

COVID19 - LAY OFF, SIMPLIFIED LAY OFF AND THE LAW OF CLOSURE DUE TO UNFORESEEABLE CIRCUMSTANCES OR FORCE MAJEURE

Posted on 20/03/2020



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by Inês Arruda

Partner – Labor and Social Security Department
Vasconcelos Arruda & Associados

In the last week the number of infected persons in Portugal has risen exponentially. As of March 19th a state of emergency has been declared nationwide. As a consequence, some commercial activities will be forced to shut down, while others, deemed vital to the functioning of society, will be required to continue their operations.

All businesses, without exception, are affected by the covid-19 pandemic. In some sectors this impact is quite dramatic, for example in the tourism and restaurant segments, which will require exceptional and urgent measures that are not in line with the legally established regime.

The Portuguese Labor Code contains a specific provision for the reduction of normal working hours and the suspension of employment contracts, commonly referred to as layoffs. These provisions apply in circumstances where such measures prove indispensable for the continued viability of the company. It is essential that these measures are founded in "structural, market, or technological catastrophes or other occurrences that have gravely impacted the regular activities of the company". During the lay off period, employees have a right to compensation corresponding to two thirds of their regular salary (with a minimum value of € 635,00 and a maximum of € 1.905,00), being 70% of the value reimbursed by the social security system. During this lay off period, as well as in the next 30 to 60 days (depending on whether or not the lay off exceeds six months), employers cannot terminate worker's contracts based on market, structural, or technological reasons.

For layoffs to be implemented employers will have to observe a relatively complex procedure, which includes an information and negotiation phase with the workers' representative, if such a position exists. The negotiation phase will be challenging to come to fruition, in the current context, and therefore the employer will likely need to wait ten days between the initial communication and the final decision.

Recognizing the difficulties in applying this legal framework for many companies, the state has approved a conjunction of measures known as "simplified layoffs" – which include (i) financial support, per worker, paid to the company for payroll; (ii) an extraordinary training program; (iii) financial incentives for the resuming of business activities; (iv) exemption from social contribution payments during the course of these measures.

Publicly funded support is aimed at maintaining employment and the mitigating crisis situations for as many businesses as possible. This legal regime is inspired by the layoff framework as far as workers' compensation and the temporary exemption of social security contributions are concerned.

However, it is somewhat different insofar as it does not imply the suspension of employment contracts and continues to allow businesses to demand performance from their employees. The procedures are less complex, in light of the extenuating circumstances.

In order to apply this public ordinance and receive financial support there must be a verifiable crisis facing the business. This can be materialized in the following situations (i) the immediate halt of business activities due to an interruption of the global supply chain, suspension, or cancellation of orders, or in the event of (ii) an abrupt drop of at least 40% of billing in the 60 days prior to the applicable filing before the social security system in comparison to equivalent periods or average of the current period (for companies with a working period of less than one year).

While this measure remains in effect, companies are exempted from paying social security contributions, and, as in the case of lay offs, they are restricted from distributing profits and applying collective redundancies on workers.

Under this public ordinance, a provision was included stating that if there is a business closure not motivated by extreme business circumstances, the standard law of closure due to unforeseeable circumstances or force majeure applies. In such case, the Labor Code outlines that employee compensation may be reduced by 75%, in which case there is no contribution from Social Security (meaning that the employer bears the entire risk). Parallel to this, the government has established and reinforced a line of credit to provide support to companies.

The general limitation of the scope of the simplified layoff regime and the reference to the regime of business closure due to unforeseeable circumstances or force majeure (without any contribution from Social Security) in addition to the procedural complexity of the lay off protocol stipulated in the Labor Code, has caused a great deal of uncertainty among the business community including in regard to the response by Social Security to the financial support that will be required.



Rua Joshua Benoliel, 6, 7A 1250-133

Lisboa | Portugal

T. (+351) 218 299 340

ines.arruda@vaassociados.com

<https://www.vaassociados.com/>