

## This Alert

Changes to the Transfer  
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## EMPLOYMENT & SOCIAL SECURITY

### CHANGES TO THE TRANSFER OF UNDERTAKING REGIME

The transfer of undertaking (TUPE) regime set out in the Portuguese Labour Code was recently the object of significant amendments.

The changes in question (introduced by Law no. 14/2018 of 19 March and which have already taken effect) relate mainly to the reinforcement of information and consultation obligations, creation of a right of employee opposition and reinforcement of administrative sanctions.

#### MAIN CHANGES

- (i) Existence of a provision expressly stating that employees who are impacted by transfer of undertaking operations maintain all their contractual rights, including but not limited to, remuneration, job category and content, length of service and social benefits;
- (ii) Redefinition of the concept of “economic unit” it now being understood as a group of organized economic means that constitute a productive unit with an autonomous organization and technical resources, bearing its own identity and aimed at carrying out an economic activity, be it principal or ancillary;
- (iii) Increase from one to two years of the period during which transferor and transferee entities are jointly liable for employee labour credits and related social charges accrued up to the transfer date;
- (iv) Reinforcement of information and consultation obligations of the transferor and transferee companies;
- (v) Implementation of the employees’ right to oppose the contractual change of employing entity resulting from the transfer;
- (vi) Employees’ entitlement to terminate their employment contract with just cause, based on the change of employing entity operated by virtue of the transfer of undertaking. Opposing employees are entitled to compensation in terms equal to those foreseen under a collective dismissal;
- (vii) Safeguarding of rights acquired under collective bargaining agreements (“CBAs”) applicable to the transferor in the event that no CBA applies to the transferee;

- (viii) The acquired rights in question relate to: (a) remuneration; (b) professional category and its definition; (c) working time duration; and (d) social protection regimes replacing those that are covered by social security;
- (ix) Reinforcement of sanctions.

## REINFORCEMENT OF INFORMATION AND CONSULTATION OBLIGATIONS

The main changes are the following:

- (i) Companies with 50 or more employees are now required to inform the Authority for Working Conditions ("ACT") of the content of the contract governing the transfer operation and, in the case of transfer of an economic unit, the elements that compose the latter. In relation to companies with less than 50 employees, the ACT may choose to pro-actively request that information;
- (ii) In addition to the date of transfer, its legal, economic and social consequences and the projected measures regarding impacted employees, transferor and transferee entities are also now required to inform the employees' representatives (and in the absence thereof, the employees themselves) of the content of the contract that governs the transfer operation;
- (iii) In the absence of employee representation structures, employees are now entitled to set up an ad hoc representation committee with the purpose of accompanying and / or intervening in the process. The committee may comprise up to a maximum of three or five members, depending on whether the transfer impacts up to five employees or more. The committee must be established within five business days following receipt of the information indicated in (ii) above;
- (iv) The definition of what constitutes "employee representatives" is broadened to include the

newly created employee representation committee as well as union associations (albeit in terms which are not clear);

- (v) The transferor and transferee may request that the Ministry of Employment participate in the negotiations with the employees' representative structures, with the aim of ensuring the observance of procedural and substantive legal requirements, as well as promoting the conciliation of the parties' interests and monitoring the observance of employee rights;
- (vi) The transfer may only take place following a period of seven business days counted from the deadline to set up the employee representation committee (when it has not been established) or once the employee representatives' consultation phase has ended.

## RIGHT OF OPPOSITION

Another relevant change relates to the employees now being able to oppose their transfer.

The opposition must have as its basis a relevant/detrimental loss (*prejuizo serio*) such as an "evident lack of solvency" or "difficult financial situation" of the transferee, or the "absence of trust" in the "work organizational policy of the transferee";

The exercise of the right of opposition does not affect the transfer operation itself although it prevents the actual transfer of the opposing employee to the transferee company; the employee is entitled to maintain his/her employment with the transferor.

## SANCTIONS

The following conducts are qualified as very serious infractions, subject to administrative sanctions ranging from € 2,040 to € 61,200:

- (i) The simulation of transfer operations that do not actually take place, it falling under the ACT's discretion to declare whether or not the transfer

of the position of employer under the employment contracts did indeed occur;

- (ii) The transferor or transferee entity not recognizing the existence of a transfer of undertaking exercise when one does occur, it falling under the ACT's discretion to declare whether or not the transfer of the position of employer under the employment contracts did indeed occur.

Additionally, the following conducts are now a qualified as a serious infraction, subject to administrative sanctions ranging from € 612 to € 9,690:

- (i) Breach of the minimum legal waiting period to carry out the transfer;
- (ii) Non-disclosure of information to the ACT;
- (iii) Breach of acquired rights due under the CBA applicable to the transferor prior to the transfer.

## CHALLENGES

It is expected that the application of the new regime will pose numerous questions and challenges, such as:

- (i) The management of the obligation imposed on the transferor and transferee entities to disclose the content of the contract that governs the transfer of undertaking operation;
- (ii) The clarification as to what constitutes "evident lack of solvency" or "difficult financial situation" of the transferee company, as well "lack of trust in the work organizational policy of the transferee"; and
- (iii) The practical effects and outcome of the right of opposition of employees, namely regarding the preservation of the employment relationship within the transferor entity.

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