INFORMATIVE NOTE

EMPLOYMENT & LABOUR LAW

THIRD AMENDMENT TO THE EMPLOYMENT CODE

Law 23/2012, which was published on 25 June, introduces the third amendment to the Employment Code. The new legislative text results, to a great extent, from the commitments made by the Portuguese State in the Memorandum of Understanding of 17 May 2012, and its aim is to improve employment legislation by updating, organising and speeding up processes. This means, on the one hand, that it will be able to safeguard the interests of the worker and, on the other hand, encourage internal flexibility in companies. It will do so by providing them with the tools they need to respond to crisis situations. The ultimate objective is, however, a return to economic growth and the sustained creation of employment.

In this respect, as referred to in the presentation of the reasons behind the draft law, the amendments established fundamentally address four different issues: the organisation of working hours, the rules for termination of the employment contract for objective reasons, the supervision of employment conditions and communications to the ACT, and the rules that apply to collective bargaining agreements.

From among the various measures that have been adopted, it is most important to draw attention to those relating to the organisation of working hours and to the rules for termination of the employment contract for objective reasons.

For the organisation of working hours, Law no. 23/2012 introduces the **individual hours bank** and **the group hours bank**. The individual hours bank, provided for under the new article 208-A of the Employment Code, makes it possible, by agreement between the employer and the employee, for the normal period of working hours to be increased by up to two hours a day, and to reach 50 hours a week, with a limit of 150 hours a year. As to the group hours bank, article 208-B of the Employment Code, now also amended, allows this system to be set up by a simple decision of the employer, as long as (i) a majority of 60% of the employees of a team, section or economic unit is already covered by an hours bank set up under a collective bargaining agreement, in which case, the respective scheme extends to the rest of the employees covered by the structure, or (ii) a majority of 75% the employees of a team, section or economic unit accepts the proposal of the employer to implement a group hours bank, in which case, all the employees covered by the structure in question are subject to the scheme.

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Law no. 23/2012 also makes a change to the rules on **rest periods** contained in article 213 of the Employment Code. It establishes that, when an employee works for more than 10 hours, the rest period may take place after 6 hours of consecutive work.

When it comes to the rules on **overtime**, Law no. 23/2012 makes a number of significant changes. Firstly, it removes the right to compensatory rest for overtime worked on a normal working day, a complementary weekly rest day or a public holiday. That right is only maintained when overtime is worked which prevents enjoyment of the compulsory daily rest period on the compulsory weekly rest day. Secondly, it reduces overtime pay to one half and this is to be 25% for the first hour or fraction and 37.5% for any subsequent hour or fraction on a working day, and 50% for each hour or fraction on a weekly rest day or public holiday. Following the same logic, Law no. 23/2012 reduces to one half the extra pay due for normal work done on a public holiday in a company that is not required to suspend its operations on this day. In this case, the extra pay will be only 50% of the corresponding pay.

With the aim of increasing productivity levels and also competitiveness, Law no. 23/2012 reduces the legal number of public holidays. It does this by eliminating four compulsory **public holidays**: Corpus Christi, 5 October, 1 November and 1 December.

In relation to the rules on **holidays**, the highlight is the elimination of the increase of up to 3 days of holidays - provided for in article 238 (3) and (4) of the Employment Code, in its wording prior to Law no. 23/2012 - in cases in which the employer has no absences or a reduced number of absences. The new version of the Law provides that the annual period of holidays is now a maximum (and minimum) of 22 working days. The new Law also features a possibility for the employer to close the company on a day which is between a public holiday that falls on a Tuesday or Thursday and a weekly rest day. In this case, the said closing day is deducted from the total annual holiday period of the employee, (alternatively, the employer may decide that the closure may be compensated by work by the employee), as provided for in the new wording of article 242 (2) of the Employment Code.

As to redundancy, article 368 (2)of the Employment Code is amended so as to eliminate the order of criteria that had to be followed by the employer in determining which post should be extinguished when there are a number of posts with identical duties.

Finally, and as regards the organisation of working hours, some changes are made to the legal rules on unjustified absences. The new law amends article 256 of the Employment Code. In fact, it is established that, in the case of an unjustified absence of one or one half of a normal daily working period immediately prior to or subsequent to a day or half day of rest or public holiday, the period of absence to be considered for the purposes of loss of pay includes the days or half days of rest or public holidays immediately prior or subsequent to the day of the absence. Behind this measure is an attempt to reduce the number of unjustified **absences** on days close to rest periods.

In turn, as we have mentioned, alongside the changes to the rules on organisation of working hours, the measures laid down by Law no. 23/2012 also bring significant changes to both the rules on termination of employment contracts for objective reasons – that is, dismissal for redundancy or for the employee's unsuitability for the job – and to the rules on the compensation payable in the event of termination of the employment contract.

As to **redundancy**, article 368 (2)of the Employment Code is amended so as to eliminate the order of criteria that had to be followed by the employer in determining which post should be extinguished when there are a number of posts with identical duties. With Law no. 23/2012, it is now the employer who has to define the said criteria with reference to the holders of the posts in question. The criteria must be relevant and non-discriminatory in light of the underlying objectives of the redundancy. Furthermore, the obligation to place the employee in a post that is compatible with his or her professional category, as provided for in article 368 (4) of the Employment Code in the pre-Law no. 23/2012 wording, is also eliminated.

In turn, **dismissal for unsuitability** is now allowed even in situations in which no changes have been made to the job in question. In this case, however, it will be necessary to show a substantial change in the performance of the employee which results, among other things, in a continued reduction in productivity or quality, repeated breakdowns in the equipment allocated to the job or risks to the health and safety of the employee or other employees or third parties, caused by the way in which the duties are carried out. It must also be reasonable to predict that the change in performance is definitive in character, in light of all the circumstances. Besides these changes, a new procedure is also established to carry out this dismissal, in particular, to safeguard against the possibility of a defence on the part of the employee as provided for in article 375 of the Employment Code.

Finally, according to the new wording of article 366 of the Employment Code, the amount of **compensation due** for **termination of the employment contract** is also reduced. The new compensation is now to correspond to 20 days' pay and 'seniority payments' for each full year of service, in accordance with the following rules of determination

(i) The value of basic pay and seniority payments to be considered for the purposes of calculating the compensation may not exceed 20 times the guaranteed minimum monthly pay;

(ii) The total amount of compensation may not exceed 12 times the basic monthly pay and seniority payments of the employee or 240 times the guaranteed minimum monthly pay;

(iii) The daily value of basic pay and seniority payments is the result of the division by 30 of the basic pay and seniority payments; and

(iv) In the case of a fraction of a year, the amount of compensation is calculated proportionally.

This brings the compensation established for pre - 1 November 2011 employment contracts into line with that established for new employment contracts already made under Law no. 53/2011 of 14 October.

However, to safeguard the expectations of employees in relation to the period up to 31 October 2012, article 6 of Law no. 23/2012 defines the means of

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calculation of the compensation due in cases of termination of an employment contract made before 1 November 2011. For the period of duration of the contract up to 31 October 2012, the amount of compensation will correspond to one month of basic pay and seniority payments for each full year of employment, as provided for in article 366 of the Employment Code, in the wording prior to Law no. 23/2012. In relation to the period of duration of the contract after 31 October 2012, the amount of compensation will correspond to that established in the new wording introduced in the said article 366. Furthermore, it is established that the total compensation thus calculated may not be less than 3 months' basic pay and seniority payments of the employee, and the maximum limit will be (i) the value of compensation calculated in accordance with the criterion set out in article 366 of the Employment Code in the wording prior to Law no. 23/2012, if this value is equal to or greater than 12 times the basic monthly pay and seniority payments of the employee or 240 times the guaranteed minimum monthly pay; or (ii) the value corresponding to 12 times the basic monthly pay and seniority payments of the employee or 240 times the guaranteed minimum monthly pay if this value exceeds the compensation calculated in accordance with the criterion provided for in article 366 of the Employment Code in the wording that preceded Law no. 23/2012.

Finally, a brief note on the changes to the legal rules on the suspension or reduction of work when there is a crisis in the business - more commonly known as **lay-offs** - which are aimed at "*speeding up procedures for reducing or suspending employment contracts in situations where the is a crisis in the business, in order to create the conditions necessary for companies to deal with transitional periods of difficulty, and to contribute to the avoidance of dismissals for economic reasons, thus [focusing] on measures to make companies viable and consequently maintain jobs.*" To achieve this, a number of measures are adopted and, among these, we would highlight the possibility of extending the suspension or reduction in work, the prohibition on terminating the employment contract during the application of the same and during the 30 or 60 subsequent days, according to the case. The penalty is the repayment of any support received. Also worthy of mention is the grant of 30% of the Social Support Index (SSI) attributed to the employer and the employee in equal parts if the latter attends professional training that contributes to the development of their professional qualification or the viability of the company and to the maintenance of jobs, among others.

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