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LATEST LABOR AND EMPLOYMENT LAW DEVELOPMENTS INTRODUCED BY ROYAL DECREE-LAW 11/2013 AND ORDER ESS/1490/2013

August 3, 2013 saw the publication in the Official State Gazette of **Royal Decree-Law 11/2013, of August 2, 2013, for the protection of part-time workers and other urgent economic and social measures**, bringing with it major new developments in the areas of employment and social security.

The same date also saw the publication of **Order ESS/1490/2013, of July 29, 2013, regulating the Public Notice Board of the State Public Employment Service and creating the personal data filing system for the Public Notice Board**.

This Newsletter summarizes the key labor and employment developments introduced by the two pieces of legislation.

1. ROYAL DECREE-LAW 11/2013, OF AUGUST 2, 2013, FOR THE PROTECTION OF PART-TIME WORKERS AND OTHER URGENT ECONOMIC AND SOCIAL MEASURES

1.1 Amendments relating to the composition and formation of negotiating committees in collective labor procedures

The royal decree-law amends various articles in the Workers' Statute governing the negotiating committee and the parties authorized to act on behalf of workers to liaise with the company during the mandatory consultation period before the adoption of collective measures affecting geographic mobility (article 40), material modifications to working conditions (article 41), and in procedures for the temporary interruption of contracts or short-time working on economic, technical, organizational or production-related grounds (article 47), collective layoffs (article 51.2) and to opt out of the working conditions provided for in collective labor agreements (article 82.3).

The key provisions under these new regulations are summarized below:

- Consultation must be carried out with a single negotiating committee, although, where several workplaces are affected, it will be confined to the workplaces affected by the procedure.

- The task of liaising with the company management during the consultation period will lie with the workplace labor union branches if they decide to do so, provided they account for a majority of the members on the works councils or among the workers' delegates at the workplaces involved, in which case they will represent all of the workers at the workplaces involved.

  Otherwise, the liaison representatives will be determined by the following rules:

  a) Where the procedure only affects one workplace, the works council or workers´ delegates will be responsible for liaising. If there are no workers' legal representatives at the workplace, the workers can appoint to represent them for the negotiation of the agreement, at their discretion, a committee made up of no more than three members, comprising workers from the company and elected democratically by those workers, or a committee with the same number of members, appointed, according to the workers they represent, by the largest labor unions and the largest labor unions in the company's industry and who must have the authority to form part of the negotiating committee for the collective labor agreement applying to the company.

     If the negotiations take place with a committee whose members have been appointed by the labor unions, the employer can appoint any of the employers' organizations to which it may belong to represent it, which can be the largest of its type at an autonomous community level, and it does not matter whether it is a single or multi-industry organization.

  b) Where the procedure affects more than one workplace, liaison activities will first of all be carried on by the inter-workplace council, provided those duties were conferred on it in the collective labor agreement under which it was created.

     Otherwise, they will be carried out by a representative committee, formed under the following rules:

     1. Where all of the workplaces involved in the procedure have workers' legal representatives, the committee will be made up of such representatives.

     2. Where some of the workplaces concerned have workers' legal representatives but others do not, the committee will only be made up of the workers' legal representatives from the workplaces that have those representatives, unless the workers at the workplaces without any workers' legal representatives elect to appoint a committee on the terms referred to in section a) above, in which case the representative committee will be made up of both the workers' legal representatives and members of the committees provided for in the above paragraph, in proportion to the number of workers they represent.

If one or more of the workplaces involved in the procedure that do not have workers' legal representatives elect not to appoint a committee, the authority to represent them will be conferred on the workers' legal representatives at the workplaces involved that do have those representatives, in proportion to the number of workers they represent.

3. If none of the workplaces involved in the procedure have workers' legal representatives, the representative committee will be made up of the persons chosen by and among the members of the committees appointed at the workplaces concerned in proportion to the number of workers they represent.

- The negotiating committee must be made up of a maximum of thirteen members representing each of the parties to the consultation period. If, as a result of applying the rules detailed above, the initial number of representatives exceeds thirteen, a maximum of thirteen members will be chosen by and among those representatives, in proportion to the number of workers they represent.

- The workers' representative committee must be formed before the start of the consultation period. For these purposes, the company management must give duly authenticated notice to the workers or their representatives of its intention to start the procedure. The deadline for the formation of the representative committee will fall seven days after the date of the above notice, unless any of the workplaces set to be involved in the procedure have no workers' legal representatives, in which case the deadline will be fifteen days.

  After the deadline for the formation of the representative committee has passed, the company management may give notice of the start of the consultation period to the workers. Any failure to form the above committee will not prevent the start or running of the consultation period, and the formation of the committee after the start of that period will not, under any circumstances, imply a lengthening of the period.

- An agreement during the consultation period will require the approval of the majority of the workers' legal representatives or, where applicable, of the majority of the workers' representative committee, provided, in both cases, they represent the majority of the workers at the workplace(s) involved.

Lastly, it has been specified that that any procedures in respect of geographic mobility (article 40), material modifications to working conditions (article 41), the temporary interruption of contracts or short-time working on economic, technical, organizational or production-related grounds (article 47), collective layoffs (article 51.2) and those to opt out of the working conditions set out in collective labor agreements (article 82.3) that are initiated prior to the entry into force of this Royal Decree-Law will be subject to the legislation in force on the date of commencement.

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1.2 Other important new developments in relation to collective layoffs and interruption of contracts and short-time working on economic, technical, organizational or production-related grounds

- Further provisions have been added on the information to be provided by companies in these procedures, including:
  - A copy of the notice given to the workers or their legal representatives by the company management of its intention to commence the collective layoff procedure.
  - The workers' representatives set to make up the negotiating committee or, as the case may be, indication of the failure to form the committee by the statutory deadline.
  - It has been specified that the obligation to submit consolidated financial statements, where economic grounds are pleaded, will only exist where the company instituting the procedure forms part of a group of companies under obligation to prepare consolidated financial statements whose parent company is domiciled in Spain.
  - Moreover, the notification to the workers' legal representatives and the labor authorities must be accompanied by a report explaining the grounds for the collective layoff, together with the accounting and tax documents and the technical reports, all of the foregoing on the terms determined in the regulations.
- Elsewhere, it has been clarified that the affected workers may be notified individually of the layoffs where an agreement has been reached or the workers' representatives have been notified of the decision.
- In addition to amending the Workers' Statute, as described above, the royal decree-law also introduces changes to Labor Jurisdiction Law 36/2011, of October 10, 2011:
  - It has been specified that a contract termination decision may only be rendered null and void where the employer has failed to observe the consultation period or deliver the documents provided for in article 51.2 of the Workers' Statute or has not observed the procedure set out in article 51.7 of the same piece of legislation (collective layoff on the ground of force majeure) or obtained approval from the judge entertaining the insolvency proceeding where the law so requires, as well as where the business measure has been implemented in breach of fundamental rights or public freedoms.
  - Moreover, any workers individually affected by a collective layoff are given the opportunity to challenge the layoff. Thus:
    - where the dismissal has not been challenged by the workers' representatives, the time period for individual challenges will start running once the twenty-day period for action to be brought by the workers' representatives has elapsed; and

- where the collective dismissal has been challenged by the workers' representatives, the time period for individual challenges will start running from the date on which the judgment rendered in the collective process has become final or, as the case may be, from the date of the conciliation hearing.

  In this last scenario, not only the final judgment but also the judicial conciliation agreement will be deemed to have res judicata status with respect to individual processes, and their subject-matter will therefore be restricted to any issues of an individual nature that have not been the subject matter of the collective claim.

- These amendments will apply to any collective layoff processes that may be instituted following the entry into force of the royal decree-law, i.e., August 4, 2013.

- The royal decree-law also amends Insolvency Law 22/2003, of July 9, 2003, and Royal Decree 1483/2012, of October 29, 2012, approving the Regulations governing collective dismissal procedures and procedures for interruptions of contracts and short-time working, with a view to adapting the new provisions introduced by the royal decree-law.

1.3 Specific rules relating to the social security protection applicable to part-time workers

On March 14, the Plenary Session of the Constitutional Court, in Judgment 61/2013, held to be unconstitutional and null and void the provision determining the computation of the contribution periods required to give rise to the right to the various social security benefits for part-time workers.

According to the second rule in paragraph 1 of additional provision number 7 of the General Social Security Law, in order to substantiate the contribution periods needed to be entitled to social security benefits, only the contributions made by reference to the number of hours worked (ordinary hours or overtime) had to be computed, to calculate the equivalent number of imputed days' contributions. In the opinion of the Constitutional Court, however, there is no justifiable reason for the different treatment given to part-time workers with respect to full-time workers in calculating the periods in which they are not eligible for benefits.

To this end, new rules for substantiating contribution periods have been put in place. Thus, the second rule in paragraph 1 of additional provision number 7 of the General Social Security Law now provides that:

a) Regard will be had to the different periods in which a worker has been registered for social security purposes under a part-time contract, regardless of the length of the worker's working hours under each such contract.

For these purposes, a portion multiplier, determined by the percentage that a part-time worker's hours bear to the hours of a comparable full-time worker, will be applied to the period the worker is registered under a part-time contract, and the result will be the number of days for which contributions are deemed to have effectively been made for each period.

The resulting number of days will be increased, where appropriate, by the number of days for which full-time contributions have been made, and the result will be the total number of substantiated contribution days computable for entitlement to benefits.

b) Once the substantiated number of days for which contributions have been made has been determined, the overall portion multiplier will be calculated, namely, the percentage that the number of days worked and for which contributions have been substantiated, under rule a) above bears to the total number of days the worker was registered for social security purposes over the course of his entire working life.

In the case of a temporary disability benefit, the portion multiplier will be calculated only by reference to the last five years.

In the case of maternity or paternity benefits, the overall portion multiplier will be calculated by reference to the last seven years, or where applicable, to the worker's entire working life.

c) The minimum contribution period required for part-time workers for each of the financial benefits to which they are entitled will be the result of applying the overall portion multiplier to the period determined generally.

In cases in which, in order to qualify for the relevant financial benefit, all or part of the required minimum contribution period must fall within a particular period of time, the overall portion multiplier will be applied to set the mandatory contribution period. The period of time within which the mandatory period must fall must in all cases be that established generally for the benefit in question.

In order to determine the amount of pensions for retirement and for permanent disability resulting from a non work related illness or injury, the number of days for which contributions have been made, calculated according to the provisions in paragraph two of letter a) of the second rule (referred to above), will be increased by applying a multiplier of 1.5, although the resulting number of days may not exceed the period in which the worker was registered on a part-time basis.

The percentage to be applied to the respective computation base will be determined in line with the general scale referred to in article 163.1 of Transitional Provision no. 21 of the General Social Security Law, with the following exception: where the interested party substantiates a minimum contribution period of less than fifteen days, by reference to the sum total of full-time and part-time days, after the latter has been increased using the 1.5 multiplier, the percentage to be applied to the respective computation base will be equal to that resulting from applying to 50 the percentage representing the contribution period substantiated by the worker over fifteen years.

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The new regulations will apply, on the terms they contain, to any social security benefits denied before the entry into force of the royal decree-law on the ground of a failure to evidence the mandatory minimum contribution period, and to any benefits currently being processed.

1.4 Rules relating to unemployment benefit and subsidy

Elsewhere, Royal Decree-Law 11/2013 introduces it a series of amendments seeking to give greater legal certainty to the recipients of unemployment benefit and subsidy. A summary of the main amendments is provided below:

- In order to receive and retain their unemployment benefit and subsidy, beneficiaries must be registered and keep up their registration by renewing their jobseeker status throughout the entire period of the benefit.

  The competent public employment services will also check to ensure that beneficiaries meet their obligation to remain registered as jobseekers, and must notify the State Public Employment Service of any failure to do so as soon as the breach arises or comes to light.

  The National Employment Institute will stop benefit payments for any periods in which beneficiaries are not registered as jobseekers.

- The following cases in which unemployment benefit will stop have been expressly included: any long stays abroad for up to 90 days or where a beneficiary's place of residence is relocated abroad for an uninterrupted period of less than 12 months in order to look for or perform work, for professional training or international cooperation, whereby prior notice of the departure must be given to the National Employment Institute, which must authorize the departure, or the benefit will be terminated. Travel abroad for a period of time of less than 15 calendar days once a year will not be treated as a long stay abroad or a relocation of residence.

- Amendments have also been made to the Labor and Social Security Infringements and Penalties Law. These amendments include:

  - Failure to observe the obligation to inform the National Employment Institute of any collective layoff and short-time working measures before they take effect has been classified as a serious infringement.

  - Failure to observe the requirement to be registered as a jobseeker (which is a condition to continue receiving benefits) has been classified as a minor infringement.

- Lastly, with a view to preventing people from wrongly applying for or receiving unemployment benefits or subsidies while working for an employer or for themselves, the royal decree-law requires prior notice of the performance of any work as a ground for stopping benefit payments.

1.5 New developments relating to placement agencies

With a view to facilitating public-private partnerships in the area of employment intermediation services via duly authorized placement agencies, to increase the chances of getting the unemployed back to work, the royal decree-law allows subcontracting in the area of employment intermediation services, although such subcontracting may only be carried out with third parties authorized to act as placement agencies.

2. ORDER ESS/1490/2013, OF JULY 29, 2013, REGULATING THE PUBLIC NOTICE BOARD OF THE STATE PUBLIC EMPLOYMENT SERVICE AND CREATING THE PERSONAL DATA FILING SYSTEM OF THE PUBLIC NOTICE BOARD

Order ESS/1490/2013, of July 29, 2013, has been issued to regulate the Public Notice Board of the State Public Employment Service, including on its website, as an official channel to publish, in the form of public notices, any notifications of administrative decisions and communications issued in the area of its powers, in the following scenarios:

- Where the interested parties to the proceeding are unknown.
- Where the place of notification or the means by which the notice is to be served are not known.
- Where an unsuccessful attempt has been made to serve the notification on the website of the State Public Employment Service or at the address of the parties concerned.

Publication on the Public Notice Board of the State Public Employment Service will be deemed official and authentic. Thus, the public notices will be published on the Public Notice Board for a period of twenty calendar days, after which the notification will be deemed to have been served, and that formality held to have been fulfilled, and the proceeding will continue, even though the notice may continue to be available for consultation on the notice board for a further three months.

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