

The Portuguese Legal Instruments to Combat the Improper Use of the Contract Service

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Abstract : Nowadays is very common that an activity may be performed independently or dependently. In Portugal, the Labour Law exclusively protects the dependent labour relations. The independent work is regulated by civil law, where the autonomy of the will is the main principle. For companies is more advantageous to hire people under a service agreement since, in that case, the relation is not submitted to the limits established in Labour law and collective bargaining. This practice has nothing wrong, if the performance of work is, in fact, made autonomously. The problem is the increased frequency of the celebration of service agreements to hide a legal relation of subordination. Aware of this and regarding the huge difficulty to demonstrate the existence of subordinated work (that often runs against the employee), the Portuguese legislator devoted some legislative rules in order to facilitate the evidence of legal subordination and, on the other hand, to avoid the misuse of the provision of service agreements. This study focuses precisely on the analysis of this solution, namely the so-called presumption of 'laboralidade' and on the lawsuit to recognize the existence of a labour contract. The presumption of the existence of a labour contract is present in the Portuguese legal system since 2003, and received, with the 2009 Labour Code, a new redaction that, according to the doctrine and the jurisprudence, finally approached it to a legal presumption, with the consequent reversal of the burden of proof and, in consequence, made easier to prove the legal subordination, because the employee will just have to plead and prove the existence of two of the elements described in the law to use this presumption. Another change in the Portuguese legal framework is related with the competencies of the Authority for Working Conditions (AWC): now, if during an inspection, the Authority finds a situation that seems to be an undeclared employment situation, it may access the company and, if it does not regularize voluntarily the situation, AWC has a duty to communicate to the public prosecutor, who will begin the lawsuit for the recognition of the existence of an employment contract. To defend the public interest, the action to recognize the existence of an employment contract will follow its terms, even against the employee will. Although the existence of these mechanisms does not solve by itself the problem of evasion of labour law and false 'green receipts', it is undeniable that it is an important step in combating fraud in this field.

Keywords : independent work, labour contract, Portugal, service agreement

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