

OUTSOURCING AND CHAIN SUPPLY IN PORTUGAL

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Introduction

In Portugal, outsourcing practices are widely allowed without legal constraints and with no relevant restrictions or consequences regarding employees, whose labor status is not protected against these new forms of productive organization, with the exception of the transfer of undertaking regime as a result of Directive 2001/23/EC and the corresponding ECJ case-law. As a consequence, outsourcing has become very common in all productive sectors.

As a rule, the employee must work directly for the employer who exercises exclusively the directive and disciplinary powers: generally, the employee's activity must directly benefit their employer. However, there are two main exceptions which are legally regulated: the so-called temporary agency work and the occasional assignment to another employer.

Moreover, since 2003, the Portuguese Labor Code allows for a single contract between one employee and several employers at once and contains a specific legal provision regulating this sort of employment relationship. This is the so-called contract with a plurality of employers. Such a contract is possible if various companies (employers) are in a corporate relationship of reciprocal ownership, control or group or simply have a common organizational structure, which may include different forms of organizational frameworks. The legal relation arising out of the contract with a plurality of employers is characterized by the existence of a single contractual relationship between the employee and a plurality of entities that assume joint ownership of the employer position and subsequent joint and several liability. The main objectives of this legal regulation are, on the one hand, to solve the problems arising from the identification of the employer in relations between a plurality of actors and to establish the corresponding responsibilities. Therefore, this regime could lead to a "re-internalization" of corporate responsibilities instead of the usual externalization, improving employees' protection.

Temporary Employment Agencies are allowed since 1989, but in order to operate legally there is a number of demanding requirements that must be met (v.g., the need of a permit for this kind of economic activity, the number of staff of the agency itself, their level of expertise, the absence of criminal record, and a public registry)⁵¹. If a Temporary Employment Agency operates without the permit all the contracts signed with users will be null and void and, as a result, the employee will be deemed to have an open-ended employment contract with the agency itself⁵² (regrettably not with the user).

The temporary employment legal regime has suffered some changes over the years which have introduced some additional flexibility. A Temporary Employment Agency (which, by the way, is not necessarily a corporation, since it can be simply a single person) may hire employees to transfer to users either through a fixed-term or an open-ended employment contract. Still, in 2016, a law aiming to combat modern forms of forced labor⁵³ extended liability in cases of temporary work. This latter trend is confirmed by recent draft laws and a Government bill which aim to amend the Labor Code in order to limit the use of temporary agency work, to reinforce employees' protection⁵⁴ and to submit outsourcing to the legal labor regime applicable to temporary agency work⁵⁵.

According to the Green Book of Labor Relations (2016), although the number of employees hired through Temporary Employment Agencies is not high, it has been increasing over time. Thus, in 2014, 2.8% of employees were employed under this scheme while, in 2002, the proportion was only 1.3%.⁵⁶ In fact, the increase in temporary agency work follows the trend towards an expansion of non-permanent/temporary employment contracts in the context of the Portuguese labor market, which assumed historically high proportions in 2014, when more than 30% of employees in the private sector had non-permanent contracts⁵⁷.

⁵¹ See Decree-Law No. 260/2009 of September 25th, modified by Law No. 5/2014 of February 12th, Law No. 146/2015 of September 9th and Law No. 28/2016 of August 23th.

⁵² See [article 173/3 of the Labor Code](#).

⁵³ Law No. 28/2016 of August 23th (<https://dre.pt/application/file/75171218>).

⁵⁴ Draft law 912/XIII (3.^a) *Diário da Assembleia da República - Separata* No. 95, 12 June 2018, available at: <http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailheIniciativa.aspx?BID=42742>; Bill No. 136/XIII, *Diário da Assembleia da República - Separata* No. 94, 12 June 2018, available at: <http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailheIniciativa.aspx?BID=42733>.

⁵⁵ See article 192-A of Draft law No. 904/XIII (3.^a), *Diário da Assembleia da República*, 12 June 2018, available at <http://debates.parlamento.pt/catalogo/r3/dar/sep/13/03/095/2018-06-12?pgs=&org=PLC>.

⁵⁶ Ministério do Trabalho, Solidariedade e Segurança Social, *Livro Verde sobre as Relações Laborais*, Guilherme Dray (eds.), December 2016, pp. 174-175, available at http://cite.gov.pt/pt/destaques/complementosDestqs2/LIVRO_VERDE_2016.pdf.

⁵⁷ *Id.*, *ibidem*.

1. Is outsourcing a legal form of production organization?

The Portuguese regulation allows outsourcing as a legal form of productive organization. Firms can partly or totally externalize their production by contracting other companies. This freedom in outsourcing is regulated in [article 61 of the Portuguese Constitution](#), which recognizes entrepreneurial freedom.

2. Are there limits and/or prohibitions to outsourcing?

There are no restrictions or prohibitions to outsourcing in the private sector.

3. Does the company that partly or totally outsources its production have any labor or Social Security responsibility in relation with the subcontractor's workers? What responsibilities?

The Portuguese regulation does not have a rule such as [article 42 of the Spanish Estatuto de los Trabajadores](#). The company that partly or totally outsources its production does not have any labor responsibility in relation to the subcontractor's employees.

However, according to [article 551/4 of the Labor Code](#), the contractor, their managers, as well as the companies in a corporate relationship of reciprocal ownership, control or group with the contractor, are joint and severally liable for the compliance with the law and for any offences committed by the subcontractor, including administrative responsibility.

The same applies to safety and security obligations ([art. 16/5 of Law No. 102/2009, September 10th](#)).

The (sub)contractor or the outsourcer that, in the same civil year, benefits from more than 50% of the activity of an independent worker, who is obliged to contribute to the Social Security System and earns an annual income of at least 6xIAS (Social Support Index, which, in 2019, is €475,76), has to pay a Contribution Rate of 10%, if the economic dependency is higher than 80%, or 7% in the other cases (economic dependency between 51% and 80%) (arts. 140 and 168/7 of [Law No. 110/2009, September 16th](#)). To this effect, companies that have a control or group relationship are considered the same (sub)contractor or outsourcer (article 140/3 of [Law No. 110/2009](#) and [Circular de Orientação Técnica No. 1 of March 28th, 2011](#)).

4. What is the collective bargaining agreement applicable to the contractor during its relationship with the main company?

In the case of the Portuguese regulation, the collective agreement applicable to the contractor during its relationship with the main company is the collective agreement (sector or company level) applicable to the contractor. That is, in other words, there is no specialty whatsoever regarding the determination of the applicable collective agreement in cases of subcontracting. Therefore, the working conditions of the workers of the contractor company that provide services in execution of the contract with the main company are determined in accordance with the collective agreement applicable to the contractor company and not to the main company.

Nevertheless, one of the previously mentioned draft laws amending the Portuguese Labor Code that are being discussed in Parliament (see Introduction) intends to submit outsourcing to the legal labor regime applicable to temporary agency work⁵⁸. Consequently, if such draft law is adopted, this situation will change accordingly (see question 10).

5. Is the subcontractor legally obliged to recognize its workers the same labor conditions applicable to the workers of the user company?

In the Portuguese legal system, the answer is negative. There is no duty for subcontractors to recognize the contractor company's employees the same conditions recognized to employees in the user company.

Again, this situation will change if the previously mentioned draft laws (see Introduction) are adopted by the Parliament, thus applying the legal regime of temporary agency work (see question 10).

6. In which cases is outsourcing considered fraudulent or there is an illegal transfer of workers? What are the consequences?

As we previously mentioned, outsourcing is allowed in the Portuguese regulation. However, it is illegal to hire employees and to transfer them to another company. There are two exceptions, though: (i) Temporary Employment Agencies (following question); and (ii) what is called the "occasional assignment to another employer" (articles 288 to 293 of the [Labor Code](#)).

⁵⁸ See article 192-A of Draft law No. 904/XIII (3.^a), *Diário da Assembleia da República*, 12 June 2018, available at <http://debates.parlamento.pt/catalogo/r3/dar/sep/13/03/095/2018-06-12?pgs=&org=PLC>.

In general, the assignment of occasional employees is illegal. Nevertheless, it is legal when five cumulative requirements are observed: (i) the employee has an open-ended contract; (ii) the transfer takes place between associated companies (companies in corporate relationships of reciprocal ownership, control or group) or between employers who share common organizational structures; (iii) the employee agrees with the assignment; (iv) the assignment duration does not exceed one year (although it can be renovated until the maximum limit of 5 years); and (v) a written contract between the companies has been signed. The transference will be illegal if one of the abovementioned requirements does not occur (articles 289, 290 and 292 of the Labor Code). The terms of the occasional assignment can be regulated by collective agreement, except for the need of the employee's agreement (article 289/2 of the Labor Code). Note that the transferor cannot have, as principal or secondary activity, the transference of employees as business, because this is only allowed to temporary work agencies. Apart from these cases, the transference of employees between companies is illicit.

Although there is no specific rule in the Portuguese Labor Code, both outsourcing and cession of occasional employees are considered illicit, because fraudulent, in the cases specifically mentioned in the Spanish regulation: (a) when the only aim of the contract between the user company and the subcontractor is for the latter to hire employees and lend them to the user company; (b) when the subcontractor is not a real firm, in the sense that it does not exert an activity or does not possess any infrastructure or enough means to perform the hired activity; and (c) when the subcontractor does not carry out the tasks of direction, organization and control of its employees in the provision of services.

For example, if a fixed-term employee of company AAA (which is not a temporary work agency) agrees with his transference to company BBB (which has with company AAA a corporate relationship of reciprocal ownership, control or group, or both share common organizational structures), there is an illegal transfer of employees, because, as we said, for it to be a licit cession it is necessary that the employee has an open-ended contract.

Another example: if an employee of company AAA (which is not a temporary work agency) works in company BBB, because of a service contract between the two companies (outsourcing), but receives orders and is controlled by BBB, it is clear that it is BBB who performs the entrepreneurial functions with regard to the direction, organization and control of the employees, and not company AAA. As a result, in this example, there is a case of fraudulent outsourcing and company BBB will be considered the employer.

The consequences of illegal assignment of occasional employees are that the affected employees acquire an open-ended contract with the company of their choosing and, in addition, there is an administrative offense. The consequence for illegal outsourcing is that the real employer (the one who performs the entrepreneurial functions with regard to the direction, organization and control of employees) shall be recognized as the employer, instead of or together with the formal one.

7. Is the hiring workers through Temporary Employment Agencies allowed in your country? If so, in which cases?

The Portuguese regulation allows hiring employees through Temporary Employment Agencies ([articles 172 ff. of the Labor Code](#)). However, pursuant to [article 175 of the Labor Code](#), it is only possible to hire employees through such agencies in some of the circumstances in which fixed-term contracts are allowed (to attend temporary needs that are exhaustively listed) and in some additional situations where there is a temporary need which does not expressly allow fixed-term contracts (also listed exhaustively). That is, only when the user company has a temporary work need in the company. Companies can never hire employees through Temporary Employment Agencies for the fulfillment of needs which are not of a temporary nature.

8. Are there specific cases or economic activities in which hiring workers through Temporary Employment Agencies is limited and/or prohibited?

In the Portuguese regulation, although hiring employees through such agencies is legal, there are some specific cases and some activities where it is forbidden. Specifically:

- a. To replace employees on strike in the user firm ([article 535 of the Labor Code](#)).
- b. To perform tasks especially dangerous for the health and safety of employees, except when that task corresponds to the professional qualification of the employee ([article 175/4 of the Labor Code](#)).
- c. To fill in a position that was amortized by collective redundancy or dismissal by extinction of the work post in the previous 12 months ([article 175/5 of the Labor Code](#)).
- d. To transfer them to another Temporary Employment Agency, which in turn will transfer them to a user company ([article 173/2 of the Labor Code](#)).

In case of hiring employees through Temporary Employment Agencies in any of these prohibited cases, the consequences can be, depending on the situation: a) administrative responsibility; b) criminal responsibility (in the first situation mentioned above); and c) the establishment of an open-ended contract with the user company.

9. What labor and Social Security liabilities does the Temporary Employment Agencies have with respect to the workers hired and transfer to user firms? And the user firm?

In the Portuguese legal system, the Temporary Employment Agencies, as sole (formal) employers, are the entities liable for fulfilling labor and Social Security obligations with regard to the employees hired.

As a rule, the Temporary Employment Agency and the user company are not jointly liable for the payment of salary and social security obligations to the employee, since these remain the duty of the employer (the Temporary Employment Agency).

Nevertheless, there are some cases where the user company may become liable vis-à-vis the employee: a) to begin with, if a user company contracts with a Temporary Employment Agency that is not legally allowed to operate, then both are jointly and severally liable for any debts to the employee arising from the employment contract, its breach or termination during the last three years, as well as for the corresponding social security obligations ([article 174/1 of the Labor Code](#)); b) on the other hand, the Temporary Employment Agency, the user, their managers and members of the board of directors, as well as companies in a corporate relationship of reciprocal ownership, control or group with the Temporary Employment Agency or with the user, are considered subsidiary liable for those obligations and also for all administrative responsibility ([article 174/2 of the Labor Code](#)).

10. How are the labor conditions applicable to workers hired by Temporary Employment Agencies and transferred to user companies determined?

The status of the employee who is hired by a Temporary Employment Agency and transferred to a user is rather complex in Portuguese law.

On the one hand, the Temporary Employment Agency has the exclusive power to sanction the employee with disciplinary measures. On the other hand, the working time and holidays are established by the user and the employee must obey all the rules of the user in matters concerning, namely, health and safety at work, place of performance and the way the work must be done ([article 185/2/3/4 of the Labor Code](#)).

Portuguese regulation establishes an equal treatment principle concerning salary and other monetary attributions between transferred employees and employees of the user company ([article 185/5/6 of the Labor Code](#)). Although the duty to pay the salary remains an exclusive duty of the Temporary Employment Agency, the employee is

entitled either to the wages stated in the collective agreement binding the Temporary Employment Agency or in the collective agreement binding the user itself, depending on which is higher. As a rule, the temporary employee must, at least, receive the same wages as the employees of the user company for the same job. In practice, though, the courts have allowed for differences in salary, taking into account, as a relevant factor to justify the differences, the seniority of the employees.

After a 60-day period of working for the benefit of a certain user, the employee, even if not affiliated to a union, will still be entitled to invoke the collective agreement that binds the employees of the user who perform the same job. The Government bill previously mentioned, as well as the other draft laws, will eliminate the 60-day period, thus applying the collective agreement from the start.

11. Other relevant aspects and personal assessment of the regulation regarding outsourcing and supply chains

The Portuguese regulation has evolved in the last years in order to consider other forms of productive organization that – if not explicitly considered – could erase some of the protection given to employees by the Labor Code, namely the number of labor rules considering the groups of undertakings has been rising in several domains.

Nevertheless, the outsourcing and supply chains not connected to groups of undertakings or Temporary Employment Agencies have been almost completely disregarded by the Portuguese labor legislator, leaving the employees without any protection. In the absence of legal provisions, the Portuguese case-law, which traditionally holds a very positivist approach, does not provide for adequate protection based for instance on the civil regimes of abuse or fraud. Still, this situation has been slowly changing (v.g., Decision of the Supreme Court of Justice of June 20th, 2018, mentioned below).

The legal regulation of the Temporary Employment Agency can be considered fairly adequate, although there are some cases in which the consequence for the infringement of the legal requirements should be the establishment of an open-ended contract with the user instead of an open-ended contract with the Temporary Employment Agency. Still, if the previously mentioned draft laws are adopted, this situation will also change.

References

AA.VV., *Trabalho temporário*, João Pena dos Reis (eds.), Centro de Estudos Judiciários, Lisboa, 2014, available at http://www.cej.mj.pt/cej/recursos/ebooks/trabalho/e-book_Trabalho_temporario.pdf.

BAPTISTA, Albino Mendes, «Primeiras notas sobre o novo regime jurídico do trabalho temporário», *Prontuário de Direito do Trabalho*, No. 76-77-78, 2007, 253-269.

GOMES, Júlio, «A fronteira entre o contrato de utilização de trabalho temporário e os (outros) contratos de prestação de serviços», *Prontuário de Direito do Trabalho*, No. 87, 2010, 85-114.

MACHADO, Maria João, «Trabalho temporário: jurisprudência recente e alterações legislativas introduzidas pela Lei 28/2016, de 23-08», *Prontuário de Direito do Trabalho*, II, 2017, 231-257.

REDINHA, Maria Regina, *A Relação laboral fragmentada – Estudo sobre o trabalho temporário*, Coimbra Editora, Coimbra, 1995.

SILVA, Luís Gonçalves da, «Considerações gerais sobre a reforma da Lei do Trabalho Temporário», in *VIII Congresso nacional de direito do trabalho – Memórias*, António Moreira (ed.), Almedina, Coimbra, 2006, 255-262.

VICENTE, Joana Nunes, *A fuga à relação de trabalho (típica) em torno da simulação e da fraude à lei*, Coimbra Editora, Coimbra, 2008.

Judicial decisions (available at www.dgsi.pt):

- Decision of the Supreme Court of Justice of June 20th, 2018 – Proc. No. 18067/15.5T8LSB.P1.S1⁵⁹
- Decision of the Supreme Court of Justice of March 21st, 2018 – Proc. No. 471/10.7TTCSC.L1.S2⁶⁰
- Decision of the Supreme Court of Justice No. 6/2013, of December 6th, 2013 – Proc. No. 289/09.0TTSTB-A.S1⁶¹

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<http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/45efa2f02cc4e0d2802582bf003097b6?OpenDocument&Highlight=0.outsourcing>

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<http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/a0375968c49b3739802582590042f176?OpenDocument&Highlight=0.outsourcing>

- Decision of the Supreme Court of Justice of May 14th, 2009 – Proc. No. 08S2315⁶²
- Decision of *Tribunal da Relação de Évora* of October 26th, 2017 – Proc. No. 817/16.4T8STB.E1⁶³
- Decision of *Tribunal da Relação de Lisboa* of 13th January 2016, Proc. No. 2094/12.7TTLSB.L1-4⁶⁴
- Decision of *Tribunal da Relação de Lisboa* of December 9th, 2008 – Proc. 09-12-2008 5829/2008-4⁶⁵
- Decision of *Tribunal da Relação do Porto* of January 24th, 2018 – Proc. No. 4222/16.4T8MTS.P1⁶⁶
- Decision of *Tribunal da Relação do Porto* of March 5th, 2018 – Proc. No. 1683/11.1TTPRT.P2⁶⁷
- Decision of *Tribunal da Relação do Porto* of September 9th, 2013 – Proc. 234/09.2TTVNG.P1⁶⁸

Other relevant judicial decisions on temporary work are available at http://www.cej.mj.pt/cej/recursos/ebooks/trabalho/e-book_Trabalho_temporario.pdf.

⁶¹ <https://dre.pt/application/dir/pdf1sdip/2013/03/04500/0125301268.pdf>

⁶²

<http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/b56400b8fb658706802575bd0038a6e0?OpenDocument&Highlight=0,08S2315>

⁶³

<http://www.dgsi.pt/jtre.nsf/134973db04f39bf2802579bf005f080b/9bef2b46a5c5ca76802581d20032e6c6?OpenDocument&Highlight=0,outsourcing>

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<http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/5c7b463dc3c6c37c80257f490042abe2?OpenDocument>

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<http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/7c9b6717e13bb9a080257544005cb6b8?OpenDocument>

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<http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/6b75c1418e53546b8025823c005a83b3?OpenDocument&Highlight=0,outsourcing>

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<http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/8b43977a5922e83d8025826b005a52c8?OpenDocument&Highlight=0,outsourcing>

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<http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/058c6df22060d70880257bea003bbe22?OpenDocument>