity area	Ordinance
Food products trade and industry	Ordinance 256/2022 - Official Gazette of the Republic of Portugal 208/2022, Series 1 of October 27, 2022



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	<p>Extending the collective agreement between the National Association of Traders and Industrial Producers of Food Products (ANCIPA) and the National Trade Union of Agriculture, Forestry, Fisheries, Tourism, Food Industry, Drinks, and Other Employees (SETAAB).</p>
<p>River and local traffic craft owners</p>	<p>Ordinance 258/2022 - Official Gazette of the Republic of Portugal 208/2022, Series 1 of October 27, 2022</p> <p>Extending the amendments to the collective agreement between the Association of River and Local Traffic Craft Owners and the Merchant Navy, Industries and Energy Trade Union (SITEMAQ) and others.</p>
<p>Social solidarity institutions</p>	<p>Ordinance 259/2022 - Official Gazette of the Republic of Portugal 208/2022, Series 1 of October 27, 2022</p> <p>Extending the collective agreement and its amendments between the National Confederation of Solidarity Institutions (CNIS) and the Portuguese Federation of Trade Unions in Trade, Offices and Services (FEPCES) and others.</p>
<p>Social solidarity institutions</p>	<p>Ordinance 260/2022 - Official Gazette of the Republic of Portugal 209/2022, Series 1 of October 28, 2022</p>



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	<p>Extending the collective agreement and its amendments between the National Confederation of Solidarity Institutions (CNIS) and the National Federation of Trade Unions of Employees in Public and Social Functions (FNSTFPS).</p>
<p>Dairy industry</p>	<p>Ordinance 261/2022 - Official Gazette of the Republic of Portugal 209/2022, Series 1 of October 28, 2022</p> <p>Extending the changes to the collective agreement between the National Association of Dairy Industries (ANIL) and others and the Trade Union of Dairy, Food, Agriculture, Offices, Trade, Services, Road Transport, Metalworking, Steel, Civil Construction and Wood Employees.</p>
<p>Meat trade</p>	<p>Ordinance 262/2022 - Official Gazette of the Republic of Portugal 209/2022, Series 1 of October 28, 2022</p> <p>Extending the changes to the collective agreement between the Association of Meat Traders of Lisbon Municipality and others and other employer associations and the Trade Union of the Southern Meat Industry and Trade.</p>
<p>Poultry slaughtering and meat processing centers</p>	<p>Ordinance 263/2022 - Official Gazette of the Republic of Portugal</p>



	<p>209/2022, Series 1 of October 28, 2022</p> <p>Extending the changes to the collective agreement between the National Association of Poultry Slaughterhouses and Meat Processing Industries (ANCAVE) and the National Trade Union of Agriculture, Forestry, Fisheries, Tourism, Food Industry, Drinks, and Other Employees (SETAAB).</p>
<p>Insurance and reinsurance mediation</p>	<p>Ordinance 264/2022 - Official Gazette of the Republic of Portugal 209/2022, Series 1 of October 28, 2022</p> <p>Extending the amendments to the collective agreement between the National Association of Insurance Agents and Brokers (APROSE) and the Trade Union of Insurance Workers (STAS) and others.</p>
<p>Social solidarity institutions</p>	<p>Ordinance 270/2022 - Official Gazette of the Republic of Portugal 216/2022, Series 1 of November 9, 2022</p> <p>Amending Ordinance 259/2022, which in turn extends the collective agreement and its amendments between the National Confederation of Solidarity Institutions (CNIS) and the Portuguese Federation of Trade Unions in Trade, Offices and Services (FEPCES) and others.</p>
<p>Social solidarity institutions</p>	



	<p>Ordinance 271/2022 - Official Gazette of the Republic of Portugal 216/2022, Series 1 of November 9, 2022</p> <p>Amending Ordinance 260/2022, which in turn extends the collective agreement and its amendments between the National Confederation of Solidarity Institutions (CNIS) and the National Federation of Public and Social Service Employees (FNSTFPS).</p>
<p>Cooperative wineries</p>	<p>Ordinance 290/2022 - Official Gazette of the Republic of Portugal 233/2022, Series 1 of December 5, 2022</p> <p>Extending the changes to the collective agreement between the Association of Portuguese Cooperative Wineries (ADCP) and the National Trade Union of Agriculture, Forestry, Fisheries, Tourism, Food Industry, Drinks, and Other Employees (SETAAB).</p>
<p>Agriculture</p>	<p>Ordinance 291/2022 - Official Gazette of the Republic of Portugal 233/2022, Series 1 of December 5, 2022</p> <p>Extending the collective agreement and its amendments between the Confederation of Portuguese Farmers (CAP) and the National Trade Union of Agriculture, Forestry, Fisheries, Tourism, Food Industry, Drinks, and Other Employees (SETAAB).</p>
<p>Food products trade and industry</p>	



	<p>Ordinance 299/2022 - Official Gazette of the Republic of Portugal 241/2022, Series 1 of December 16, 2022</p> <p>Extending the amendments to the collective agreement between the National Association of Traders and Industrial Producers of Food Products (ANCIPA) and the Federation of Agriculture, Food, Beverage, Hospitality and Tourism Trade Unions of Portugal (FESAHT).</p>
<p>Animal casing industry</p>	<p>Ordinance 300/2022 - Official Gazette of the Republic of Portugal 241/2022, Series 1 of December 16, 2022</p> <p>Extending the collective agreement and its amendments between the Portuguese Association of Animal Casings and Related Industries (ITA) and the Federation of Agriculture, Food, Beverage, Hospitality and Tourism Trade Unions of Portugal (FESAHT).</p>

Portuguese case law

Judgment of the Porto Court of Appeals of October 3, 2022

Successive awards of service agreements to different companies through public procurement does not in itself constitute a transfer of an economic unit.

The Porto Court of Appeals was called on to analyze whether there was a transfer of an economic unit between the company whose private security services agreement was terminated and the company that was subsequently awarded the provision of the same services following a public tender.



In this case, it was possible to identify a separate stable economic unit that could be transferred. However, according to the Porto Court of Appeals, there was no transfer of an economic unit in the successive service agreements. The fact that the old and new service providers provided similar services is not sufficient to consider that there was a transfer of an economic unit. Also, given that the activity carried out is essentially labor based, the Porto Court of Appeals considered that, for a transfer to exist, a key portion of the former provider's employees—in terms of numbers and skillsets—must be retained. As this was not the case, the Porto Court of Appeals held that it could not consider that there was a transfer of an economic unit.

Judgment of the Supreme Court of October 12, 2022

The flexitime system also includes weekly rest days, meaning employees have the right to choose these rest days.

The Supreme Court considered that the flexitime regime applies to weekly rest days, meaning employees benefiting from this regime can choose their weekly rest days based on their need to strike a work–life balance.

The Supreme Court based this conclusion on (i) the robust legal and constitutional protection for employees to achieve a work–life balance; (ii) the concept of working hours defined in the Portuguese Labor Code (which includes weekly rest days); and (iii) the rationale behind the flexitime regime. Regarding the last point, the Supreme Court considered that considering the flexitime regime to exclude the weekly rest period would seriously restrict the flexitime regime and the constitutional and legal protection for employees to achieve a work–life balance.

However, the Supreme Court noted that achieving a work–life balance is not an absolute right and, consequently, is subject to limitations. Therefore, an employer can reject the flexitime request if it has a valid reason (which it did not in this case). The courts and the Commission for Equality in Labor and Employment determine whether the reasons the employer has given for rejecting the flexitime request are valid.

Judgment of the Supreme Court of November 2, 2022

Non-competition pacts involve bilateral reciprocal obligations, as they impose an obligation on the employee not to do something and an obligation on the employer to pay compensation. The compensation amount does not have to be set directly, as it need only be determinable.

The case before the Supreme Court involved a non-competition clause in an employment contract and whether it was invalid because it did not expressly stipulate the compensation amount to which the employee was entitled.

According to the Supreme Court, competition pacts necessarily involve bilateral reciprocal obligations, as they generate a compensation obligation for the employer and a non-compete obligation for the employee. As the non-compete clause was



included in the employment contract, the Supreme Court emphasized that it could not be viewed and interpreted in isolation, but in conjunction with all the other clauses of the contract.

Therefore, although the compensation amount in this case was the employee's participation in an incentive plan (LTIP - Long-Term Incentive Plan) and no express value was set, the Supreme Court concluded that this situation did not clash with the principle of employee protection or any other legal rule. This is because, while the situation might generate a certain degree of risk for the employee, it could also bring him a major gain, allowing him to earn a much higher amount than his annual salary.

Judgment of the Porto Court of Appeals of November 28, 2022

Video surveillance footage can be used to determine an employee's disciplinary liability if the facts at issue could give rise to criminal liability, regardless of whether the corresponding criminal proceedings have been started.

The Porto Court of Appeals ruled that video surveillance footage can be used to determine an employee's disciplinary liability if the facts involved could give rise to criminal liability. However, the court said that it is clear from the Portuguese Labor Code that images captured by video surveillance systems cannot be used to monitor employee work performance.

This view is based on the particular gravity of the facts attributed to the employee, who were captured by the video surveillance system. The court considered that the existence of criminal proceedings relating to the facts attributed to the employee is irrelevant. For video surveillance footage to be used to determine disciplinary liability, it is sufficient that the facts involved could give rise to criminal liability.

Constitutional Court Ruling 698/2022 of December 2, 2022

The Constitutional Court ruled that the joint and several liability established in article 551.4 of the Portuguese Labor Code is not unconstitutional.

The Constitutional Court was called on to analyze the unconstitutionality of article 551.4 of the Portuguese Labor Code, which establishes that the contractor and owner of the construction site, company or farm, as well as their respective managers or directors, and of companies that are in a reciprocal control or group relationship with the contractor or owner of the construction site, company or farm, are jointly and severally liable for employment-related administrative offenses.

The court held that the purpose of the article in question is to hold everyone in the chain liable for the infringement of mandatory Portuguese Labor Code provisions and punish them as a deterrent. It also considered that this joint and several liability stems from a broad concept of offender, in which any agent who contributes to committing



the administrative offense—whether causally or co-causally, or by act or omission—is considered an offender.

The court stated that the entire production chain has a duty to ensure compliance with the applicable legal provisions, and that the existence of this joint and several liability for labor-related administrative offenses is not unconstitutional.

The court also held that there is no unconstitutionality in starting parallel administrative offense proceedings for the same administrative offense against the various co-offenders (in the broadest sense).

Finally, the court rejected the idea that this provision infringed the right of defense, as any offender can have the administrative decision about the offender changed by lodging a judicial appeal.

European Union case law

Judgment of the Court of Justice of the European Union (“CJEU”) of October 13, 2022

An employer’s internal policy that imposes a general policy of religious, philosophical or political convictions neutrality does not constitute direct discrimination, within the meaning of Directive 2000/78/EC, when it prevents a female employee from wearing the Islamic headscarf while working.

The CJEU considers that a company’s internal neutrality rule prohibiting employees from wearing any visible symbol of political, philosophical or religious beliefs in the workplace does not amount to direct discrimination based on a female employee’s religion or beliefs.

According to the CJEU, as the company’s internal policy refers generally to any expression of these beliefs and treats all company employees in the same way, requiring a neutrality of dress that is not compatible with the use of these symbols, there is no reason to consider that there is direct discrimination, within the meaning of [Directive 2000/78/EC](#), when the employee is required not to wear the Islamic headscarf in the workplace.

Judgment of the European Court of Human Rights of November 17, 2022

European Union law considers that an employee’s behavior while outside the workplace, especially as regards the media, legitimizes the imposition of the disciplinary penalty of dismissal.

The employee was initially suspended for eight days with loss of pay and seniority for having improperly used the company premises and for having breached company regulations on the use of vehicles on site. Based on this suspension, the employee



commented in various media outlets, such as newspapers and television channels, that the penalty was unfair and had been motivated by his trade union activity. He said that it should be viewed as a true act of retaliation by his employer. The employer eventually imposed the most serious disciplinary penalty—dismissal—because of the employee’s statements to the media.

The two national courts called on to assess the dismissal—the Funchal Labor Court and, subsequently, the Lisbon Court of Appeals—ruled that the dismissal was lawful.

The employee disagreed with these decisions and asked the European Court of Human Rights to analyze whether, under article 10 of the European Convention on Human Rights (the “ECHR”), there was an infringement of his right to freedom of speech and whether he had been unfairly dismissed because of his statements to the media.

The European Court of Human Rights reached the same conclusion as that of the Portuguese courts, ruling that (i) the employee’s conduct was particularly serious and could justify the imposition of the most severe disciplinary penalty (i.e., dismissal); and (ii) the penalty was not excessively or manifestly disproportionate.

Judgment of the European Court of Human Rights of December 13, 2022

The dismissal of an employee for a breach of duty that was discovered from satellite navigation system data does not constitute unlawful dismissal.

In this judgment, the European Court of Human Rights examined whether the dismissal of an employee—a medical sales representative—based on data collected by a satellite navigation system in his company vehicle constituted an infringement of the right to have private life respected under article 8 of the ECHR.

In this case, after the employer discovered that the employee was not keeping to his work schedule and was increasing the number of kilometers that he actually drove, it decided to dismiss him.

The employee disagreed with this decision and filed a claim with the Vila Real Labor Court. He then went on to lodge an appeal with the Guimarães Court of Appeals. While both Portuguese courts concluded that the dismissal was lawful, they did so on different grounds.

The employee disagreed with these decisions and asked the European Court of Human Rights to examine whether, under article 8 of the ECHR, there was an infringement of his right to have his private life respected and whether his dismissal was unlawful because it was based on data collected unlawfully.

The European Court of Human Rights said that it could only examine whether the Portuguese courts had properly protected the employee’s right because the employee knew about and had consented to the installation of a satellite navigation system in his vehicle. The court ultimately concluded that the employee’s right was properly protected by the Portuguese courts, which had correctly weighed up the two interests



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at issue (respect for the employee's private life and the employer's right to control the costs deriving from the use of vehicles by employees).

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