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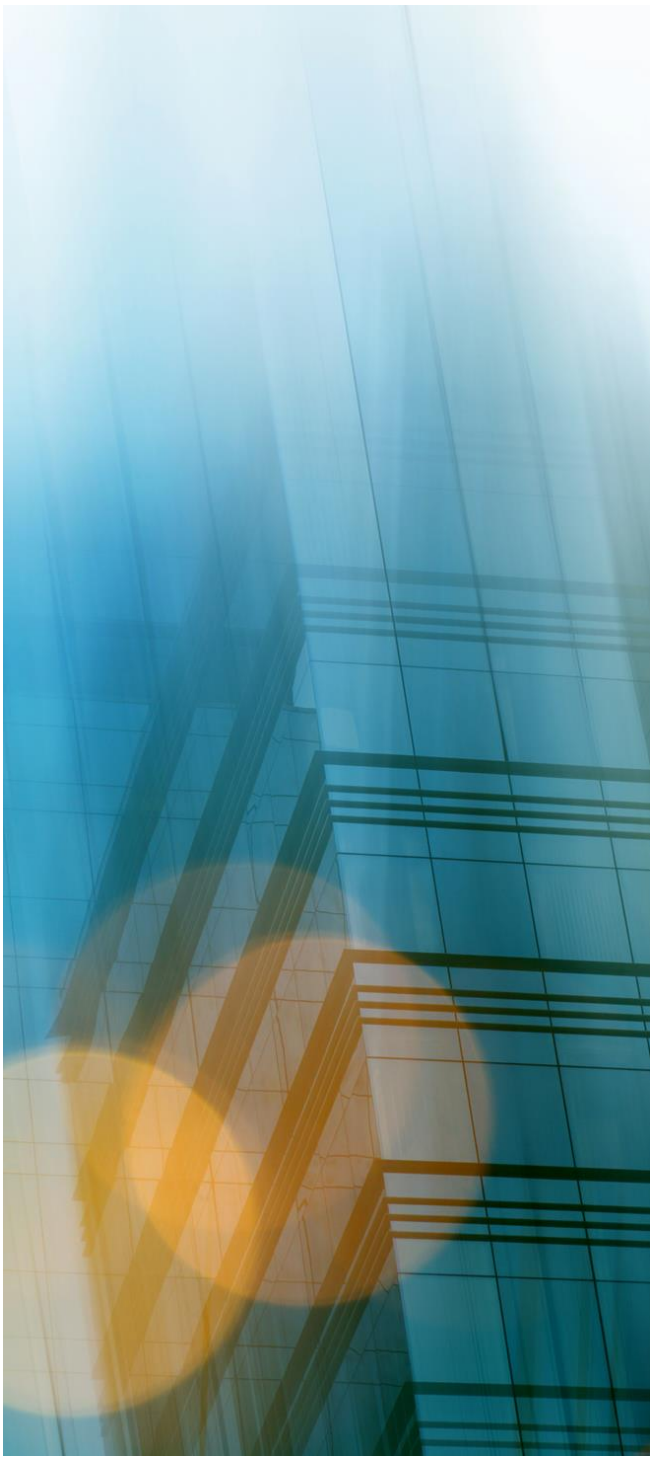
Legal Update – 3rd Quarter 2022

Labor Newsletter

November 23, 2022



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So-called "seasonality" allows employers and employees to enter fixed-term employment contracts. However, what is actually meant by seasonality?

This issue is addressed in the Judgment of the Supreme Court of September 7, 2022, but in a way that will undoubtedly cause a certain degree of confusion.

The law itself considers "seasonal activity" as a case of "temporary company need" that justifies the use of fixed-term contracts. As the industry that is most often subject to seasonal cycles, local festivals and vacation periods, tourism—the sector at issue in the ruling—uses this reason to justify the use of fixed-term contracts for employees.

However, citing Joana Nunes Vicente, the ruling states, "*the concept of seasonality presupposes a necessary temporal limitation; therefore, it is hardly a seasonal activity when it lasts for an entire year or even half a year.*"

No objections can be raised to the fact that seasonality does not exist when there is a steady—or only slight variation—in the influx of tourists, thereby resulting in the ongoing need for a similar number of employees. However, understanding how an activity that is repeated every year—even for six-month periods—cannot be classified as seasonal is somewhat harder.

Therefore, an exact definition of seasonality remains elusive. This is an important matter, as it also affects several other areas of seasonal activity such as agriculture.

Maria da Glória Leitão,
Partner in the Labor Law Practice Area

Legislation

Ordinance 205/2022 of August 11

Is the second amendment to Ordinance 170-A/2020 of July 13, which regulates the procedures, conditions and terms of access to the extraordinary incentive for the normalization of entrepreneurial activity.

This ordinance clarifies that employers who, by December 31, 2020, have given up the extraordinary incentive to normalize business activity to access the extraordinary support for the gradual resumption of their business activity are entitled to keep the benefit of a 50% partial waiver of the payment of social security contributions payable by the employer.

Ordinance 216/2022 of August 30

Is the first amendment to Ordinance 7/2022 of January 4, which regulates the conditions for fixing work schedules and for the way working time is recorded.

This ordinance establishes a transitional rule that extends, for a six-month period (i.e., until February 28, 2023), the possibility granted to the employer to fix work schedules by any means or to use the individual control booklet, dispensing with authentication.

Ordinance 218/2022 of September 1

Is the fourth amendment to Ordinance 182/2018 of June 22, which regulates the working conditions of administrative employees not covered by a specific collective agreement.

This ordinance updates the pay scale, the meals allowance amount, seniority payments, and the amount of cashier's allowances for administrative employees not covered by a specific collective agreement.

Regulatory Decree 4/2022 of September 30

Amends the regulation on the legal regime for the entry, stay, exit and expulsion of foreign citizens from the national territory. Specifically, it establishes the conditions required for granting temporary stay and residence visas for the pursuit of a professional activity carried out remotely outside the national territory.

This decree amends Regulatory Decree 84/2007 of November 5, establishing the items that must accompany (i) the application for a temporary stay visa for the pursuit of a professional activity carried out remotely outside the national territory, as provided for in article 54.B.1.i) of Law 23/2007 of July 4; and (ii) the application

for a residency visa for the pursuit of a professional activity carried out remotely outside the national territory, as provided for in article 61.B of Law 23/2007 of July 4.

Extension ordinances

Activity area	Ordinance
Private hospitals	**Ordinance 171/2022 - Official Gazette of the Republic of Portugal 128/2022, Series I of July 5, 2022** Extending the changes to the collective agreement between the Portuguese Association of Private Hospitals (APHP) and the Federation of Agriculture, Food, Beverage, Hospitality and Tourism Trade Unions of Portugal (FESAHT) and others.
Private security services	**Ordinance 172/2022 - Official Gazette of the Republic of Portugal 128/2022, Series I of July 5, 2022** Extending the changes to the collective agreement between the Association of Security Companies (AES) and the Federation of Trade Unions in Industry and Services (FETESE) and others.
Private security services	**Ordinance 173/2022 - Official Gazette of the Republic of Portugal 128/2022, Series I of July 5, 2022** Extending the changes to the collective agreement between the Association of Security Companies (AES) and the Service, Commerce,

	Restaurant and Tourism Employees and Technical Personnel Trade Union (SITESE).
Driving schools	**Ordinance 190/2022 - Official Gazette of the Republic of Portugal 142/2022, Series I of July 25, 2022** Extending the collective agreement between the Portuguese Association of Driving Schools (APEC) and the Federation of Transport and Communications Trade Unions (FECTRANS).
Ceramics, crystal, cement, abrasives and glass industries	**Ordinance 191/2022 - Official Gazette of the Republic of Portugal 142/2022, Series I of July 25, 2022** Extending the changes to the collective agreement between the Portuguese Association of Ceramic and Crystal Industries (APICER) and the National Trade Union for Employees in the Ceramic, Cement, Abrasives, Glass and Similar, Civil Works, and Public Works Industries (SINTICAVS).
Wholesale pharmaceutical and veterinary products	**Ordinance 192/2022 - Official Gazette of the Republic of Portugal 142/2022, Series I of July 25, 2022** Extending the changes to the collective agreement between the Association of Wholesalers of Chemicals and Pharmaceuticals (GROQUIFAR) and the Federation of Industry, Energy and Transport Trade Unions (COFESINT) and others.

Aviation	**Ordinance 193/2022 - Official Gazette of the Republic of Portugal 143/2022, Series I of July 26, 2022** Extending the company agreement between *Indústria Aeronáutica de Portugal, S. A.* (OGMA) and the Aviation and Airport Employees Trade Union (SITAVA) and others.
Pest control services	**Ordinance 194/2022 - Official Gazette of the Republic of Portugal 143/2022, Series I of July 26, 2022** Extending the changes to the collective agreement between the Association of Wholesalers of Chemicals and Pharmaceuticals (GROQUIFAR) and the Inter-Trade Union Federation of Metallurgical, Chemical, Electrical, Pharmaceutical, Cellulose, Paper, Graphical, Press, Energy and Mining Industries (FIEQUIMETAL).
Retail fuel trade	**Ordinance 195/2022 - Official Gazette of the Republic of Portugal 143/2022, Series I of July 26, 2022** Extending the changes to the collective agreement between the *Alto Tamega* Business Association (ACISAT) and the Portuguese Federation of Trade Unions in Trade, Offices and Services (FEPCES).

Private security services	**Ordinance 196/2022 - Official Gazette of the Republic of Portugal 143/2022, Series I of July 26, 2022** Extending the changes to the collective agreement between the Association of Security Companies (AES) and the Trade Union of Gatehouse Workers, Security Guards, Cleaning, Housekeeping and Miscellaneous Activity Employees (STAD) and others.
Wholesale chemical products	**Ordinance 219/2022 - Official Gazette of the Republic of Portugal 171/2022, Series I of September 5, 2022** Extending the collective agreement and its changes between the Association of Wholesalers of Chemicals and Pharmaceuticals (GROQUIFAR) and the Trade Union of Service, Trade, Catering, and Tourism Employees and Technicians (SITESE).
Wholesale chemicals for industry or agriculture	**Ordinance 220/2022 - Official Gazette of the Republic of Portugal 171/2022, Series I of September 5, 2022** Extending the changes to the collective agreement between the Association of Wholesalers of Chemicals and Pharmaceuticals (GROQUIFAR) and the Portuguese Federation of Trade Unions in Trade, Offices and Services (FEPCES) and others.

Driving schools	**Ordinance 221/2022 - Official Gazette of the Republic of Portugal 171/2022, Series I of September 5, 2022** Extending the collective agreement between the National Association of Automobile Driving Schools (ANIECA) and the Federation of Transport and Communications Trade Unions (FECTRANS).
Horticulture, fruit and floriculture	**Ordinance 222/2022 - Official Gazette of the Republic of Portugal 171/2022, Series I of September 5, 2022** Extending the collective agreement between the Association of Vegetable, Fruit and Flower Growers of the Municipalities of Odemira and Aljezur (AHSA) and the National Trade Union of Agriculture, Forestry, Fisheries, Tourism, Food Industry, Drinks, and Other Employees (SETAAB).
Wholesale pharmaceutical and veterinary products	**Ordinance 226/2022 - Official Gazette of the Republic of Portugal 172/2022, Series I of September 6, 2022** Extending the changes to the collective agreement between the Association of Wholesalers of Chemicals and Pharmaceuticals (GROQUIFAR) and the Inter-Trade Union Federation of Metallurgical, Chemical, Electrical, Pharmaceutical, Cellulose, Paper, Graphical, Press,

	Energy and Mining Industries (FIEQUIMETAL).
Private hospitals	**Ordinance 227/2022 - Official Gazette of the Republic of Portugal 172/2022, Series I of September 6, 2022** Extending the changes to the collective agreement between the Portuguese Association of Private Hospitals (APHP) and the Portuguese Nurses Union (SEP).
Two-wheeler, hardware, furniture and related industries	**Ordinance 228/2022 - Official Gazette of the Republic of Portugal 172/2022, Series I of September 6, 2022**Extending the changes to the collective agreement between the National Association of Two-Wheeler, Hardware, Furniture and Related Industries (ABIMOTA) and the National Industry and Energy Union (SINDEL) and another.
Pharmaceutical industry	**Ordinance 230/2022 - Official Gazette of the Republic of Portugal 172/2022, Series I of September 6, 2022** Extending the changes to the collective agreement between the Portuguese Pharmaceutical Industry Association (APIFARMA) and the Federation of Industry, Energy, and Transport Trade Unions (COFESINT) and others.
Chemical industry	

	Ordinance 231/2022 - Official Gazette of the Republic of Portugal 172/2022, Series I of September 6, 2022 Extending the changes to the collective agreement between the Portuguese Chemical, Petrochemical and Refinery Association (APQuímica) and others and the Federation of Industry, Energy and Transport Trade Unions (COFESINT) and others.

Portuguese case law

Judgment of the Supreme Court of July 14, 2022

When an athlete is entitled to a pension for absolute permanent incapacity to perform his or her usual work, he or she cannot combine this pension with a legal compensation for temporary incapacity if he or she has a recurrence.

The Supreme Court of Justice examined and decided whether an employee can combine a disability pension with a temporary incapacity legal compensation. The case involved an athlete who had had an accident that left him unable to continue in his profession as a soccer player, for which he received a disability pension. The athlete had a recurrence, which led to hospitalization and surgery, leaving him in a state of absolute temporary incapacity, and he believed he was entitled to combine the disability pension with a legal compensation for temporary incapacity.

According to the Supreme Court of Justice, although occupational accidents can result in the temporary or permanent incapacity to pursue one's profession, the harm that is being repaired is always the same: the employee's loss of capacity.

Even in the case of a recurrence or aggravation, the employee cannot seek to receive two cash benefits aimed at repairing the same harm, as such a situation would constitute unjust enrichment.

Therefore, the Supreme Court of Justice ruled that no basis is established in the Occupational Accidents Law for allowing an employee, in the case of a recurrence, to receive a temporary incapacity benefit when he or she is already receiving a permanent disability pension.

Judgment of the Supreme Court of September 7, 2022

A company that operates river cruises for approximately 10 months every year cannot use seasonal activity to justify a fixed-term contract for a cabin steward, without any peak in activity, as the need involved is permanent, not temporary.

Among the various issues addressed in the ruling, we highlight the court's analysis of the concept of seasonal activity as an admissible reason for entering a fixed-term contract under article 140.2.e) of the Labor Code.

The contracts involved were fixed-term employment contracts entered with the same employee in consecutive years for varying terms of between 5, 7, 8 and 9 months. Both the first instance court and the Porto Court of Appeals (in its ruling of February 22, 2021) held that the company's business was seasonal, as it operates river cruises on the Douro River between April and October of each year, but not all of these start on March 1 and not all of them end on November 30 of the same year. Consequently, they considered the fixed term of the employment contract(s) in question valid.

The Supreme Court of Justice queried what should be understood by "temporary need," and, citing Joana Nunes Vicente, argued that the "concept of seasonality presupposes a necessary temporal limitation; therefore, it is hardly a seasonal activity when it lasts for an entire year or even half a year." Considering that the employees were hired "to meet the permanent needs of the company, as a cruise company, and that the periods for entering contracts with the plaintiff are not even limited to peak activity times," the Supreme Court of Justice ruled, with one dissenting vote, that there was no temporary need in the case in question that would justify entering a fixed-term employment contract.

In this decision, the Supreme Court of Justice also addressed the starting date of the limitation period for credits arising from the various existing employment contracts, querying whether one single contract should be considered to exist—on the termination date of which the limitation period would start running—or whether there were several contracts that, although unlawful, would give rise to different and successive limitation periods.

Judgment of the Supreme Court of September 14, 2022

When defining the minimum services to be provided during a strike, the employer cannot designate the employees allocated to provide minimum services when the trade union has already done so. The designation by the employer under these conditions is abusive and the employee is not obliged to obey it.

The fundamental question raised in this Supreme Court of Justice ruling concerns the question of whether employees are obliged to obey their employer's designation of the employees allocated to provide minimum services when, by making such a designation, the employer has abused the employees' rights.

In this case, the trade union urged the employer to provide a list of employees available to provide minimum services, but it failed to do so. Subsequently, after the union

designated the employees who would be allocated to provide minimum services, the employer issued its own list and demanded compliance.

The Supreme Court of Justice held that the employer's behavior constituted a breach of the duty of the parties, during a strike, to act in good faith. The court also emphasized that the employer can only allocate employees to provide these services when the representative body fails to do so.

As the employer adversely affected the performance of the duty imposed on the union and tried to override the designation that the union had made, the Supreme Court of Justice considered that the employer acted in abuse of its rights. Therefore, it considered that the designation was unlawful, meaning the employees were not obliged to obey it. Any designated employee who did not comply could not be subject to disciplinary action.

Judgment of the Lisbon Court of Appeals of July 7, 2022

During occupational accident proceedings, if the parties fail to reach an agreement during the conciliation phase regarding the degree of incapacity, the Medical Board cannot later reconsider other matters agreed on during that phase.

The Lisbon Court of Appeals examined the possibility of new facts reported by a Medical Board during occupational accident proceedings being considered at the end of the conciliation phase in which the parties disagreed on the attributed degree of incapacity.

According to the Lisbon Court of Appeals, the Medical Board may not make any changes to what the parties agreed regarding the injuries suffered by the employee and their causal nexus. Specifically, the Medical Board cannot introduce new facts when the conciliation phase of the proceedings is over.

As the appealed decision followed the Medical Board's opinion, in which issues agreed on during the conciliation phase had been reconsidered and facts that were not raised during the conciliation phase were taken into account, the Lisbon Court of Appeals ruled that the opinion and the appealed decision based on that opinion should be overturned. The court also considered that there should be a new Medical Board to establish the degree of incapacity and that a new decision should be delivered on that basis.

Judgment of the Porto Court of Appeals of July 13, 2022

Fair cause for dismissal only occurs in cases of culpable and particularly serious misconduct, and the conduct listed in article 351 of the Labor Code is not enough in itself.

The Porto Court of Appeals considered whether the conduct of a female physiotherapist suffering from dermatitis who refused to perform any of the tasks indicated by the employer but remained at work for several days because she was not

given a work schedule with her name written on it and with signed and stamped instructions, could (i) be considered conduct that makes the continuation of the employment relationship practically impossible, and (ii) give rise to a fair cause for dismissal.

According to the Porto Court of Appeals, it is clear from article 351 of the Labor Code that, for a fair cause for dismissal, the employee must have behaved in an unlawful and culpable way that makes it impossible for the labor relationship to continue.

In this case, the Porto Court of Appeals considered that the repeated refusal of the employee to carry out her duties and the request for a work plan with her name written on it and containing duties and working conditions compatible with her state of health did not constitute behavior that demonstrated that the employer could not keep her at the company. The court considered that disobeying certain orders given by superiors and the resulting failure to carry out the work with the diligence due does not automatically give rise to a fair cause for dismissal.

The Porto Court of Appeals recalled that other disciplinary actions are available to the employer, and that employees should only be dismissed in extreme cases where there is an insurmountable disruption to the labor relationship. The court held that there was no fair cause for dismissal and, consequently, that the dismissal was unlawful.

Judgment of the Guimarães Court of Appeals of July 13, 2022

Decharacterizing an occupational accident requires a culpable and conscious breach of safety rules by the employee.

The Guimarães Court of Appeals examined the possible decharacterization of an occupational accident suffered by an employee who fell off a roof while working as a self-employed construction builder. In this case, the builder did not set up a lifeline, or use a harness, and was only wearing gloves and boots.

The Guimarães Court of Appeals explained that the concept of decharacterization of an occupational accident is based on several requirements established in article 14 of the Occupational Accidents Law, one of the main requirements of which is fault or gross negligence.

The proven facts demonstrated that the employee had been working as a self-employed construction builder for 18 years and was overly confident and reckless in neglecting the dangers involved in carrying out the work. However, the court held that he demonstrated recklessness by failing to use the necessary equipment but did not act culpably or with gross negligence. Therefore, the court ruled that the accident could not be decharacterized.

European Union case law

Judgment of the Court of Justice of the European Union of July 7, 2022

The Court of Justice of the European Union ("CJEU") ruled that (i) a provision in a collective agreement that stipulated a pay increase for night work carried out on an occasional basis that was higher than that set for night work carried out on a regular basis does not fall within the scope of Directive 2003/88 of the European Parliament and of the Council, and (ii) this directive does not apply under article 51.1 of the Charter of Fundamental Rights of the European Union.

The CJEU was asked to make a preliminary ruling on whether a provision for a pay increase in a collective agreement could be held to be incompatible with Directive 2003/88/EC (the "Directive") and, consequently, with article 51.1 of the Charter of Fundamental Rights of the European Union (the "Charter").

In this case, a collective agreement was entered with a German trade union that established a pay increase for night work done on an occasional basis that was higher than the pay increase for night work done on a regular basis.

According to the CJEU, it is necessary to see whether the Directive regulates this increased pay for night work and, if so, whether it imposes any specific obligations. The CJEU explained that the Directive only regulates certain aspects of the organization of working time to ensure the health and safety of employees, but it does not regulate aspects relating to employees' pay for night work.

Furthermore, and considering article 51 of the Charter, which enshrines the principle of subsidiarity, the CJEU clarified that EU law does not apply in certain matters, such as pay in this case. The CJEU concluded that establishing the pay level falls within the contractual freedom of the social partners at a national level and should be seen as being within the competence of each Member State.

Therefore, while it is true that certain articles of the Directive concern night work, these provisions concern other aspects unrelated to pay, such as the duration and pace of night work.

Accordingly, the CJEU held that not only is the pay increase provided for in the collective agreement not covered by the Directive, but that the Directive does not apply under article 51.1 of the Charter.

Judgment of the Court of Justice of the European Union of September 22, 2022

European Union law runs counter to national law whereby the right to paid annual leave acquired by an employee in respect of a reference period is time-barred at the end of a three-year period, which starts running at the end of the year in which that right arose, when the employer has not actually given the employee the opportunity to exercise that right.

The CJEU was asked to make a preliminary ruling on whether a provision of German law under which employees would be time-barred from their right to paid vacation leave if this was not taken within a three-year period could be considered incompatible with article 7 of Directive 2003/88 ("Directive") and article 31.2 of the Charter.

Article 31.2 of the Charter guarantees the right of every employee to an annual period of paid vacation leave, while article 7 of the Directive applies this principle by setting the duration of this period at a minimum of four weeks.

The CJEU explained that employees' right to paid leave is of particular importance as an EU social right and can only be restricted under certain conditions, such as (i) the existence of a legal provision, (ii) respect for the key content of the right, and (iii) compliance with the principle of proportionality. In this case, the CJEU found that, although the limitation of the right to paid vacation leave was provided for in German law and did not breach the fundamental right to paid vacations, it could only be concluded that this measure went beyond what was necessary to achieve its purpose.

The CJEU held that the employer cannot rely on the employee's right being time barred if it has not given that employee a true opportunity to exercise that right, at the risk of accepting the unjust enrichment of the employer to the detriment of the protection of the employee's health and in breach of article 31.2 of the Charter.

For additional information on the contents of this document, please contact Cuatrecasas.