

# Labor Newsletter

**CAPE VERDE**

**February 2020**

**OPINION**

## ALCOHOL PREVENTION IN THE WORK ENVIRONMENT – 1 YEAR AFTER LAW NO. 51/XI/2019

It was on the last 15 March 2019 that the Cape Verdean Parliament approved Law no. 51/XI/2019, published on 8th of April ("Law") of the same year. A few months after the gazetting of the Law, during an event that was held in Praia, the Minister of Health of Cape Verde stated that the Law did not intend to increase unemployment or the impoverishment of the population: "We can be sure that the new alcohol legislation will not increase the unemployment nor the impoverishment of the families, on the contrary. The social, economic and financial benefits resulting from its enforcement will be by far superior to eventual and circumstantial losses".

Arlindo do Rosário's statement is in line with what the Government expected from the Law. Essentially, the expectation was to decrease alcohol consumption by the Cape-Verdean population, by prohibiting the sale of alcoholic products in certain circumstances, such as the availability of alcohol beverages on public and private sector workplaces, the prohibition of selling said beverages to minors under 18 years old and on the streets, street vending and in kiosks or canteens, being also prohibited alcohol advertisement and its availability at public events where the entrance of minors is allowed.

However, no consideration was given to the practical applicability of the measures to be adopted by the employers as a way to prevent and fight alcohol consumption on the labor environment.

The mentioned regime bases its whole existence on the fact that the employees must maintain all the necessary and required physical and psychological conditions necessary to perform their tasks, not being able to attend or remain at work under the influence of alcohol (which already derives, implicitly, from the employee's obligations foreseen on the Labor Code), which is one of the main concerns of the lawmaker in accordance with the Law's preamble.

The alcohol tests shall be predominantly performed through an instrument to measure alcohol levels by blood testing and/or through air exhalation, being able to be performed to any employee at work, as long as they have the purpose of protecting and secure the employee or any third party or when particular requirements inherent to the activity justify it, provided that the employee is in a clear state of substance abuse or lack of physical or psychological conditions necessary and required to perform his/her tasks. These tests can be requested by any employee's supervisor, as well as through routine medical tests or examinations, in accordance with the company's internal procedures.

According to what is established in the Law, an employee is considered to be under the influence of alcohol if from a test or examination, carried out under the terms explained below, results a blood alcohol level equal to or higher than 0.5 grams per liter of blood.

Regarding the tests performed by air exhalation, the Law clarifies that 1mg of alcohol per liter of exhaled air is equivalent to 2.3 grams per liter of blood, i. e., on air exhalation tests the employee is considered to be under the influence of alcohol whenever they result in an amount equal or higher than 0.22 mg of alcohol per liter of exhaled air.

Despite all the forecasts and mechanisms created to fight and avoid alcohol consumption at the workplace, the Law seems to be insufficient since it does not set up effective mechanisms for enforcement. The performance of tests through alcohol meters is the exclusive competence of health professionals working in public services (healthcare centers or public hospitals) or other health professionals who provide services to private entities, given that they are duly certified by the Ministry of Health for this purpose (private clinics or independent professionals).

Moreover, although the Law foresees that the refusal of an employee to be submitted to substance abuse tests or examinations can be considered a disciplinary infringement, such infringement must be observed under the general terms of the Labor Code, meaning that it must be considered when determining the extension of the penalty to be applied, the seriousness of the infraction and the offender's guilt, being also necessary to consider the offender's personality, seniority and, on a more critical way, its disciplinary background.

As such, the fact that the employer is not able to perform alcohol tests directly, even if all the privacy procedures required by the Law are met, as well as the possibility that the employee has to refuse to carry out the tests without being foreseen a severe penalty for such behavior, may render the Law meaningless and devoid it of all the useful measures that - virtually - were created, all this in prejudice of safety, health and hygiene at work.

## COURT DECISION

**Sotavento Court of Appeals – Ruling of 12 March 2018**

*Remuneration definition; Employer's guidance power; dismissal with just cause because of a behavior of the employer; definition of just cause.*

The appealed case was based on an employee that invoked just cause to terminate the employment relationship further to an employer's alleged illegal conduct, where the legality of the termination was disputed by employer. The employee claimed, in short, that he used to receive a monthly allowance for special duties performed in the amount of CVE 30,000$00 and that said allowance was removed by unilateral decision of the employer. In addition, the employee further claimed that for a period of two months no salary was paid. On another hand, the employer invoked the change in the employee's duties, since he changed from a more complex function to less complex role, and that such functions did not entail the payment of the referred allowance. The employer also alleged internal organization purposes and cost reduction in order to exclude the allowance. As for the alleged delay in the payment of the salary, the employer stated that although the salaries were not paid until the last day of the month, as expected, they were paid during the first days of the month following the one which they had matured.

Firstly, the Court considered that, in relation to the allowance for special duties, it was a regular and periodic remuneration which means that the employer's unilateral decision to remove such allowance was unlawful.

On another hand, and more relevantly, the Court ruled that there was no just cause for the employee to terminate the employment relationship because he had followed an erroneous procedure when terminated the employment contract without protesting against the unilateral decision of the employer. The Court considered that the employee did not demonstrate that the actions performed by the employer that presided his decision to unilaterally terminate the employment relationship had produced severe consequences that made the subsistence of the employment relationship immediately and practically impossible, in particular and in accordance with the expected good faith rules. This meant that the employee could not terminate his employment relationship (it should be noted that the decision issued by the employer would only be effective a few days after the moment that the employee terminated his employment contract).

Although the Court decided that the employer's order to cease the complementary functions and to remove its allowance was unlawful, it also considered that the employee did not act correctly when he terminated the employment contract with immediate effects without protesting against the unlawful order issued by the employer and, consequently, wait for a reaction from the employer. In the absence of such conduct, the Court ruled that the contractual status of the employee was not changed in such a way that would entitle him to terminate the employment contract, so it did not considered that there was a just cause, at the time, for the employment relationship to be terminated by employee's initiative.

## FUTURE LABOUR OBLIGATIONS TO BEAR IN MIND

### Posting of Personnel Chart

Companies must prepare a personnel chart and post it at an easily accessible and visible place for the employees until 31 March with updated HR data in relation to February. The personnel chart must also be filed (along with three copies, or via a digital file or database access) with the General Inspectorate of Labor at the Municipality of Praia, in relation to the employees whose workplaces are located in Sotavento Islands (Maio, Santiago, Fogo and Brava), or the General Inspectorate of Labor Regional Delegation of São Vicente, in relation to the employees whose workplaces are located in Barlavento Islands (Santo Antão, São Vicente, Santa Luzia, São Nicolau, Sal and Boa Vista).

The personnel chart must describe in relation to each employee, amongst other information, the full name, professional category, base salary and other remuneration benefits, date of hiring and scheduled vacation periods.

For more information, please contact:

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