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# Employment Law

Newsletter | Portugal

2<sup>nd</sup> Quarter 2020

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## I. *Laboratory*

As referred to in the latest issue, our newsletter is no longer issued on a monthly basis. This change is due to the volume of legislation that has been published since the outbreak of the pandemic, which led us to dedicate newsletters and legal flashes exclusively to the COVID-19 crisis. You can find a link to these publications [here](#).

However, there is life beyond this crisis, as will be shown in this newsletter.

We would like to highlight, in particular, the ruling of the Porto Court of Appeal.

This ruling established that the failure to carry out a formality (the employees and their representatives' right of consultation regarding the change of the protection equipment to be used in the workplace) was legitimate grounds for the employee (a trade union representative) to disobey orders.

In the current situation, in which companies must review and adapt their health and safety policies due to the COVID-19 pandemic, it is essential to remember that the formalities required to approve them must be carried out.

Finally, we take this opportunity to remind you that time banks (*bancos de horas*) individually agreed under article 208-A of the Labor Code (*Código do Trabalho*) will cease to be in force on October 1, 2020. Those companies that intend to maintain this regime (and if this regime is not foreseen in a collective bargaining agreement) must commence to establish and prepare the survey required for the implementation of the said regime.

Maria da Glória Leitão,  
Head of the Labor Law Department



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## II. Legislation

Decree Law 14-D/2020 - Official Gazette of the Portuguese Republic 72/2020, 1<sup>st</sup> Supplement, Series I of April 13 2020

**Reinforces parenthood protection for employees who perform public functions under the converging social security system**

This decree law established that, under the system to protect parenthood, regarding the maternity, paternity, and adoption of employees who perform public functions under the converging social security system, the daily amount of the childcare subsidy becomes equal to 100% of the beneficiary's reference salary, harmonizing this solution with the one already in force for employees falling under the legal social security system for parenthood under the pension system and the solidarity subsystem.

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## III. Extension orders

| Area of activity   | Order  |
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| <b>Trade and provision of services (Braga District)</b>      | <b>Order No. 88/2020 - Official Gazette of the Portuguese Republic No. 68/2020, Series I of April 6, 2020</b><br>Extends the amendments to the collective bargaining agreement entered into between the Braga Commercial Association (Trade, Tourism, and Services and others) and the Union of Trade, Office and Service Employees of Minho (CESMINHO) and other. |
| <b>Film import, distribution, screening and laboratories</b> | <b>Order No. 93/2020 - Official Gazette of the Portuguese Republic No. 75/2020, Series I of April 16, 2020</b><br>Extends the amendments to the collective bargaining agreement entered into between the Portuguese Association of Film Companies and  |



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|   | the National Union of Telecommunications and Audiovisual Employees (SINTTAV).  |
| <b>Food product retail</b>                    | <b>Order No. 94/2020 - Official Gazette of the Portuguese Republic No. 75/2020, Series I of April 16, 2020</b><br>Extends the amendments to the collective bargaining agreement entered into between the Association of Food Product Distributors (ADIPA) and the Union of Service, Trade, Catering, and Tourism Employees and Technicians (SITESE) (food product retail). |
| <b>Charities</b>                              | <b>Order No. 99/2020 - Official Gazette of the Portuguese Republic No. 78/2020, Series I of April 21, 2020</b><br>Extends the collective bargaining agreement entered into between the National Confederation of Charities (CNIS) and the National Federation of Unions of Employees in Public and Social Functions (FNSTFPS).   |
| <b>Public railway transport of passengers</b> | <b>Order No. 103/2020 - Official Gazette of the Portuguese Republic No. 82/2020, Series I of April 27, 2020</b><br>Extends the collective bargaining agreement entered into between the National Association of Passenger Transport (ANDROP) and the Portuguese Union of Railway and Urban Transport Employees (STRUP).  |
| <b>Air transport</b>                          | <b>Order No. 108/2020 - Official Gazette of the Portuguese Republic No. 87/2020, Series I of May 5, 2020</b>   |



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|   | <p>Extends the amendments to the collective bargaining agreement entered into between the Association of Airlines in Portugal (RENA) and the Union of Aviation and Airport Employees (SITAVA) and other.</p>  |
| <p><b>Ceramics and glass</b></p>        | <p><b>Order No. 109/2020 - Official Gazette of the Portuguese Republic No. 87/2020, Series I of May 5, 2020</b></p> <p>Extends the amendments to the collective bargaining agreement entered into between the Portuguese Association of Ceramic and Glass Industries (APICER) and the National Union of Ceramic, Cement, Abrasives, Glass and Similar, Civil Works, and Public Works Industries (SINTICAVS) (ceramic industry - factory employees).</p> |
| <p><b>Private hospitalization</b></p>   | <p><b>Order No. 110/2020 - Official Gazette of the Portuguese Republic No. 88/2020, Series I of May 6, 2020</b></p> <p>Extends the amendments to the collective bargaining agreement entered into between the Portuguese Association of Private Hospitalization (APHP) and the Federation of Portuguese Agriculture, Food, Drinks, Hospitality, and Tourism Unions (FESAHT) and other.</p>  |
| <p><b>Food product distribution</b></p> | <p><b>Order No. 115/2020 - Official Gazette of the Portuguese Republic No. 92/2020, Series I of May 12, 2020</b></p> <p>Extends the amendments to the collective bargaining agreement entered into between the Association of Food Product Distributors</p>   |



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|                         | (ADIPA) and others and the Union of Services, Trade, Catering and Tourism Employees and Technicians (SITESE) (wholesale).  |
| <b>Jewelry</b>          | <b>Order No. 117/2020 - Official Gazette of the Portuguese Republic No. 98/2020, Series I of May 20, 2020</b><br>Extends the amendments to the collective bargaining agreement entered into between the Portuguese Association of the Jewelry Industry (APIO) and the Inter-Trade Federation of Metallurgical, Chemical, Electrical, Pharmaceutical, Cellulose, Paper, Graphic, Print, Energy and Mining Industries (FIEQUIMETAL). |
| <b>Driving schools</b>  | <b>Order No. 118/2020 - Official Gazette of the Portuguese Republic No. 98/2020, Series I of May 20, 2020</b><br>Extends the collective bargaining agreement entered into between the National Association of Automobile Driving Schools (ANIECA) and the Federation of Transport and Communications Unions (FECTRANS).  |
| <b>Tripe's industry</b> | <b>Order No. 120/2020 - Official Gazette of the Portuguese Republic No. 99/2020, Series I of May 21, 2020</b><br>Extends the amendments to the collective bargaining agreement entered into between the Portuguese Association of Tripes and Similar Industries (ITA) and the Federation of Agriculture, Food, Drinks, Hospitality, and Tourism Unions of Portugal (FESAHT).   |



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| <p><b>Mutuals</b></p>                 | <p><b>Order No. 144/2020 - Official Gazette of the Portuguese Republic No. 117/2020, Series I of June 18, 2020</b></p> <p>Extends the collective bargaining agreement entered into between the Union of Portuguese Mutuals and the National Federation of Education (FNE) and others.</p>   |
| <p><b>Pharmaceutical industry</b></p> | <p><b>Order No. 155/2020 - Official Gazette of the Portuguese Republic No. 120/2020, Series I of June 23, 2020</b></p> <p>Extends the amendments to the collective bargaining agreement entered into between the Portuguese Association of the Pharmaceutical Industry (APIFARMA) and the Federation of Industry, Energy, and Transports Unions (COFESINT) and others.</p>                          |
| <p><b>Cooperative wineries</b></p>    | <p><b>Order No. 156/2020 - Official Gazette of the Portuguese Republic No. 121/2020, Series I of June 24, 2020</b></p> <p>Extends the amendments to the collective bargaining agreement entered into between the Association of Portuguese Cooperative Wineries (ADCP) and the National Union of Agriculture, Forestry, Fisheries, Tourism, Food Industry, Drinks and Other Employees (SETAAB).</p> |



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## IV. National case law

### Ruling of the Porto Court of Appeal of April 27, 2020

**The violation of the right of consultation on the change of the protection equipment to be used in the workplace represents legitimate grounds for an employee, who is a trade union representative, to disobey orders**

In the context of an individual dismissal, based on the employee's culpable failure to comply with the occupational health and safety rules (specifically, the refusal to use the safety footwear provided by the employer), the employee filed a claim for its unlawfulness, which was declared by the First Instance Court.

The employer filed an appeal against this decision, claiming that the employee, in persisting repeatedly and successively to refuse to use the safety footwear provided by the employer, breached his duty of obedience, among others.

On the other hand, the employee claimed that he was not consulted as to the need to use safety footwear, and that a disciplinary procedure for this failure to use the safety footwear was initiated only because he was a trade union representative.

The Porto Court of Appeal clarified that the duty of obedience represents the counterpoint to the employer's authority to direct orders.

The court also clarified that the duty of obedience is not absolute, as it is circumscribed by the limits that restrict its enforceability. Therefore, in some situations, the employee's refusal to follow the employer's orders or instructions is legitimate, specifically when they endanger the employee's rights or guarantees or violate the rules of good faith.

The Porto Court of Appeal added that, in this specific case, the employer decided to make the safety footwear mandatory, but only later explained the reasons and the implementation of these measures to the trade union and to the employees in question.

The Porto Court of Appeal clarified that the Portuguese Labor Code (*Código do Trabalho*) and the Legal Regime to Promote Occupational Health and Safety expressly state, *"The law is clear in establishing the employees and their representatives' right to be consulted on the health and safety rules to implement in the workplace, including the selection of adequate personal protection equipment. This consultation must be prior to any decision by the employer."*

Thus, the court found that the employer breached the express legislative requirement for its employees to use personal protection equipment in the workplace, which legitimized the decision of the employee (a trade union representative) to refuse to use the safety footwear



provided. Therefore, the Porto Court of Appeal concluded that, in this specific case, the dismissal was unlawful.

### **Ruling of the Évora Court of Appeal of June 4, 2020**

#### **The WhatsApp messages exchanged by two employees as part of their private personal relationship cannot be used in the disciplinary proceedings against one of them**

In this case, the employer dismissed an employee based on WhatsApp messages exchanged by that employee and another. The dismissed employee claimed that the dismissal was unlawful, which was upheld by the First Instance Court.

The employer filed an appeal against this judgment, claiming that its becoming aware of the contents of the WhatsApp messages the employee sent to another employee in the same company did not constitute a breach or intrusion in private communications, inasmuch as the employer was informed of their contents by the recipient of the messages, in the exercise of his right to the freedom of expression.

The employer also added that it could and should use the contents of the messages in the disciplinary proceedings as evidence of the employee's objectionable behavior, considering he admitted he had written those messages.

When examining this case, the Évora Court of Appeal started by clarifying that Article 22 paragraph 1 of the Labor Code (*"The employee has the right of privacy and confidentiality regarding the contents of personal messages and access to non-professional information sent, received, or viewed, particularly via email"*) in the section *"Confidentiality of messages and of access to information"* recognizes and takes as its basis the general rule on the respect of privacy and the inviolability of the secrecy of correspondence. The Court of Appeal pointed out that this rule is not only enshrined in the Portuguese Constitution and Civil Code, but also in the European Human Rights Convention and the European Union Charter of Fundamental Rights.

The court also clarified that, under the Civil Code, *"(...) as for non-confidential letters-messages, the recipient may only use them under terms that do not contradict their author's expectations (...)"* and that the scope of protection of this rule encompasses and applies to *"all formats that can serve as communications between the parties,"* in this case, WhatsApp messages.

The Évora Court of Appeal also pointed out that, like any other citizen, employees also expect privacy regarding the contents of their personal communications and that, given their private nature, the messages cannot be expected to be viewed by anyone (much less their employer) other than their recipients.



Therefore, although the expectation of privacy in this kind of online app is never absolute, the Évora Court of Appeal stated that, in this specific case, as the messages exchanged by the employees were personal and were not even sent through the employer's IT network or instruments, not only was the employer unable to access them, but they should not serve as evidence of disciplinary breaches.

Finally, the Évora Court of Appeal highlighted that not even the employee who received the messages could have made them public, as the employee who sent the said messages expected them to remain private, and also the use of those messages as evidence in court would be null.

Therefore, the Évora Court of Appeal decided to confirm the ruling under appeal, stating that the employee's dismissal was unlawful.

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## V. EU case law

### **Ruling of the Court of Justice of the European Union of June 4, 2020**

**Special paid leaves are inextricably linked to working hours, so, when the circumstances that give rise to them occur during a weekly rest period or annual vacations, these leaves cannot be taken during a subsequent working period**

In the context of lawsuits filed by trade unions and a Spanish business group regarding the conditions to implement special leaves, the *Audiencia Nacional* (Spain) requested a preliminary ruling from the Court of Justice of the European Union (CJEU) to decide on the interpretation of a particular legislation, namely whether a specific law or national practice is compatible with European Union law.

In this case, the conditions to implement paid special leaves under the collective bargaining agreement for the business group were discussed, which, in addition to implementing the minimum Employees' Statute provisions regarding weekly rest, vacations, and leaves, establishes rights that go beyond these provisions, specifically longer leaves.

In this context, the question was whether paid special leaves were to be calculated from a date when the employee should (in principle) be at work and be taken by the employee on those days (with the exception of marriage leave, the duration of which is expressly specified in calendar days).

The trade unions involved in these proceedings argued that, should one of the needs or obligations established in one of the paid special leaves under the collective agreement (e.g., the birth of a child, the death or outpatient surgery of a relative up to the second degree or a



change of residence) arise during the weekly rest and paid annual vacation periods, the paid special leaves for that event could be taken outside these periods.

The CJEU started by clarifying that its case law provides that, if an employee benefits from a sick leave, his or her right to take the paid annual vacation is not affected, considering the different purposes of both types of rest periods (i.e., allowing the employee to rest and have a period for relaxation and leisure, as opposed to allowing the employee to recover from an illness).

Considering the different purposes of these two types of rest periods, and following the uniformly established case law, the CJEU found that, regarding the sick leave during the previously set vacation period, an employee is entitled, at his or her request and to benefit from their annual vacation, to take them at a different time from that of their sick leave.

However, the CJEU established that the regulations on special leaves in question in the proceedings recognize the employees' right to take leaves of absence from work, maintaining the remuneration, when the events envisaged in them occur, thus they are only intended to allow employees to be absent from work to cover specific needs or obligations that require their physical presence.

Therefore, in this case, the CJEU concluded that paid special leaves are not equivalent to sick leaves, given that paid special leaves are inextricably linked to working hours, and when the circumstances giving rise to those special leaves do occur during the weekly rest period or annual vacations, the leaves cannot be taken during a subsequent work period.



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Cuatrecasas has set up a Coronavirus Task Force, a multidisciplinary team that constantly analyzes the situation emerging from the COVID-19 pandemic. For additional information, please contact our taskforce by email [TFcoronavirusPT@cuatrecasas.com](mailto:TFcoronavirusPT@cuatrecasas.com). On our [website](#), you can read publications or attend webinars on legal issues arising from the pandemic and the measures adopted to mitigate it. You may also find our publications in [Portuguese](#) and [Spanish](#).

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