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EMPLOYMENT & BENEFITS

PROPOSAL FOR AMENDMENT - TRANSFER OF UNDERTAKINGS, BUSINESSES OR PARTS OF BUSINESSES

Today was promulgated by the President of the Portuguese Republic, the diploma of the Parliament amending the legal regime applicable to the transfer of undertakings, businesses or parts of businesses and that strengthens the rights of workers, proceeding to the amendment to the Labor Code, approved in annex to Law No. 7/2009, of 12 February.

In this regard, we list the main changes foreseen in the mentioned diploma:

Workers' right of opposition

The worker shall be entitled to use the right of opposition to the transfer of his/her position of employee in case of transfer of undertakings, businesses or parts of businesses of an economic unit, when:

- it can cause serious damage, namely in case of lack of solvency or difficult financial situation of the purchaser; or
- if the purchaser work organization policies do not provide the minimum reliability standards

Such opposition prevents the transfer of the employer's position in his employment contract, maintaining the link to the transferring entity

Just cause for rescission and right of compensation

- The transfer of the employer's position in their employment contract as a consequence of the transfer of undertakings, businesses or parts of businesses can now be considered a just cause for rescission by the employee when the employee has exercised his right of opposition;
- In case of termination of the contract based on the previous paragraph justification, the employee is entitled to a compensation calculated in accordance with the compensation provided for collective redundancy

Reinforcement of the workers' rights

Workers transmitted to the transferee shall maintain all the contractual and acquired rights, namely remuneration, seniority, professional category and functional content as well as social benefits acquired

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**Amendment of the
'economic unit' concept**

An economic unit is considered to be a set of organized means that constitutes a productive unit endowed with technical-organizational autonomy and that maintains its own identity, with the purpose of exercising an, main or ancillary, economic activity

**Extension of the responsibilities
and the obligations of the
transferor**

- The transferor shall be jointly and severally liable for the claims of the employees arising from the employment contract, for its violation or termination, as well as for the corresponding social charges, due up to the date of the transfer, assignment or reversal, for a period of two years following the latter
 - The transferor must inform the department with inspective competence of the ministry responsible for the labour area (i) the content of the contract celebrated between the transferor and transferee (ii) if there is a transfer of an economic unit, all the elements that constitute it
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**New information and
consultation procedures**

- The transferor and the transferee shall be obliged to inform the employees' representatives of the content of the contract celebrated between the transferor and the transferee
 - At the request of either parties, the department of the Ministry responsible for labour matters may take part in the negotiation (already foreseen), in order to reach an agreement on the eventual measures to be taken
 - In the absence of representatives of the employees covered by the transfer, the latter may designate, among them, within five working days counted from the receipt of the information, a representative commission with a maximum of three or five members depending on the transmission of up to five or more workers
 - Trade union associations are now considered to be workers' representatives
 - In the absence of any intervention by the representative committee (referred to above on paragraph c)), the transferee shall immediately inform the workers covered by the transfer about the content of the agreement concluded or of the consultation term
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Deadline for the transfer

The transfer may only occur within seven working days following the expiry of the deadline for the appointment of a representative committee, if it has not been created, or after the agreement or term of the consultation with the representatives of the respective workers. Violation of this rule will constitute a serious misdemeanor

**Application of a collective
bargaining agreement**

- According to the current wording, as a result of the transfer of an economic unit, the collective bargaining agreement ("CBA") that binds the transferor is applicable to the transferee until its expiration date or at least for 12 months transmission
 - According to the proposed amendment, after the expiration of the deadline, if there is no CBA applicable to the transferee, the effects already produced in the employment contract by the CBA applicable ex vi the transfer of economic unit will continue
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**Reinforcement of the
Labour Inspectors' duties**

The following shall now be considered as very serious misconducts:

- The conduct of the employer on the basis of an alleged transfer of his position in any employment contracts on the grounds of a transfer of an economic unit or in transfer, assignment or reversal of his exploitation right, when it has not occurred
- The conduct of the transferor or the transferee who does not acknowledge that there has been a transfer of his position in the employment contracts of his employees when there was a transfer of an economic unit or transfer, assignment or reversal of his exploitation right

A decision sentencing the employer or the transferee of such a misconduct must state, respectively, that the employer's position in the employees' employment contracts has not been or that it has been transmitted

Entry into force

The mention amendments shall entry into force on the day following the publication of the diploma on the national official journal.