

## Employment Headlines – september

*NGA Lawyers monthly newsletter on Employment matters*

### A. Legislation

- i) [Legislative Order No. 23-A/2021 of September, 15](#)  
[Extension of the deadline for the delivery of Equality Plans](#)

On September 15th, was published a Legislative Order extending the deadlines provided for in paragraph 4 of article 3 and in paragraph 2 of article 5 of Legislative Order no. 18/2019, of 21 June.

As a result, listed companies and companies belonging to the state corporate sector and local business sector have now two more months to communicate their annual equality plans, having until November 15 for this purpose - under the combined terms of article 7 of Law No. 62/2017, of August 1, and Article 3 of Normative Dispatch No. 18/2019, of June 21.

- (ii) [Resolution of the Council of Ministers no. 135-A/2021 and Decree-Law no. 78-A/2021](#)

[Alert Situation - Mitigation of measures to fight the pandemic](#)

Both Diplomas (the Resolution of the Council of Ministers and the Decree-Law above mentioned) reflect a new phase in the process of mitigation of the measures to combat the pandemic. Both having an important impact on various sectors of the economy, they have also, consequently, implications on the labor market.

Unlike the previous regime, the law now establishes that the employer *"may implement the technical and organizational measures that guarantee the protection of workers, namely the use of appropriate personal protective equipment, such as masks or visors"*. Therefore, the decision to implement these measures is at the employer's discretion, unless in specific economic activities such as bars, clubs, restaurants and similar (where the aforementioned use remains mandatory).

The recommendation of telework was eliminated (without prejudice of the maintenance of the rules regarding the time mismatch) and the testing regime was changed, being eliminated, in particular, the provisions regarding testing in workplaces with 150 or more workers. Commercial establishments and certain events and celebrations no longer have limitations in terms of

capacity and opening hours, catering establishments and similar no longer have limits regarding the number of people per group, and the obligation to present a COVID Digital Certificate to have access to restaurants and similar establishments and to tourist establishments or local accommodation was also eliminated.

Finally, it is no longer mandatory to present a COVID Digital Certificate or a test with a negative result for the purpose of participating in group classes in gyms as well as for access to gambling establishments, casinos, bingos or similar and to spas or similar establishments.

## **B. Jurisprudence**

### **(i) Judgment of the Constitutional Court No. 545/2021 of September 16, 2021 Unconstitutionality of financial support in the context of COVID-19**

The Constitutional Court (CC) deemed unconstitutional some of the rules that provided for financial support, namely for subordinate, independent workers and sole proprietors, in the context of COVID-19.

For reasons of legal certainty and equity, the effects produced by the rules declared unconstitutional up to the date of publication of the Decision were preserved.

The rule contained in article 3 of Law No. 16/2021, of 7 April, was declared unconstitutional, with general mandatory force, in the part that adds article 4 -C to the Decree - Law No. 8 -B/2021, of January 22, and hereby amends paragraphs 2 and 3 of article 24 of Decree -Law No. 10 - A/2020, of March 13, for violation the provisions of paragraph 2 of article 167 and paragraph 1 of article 169 of the Constitution and the unconstitutionality, with general mandatory force, of the rule contained in article 2 of Law 16/2021 , of 7 April, in the part that amends paragraph 2 of article 3 of Decree-Law no. 8 -B/2021, of 22 January, for violation of the provisions of paragraph 2 of article 167 of the Constitution.

### **(ii) Judgment of the Constitucional Court No. 485/2021 of Setember, 22, 2021 Labor administrative offenses: Unconstitutionality of the deposit without evaluation of the damage to the defendant**

The CC ruled unconstitutional the normative interpretation extracted from numbers 1 to 3 of article 35 of Law No. 107/2009, of September 14, (Procedural regime applicable to labor and Social Security infractions), in the sense that the attribution of suspensive effect to the judicial appeal of a final condemnatory decision, rendered in an administrative proceeding, by an administrative authority, depends on the deposit of the amount of the fine applied and the costs of the process or on a first call bank guarantee, without the judge in the case being able to assess whether such requirement results in considerable damage to the defendant.

Therefore, the deposit of the amount of the fine and costs to allow the suspensive effect of the appeal against the condemnatory administrative decision will have to be articulated with the principle of effective judicial protection, and the principle of presumption of innocence.

- (iii) [Judgment of the Court of Appeal of Guimarães of September 23, 2021, case No. 1985/20.6T8BRG.G1](#)  
[Unlawful Dismissal - unconstitutionality of the trial period.](#)

The recent declaration of unconstitutionality of article 112, number 1, subparagraph b) iii of the Labor Code, regarding the duration of the trial period of workers looking for their first job, starts having an impact.

Decision of the Constitutional Court (CC) No. 318/2021, of 18 May, ruled unconstitutional the extension of the trial period to 180 days in the case of workers looking for their first job, when applicable to workers previously hired on a fixed-term basis by other employers, for a period equal to or greater than 90 days. The CC Decision - which, pursuant to Articles 282 of the Constitution of the Portuguese Republic and 66 of Law No. 28/82 of 15 November, has general mandatory force and retroactive effects - has now grounded the Courts' reasoning in the judgment of the illegality of dismissal, when carried out in that circumstantiality.

In this case, the worker's situation fit the definition of "*Worker looking for a first job*" because she had never been hired under an open-ended employment contract before. However, the employee had six months of previous work experience in the same activity, provided to a third-party company. Consequently, the termination of the contract occurred beyond the trial period, which represents an irregular dismissal, with the legal consequences, provided for in articles 381, paragraph c), 390 and 391 of the Labor Code.

### **C. Other Highlights**

- (i) [Good Practice Guide on anti-competitive agreements in the labor market - Competition Authority – September 2021](#)

Agreements between companies, likely to occur in the labor market, namely non-recruitment agreements, by which companies undertake not to solicit or hire workers from each other, and agreements to set wages or other forms of remuneration of workers, are liable to infringe the Competition Law and, if applicable, the TFEU.

In order to promote competition in the labor market, the Competition Authority has published a Guide to Good Practices that aim to raise awareness among companies, human resources

professionals and other workers, and recruitment agencies, among others, for the possible effects of anti-competitive agreements in the labor market.

(ii) [Agreement between Portugal and India for the recruitment of Indian workers](#)

On September 13, Portugal and India signed an agreement on the recruitment of Indian citizens to work in Portugal. The agreement aims to facilitate legal and safe labor migration flows between the two countries, establishing procedures for the admission of Indian citizens to carry out a professional activity, under an employment contract, in Portugal.

It will apply to every any labor activities and every type of employment agreement and Indian workers will benefit from all the rights guaranteed by Portuguese law.

**Inês Coelho Simões**

Partner

[ines.simoese@nga.pt](mailto:ines.simoese@nga.pt)

**Mathilde Valério**

Associate Lawyer

[mathilde.valerio@nga.pt](mailto:mathilde.valerio@nga.pt)