

OUTSOURCING AND SUPPLY CHAINS 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 the 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 his/her employer. However, there are two main exceptions which are legally regulated: the so-called temporary agency work and the occasional assignment.

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 employers belong to a group of enterprises 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.

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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, a public registry)⁴³. 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 itself (regrettably not with the user).

Still, 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. Even though, recently, a new law aiming to combat modern forms of forced labor⁴⁴ extended liability in cases of temporary work.

There are no statistical data referring solely to the number of employees working for Temporary Employment Agencies, but the wider number referring to all employees who have “temporary jobs” points to 22% of the Portuguese workforce⁴⁵.

1. Is outsourcing a legal form of production organization?

The Portuguese regulation allows outsourcing as a legal form 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 Constitution⁴⁶ that recognizes entrepreneurial freedom.

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

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

⁴³ 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.

⁴⁴ Law No. 28/2016 of August 23th (<https://dre.pt/application/file/75171218>).

⁴⁵ Available at:

<http://www.pordata.pt/Europa/Trabalhadores+com+contrato+de+trabalho+temporário+em+percentagem+do+total+de+empregados+total+e+por+sexo-2402-216813>

⁴⁶ <http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf>

3. Does the company that partly or totally outsources its production have any labor or Social Security responsibility towards 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*⁴⁷. 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 the recent amendment 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 safe and security obligations (art. 16/5 of Law No. 102/2009, of 10th September⁴⁸).

Moreover, if the (sub)contracted is an independent worker, who is obliged to contribute to the Social Security system, with an annual income of at least 6xIAS (Social Support Index) and who earns at least 80% of his incomes from just one contractor or outsourcer, the contractor has to pay to Social Security 5% of the total cost of the services that the independent worker provided to him or her in that civil year. To this effect, the Portuguese legislation considers "the same contractor" companies that have a control or group relationship (articles 140 and 168/7 of Law No. 110/2009⁴⁹ of September 16th and Circular de Orientação Técnica No. 1 of 28 March 2011⁵⁰).

4. ¿And regarding pension plans and pension funds?

In the Portuguese regulation, despite the liability of the outsourcer or subcontractor for the Social Security contribution when the independent worker earns at least 80% of his income from him, there is no other obligation. As a result, employees hired by the

⁴⁷ http://www.juntadeandalucia.es/empleo/anexos/estatico/1_571_0.pdf

⁴⁸ Available at:

http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?artigo_id=1158A0016&nid=1158&tabela=leis&pagina=1&ficha=1&so_miolo=&nversao=#artigo

⁴⁹ Available at: <http://www.sg.min-saude.pt/NR/rdonlyres/E0A3D8AB-0543-4E9A-BFE0-6703B5EB8B8B/18530/0649006528.pdf>

⁵⁰ Available at: http://www.seg-social.pt/documents/10152/58551/COT_1_2011/0fc22f38-9795-436c-9bd6-53332a8e368b

subcontractor could not claim against the user company for pension plans or pension funds contributions.

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 employees' the same conditions than those recognized to employees in the user company.

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. In the Portuguese legal system, it is illegal hiring employees and transferring them to another company. Though, there are two exceptions: (i) Temporary Employment Agencies (following question); and (ii) what it is called "occasional assignment to another employer" (articles 288 to 293 of the Labor Code⁵¹).

In general, the occasional employee's assignment 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 above-mentioned 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 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, outsourcing and occasional employees cession are illicit, because fraudulent, in the cases specifically mentioned in the Spanish regulation: (a) when the only aim of the contract between the

⁵¹ Available at:

http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?artigo_id=1047A0288&nid=1047&tabela=leis&pagina=1&ficha=1&so_miolo=&nversao=#artigo

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 the company AAA (which is not a temporary work agency) agrees 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, 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 the 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 occasional employees' assignment 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 or together with the formal one.

7. Is the hiring of 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)⁵². 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

⁵² Available at:

http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?artigo_id=1047A0172&nid=1047&tabela=leis&pagina=1&ficha=1&so_miolo=&nversao=#artigo

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: (i) administrative responsibility; (ii) criminal responsibility (in the first situation mentioned above); and (iii) the establishment of an open-ended contract with the user company.

9. What labor and Social Security liabilities do 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, a *very* recent amendment to the Labor Code⁵³ established that the Temporary Employment Agency, the user, their managers and members of the board of directors, as well as the companies which have mutual ownership stakes, control or group relationships 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 Agencies 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, according to 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, 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 worker, even if he/she is 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.

⁵³ Law No. 28/2016, of August 23th.

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, 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 employees without any protection. In the absence of legal provisions, the Portuguese case-law, which usually has a very positivist approach, does not provide for protection based for instance on the civil regimes of abuse or fraud.

The legal regulation of the Temporary Employment Agency, after the recent amendments that extended liability, 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 the Temporary Employment Agency.

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

⁵⁴ <https://dre.pt/application/dir/pdf1sdip/2013/03/04500/0125301268.pdf>

⁵⁵ Available at:

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

⁵⁶ Available at:

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

⁵⁷ Available at:

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