

19-2012
December, 2012

LAW 13/2012, OF DECEMBER 26, 2012, ON COMBATTING UNDECLARED EMPLOYMENT AND SOCIAL SECURITY FRAUD

This Newsletter describes the most significant aspects of Law 13/2012, of December 26, 2012, on combatting undeclared employment and social security fraud, which was published in the Official State Gazette on December 27, 2012.

1. PROVISIONS ON THE OUTSOURCING OF SERVICES

The Law introduces changes to the rules on liability relating to outsourcing arrangements (regulated in article 42 of the Workers' Statute), specifying the types of liability and altering the time period during which the principal may be held jointly and severally liable for:

- obligations relating to social security: the principal will be held jointly and severally liable for three years following completion of the outsourced work/services, for obligations entered into by contractors and subcontractors during the term of the outsourcing contract.
- obligations relating to salary: the principal will be held jointly and severally liable for obligations entered into by contractors and subcontractors with their workers for one year following completion of the outsourced work/services.

In connection with the foregoing, a change is also made to Royal Decree-Law 5/2011, of April 29, 2011, on measures to regularize and control hidden employment and to encourage the renovation of housing, specifying that employers who engage services that are related to their own activity or provided on an ongoing basis at their workplaces, must check before such services start to be provided that each worker assigned by the contractor/subcontractor to render such services has been registered with and notified to the social security authorities as an employee of the contractor/subcontractor while the contract or subcontract is being performed.

2. CHANGES RELATING TO SOCIAL SECURITY

Law 13/2012 makes changes to the General Social Security Law. In particular:

- in connection with the possibility of reducing the amount payable for social security infringements by 50% if the infringer agrees with the assessment issued and pays in the amount by the relevant deadline: this possibility is limited to cases in which the amount of the assessment is higher than the penalty proposed initially;

- it imposes a new obligation on employers to notify changes in the working calendar or in the work schedule initially stipulated for each affected worker before such changes take effect, in cases where contracts are to be held in abeyance or working hours are to be reduced as measures taken pursuant to article 47 of the Workers' Statute;
- in connection with special social security agreements in the context of collective layoffs, the wording is brought into line with the current wording of the Workers' Statute and reference is made to the provisions on retirement.

The Law also introduces a new provision in the General Regulations on the registration of employers and workers, notification of new hires and terminations and changes in workers' particulars for social security purposes, so that when the General Treasury detects that a registered employer is inactive and does not meet the requirements to be registered, it will proceed *ex officio* to revoke its registration, without prejudice to commencing the appropriate enforcement or criminal proceedings.

3. CHANGES TO THE LABOR AND SOCIAL SECURITY INFRINGEMENTS AND PENALTIES LAW ("LISOS")

Law 13/2012 modifies the list of social security penalties and infringements, the most significant new features being detailed below.

3.1 Social security infringements

Pursuant to article 21 LISOS, the following will be punishable as minor infringements: (i) failing to report or reporting late any information, certifications and declarations which employers, self-employed workers and workers treated as such are obliged to furnish, or omitting them or reporting them inaccurately, and (ii) failing to notify any change in the documents of association or adhesion for the coverage of the contingencies of occupational accidents and diseases or, as the case may be, common contingencies.

In addition to certain changes in the definitions of infringements in article 22 LISOS, the Law introduces the following new serious social security infringements:

- Failing to proceed, by the deadline stipulated by regulations, to register and pay contributions on pay accruing during proceedings and on vacation time accrued and not taken before termination of employment (one infringement will be deemed to exist for each affected worker).
- Failing to comply with the obligation to inform the National Employment Institute (the agency managing unemployment benefit) of any changes in the working calendar initially stipulated, before such changes take effect, in connection with the specific details and itemization by worker of the number of days a contract is to be held in abeyance or working time is to be reduced, as well as (in the latter case) the work schedule affected by the reduction.

- Engaging, after their notification as new hires for social security purposes, workers, claimants or beneficiaries of pensions or other periodic social security benefits the receipt of which is incompatible with working as an employee.

Along the same lines and among other changes, the following are included under the heading of very serious social security infringements:

- Failing to comply with the obligation to sign a special agreement in the cases stipulated in article 51.9 of the Workers' Statute.
- Engaging workers affected by the holding in abeyance of their contracts or a reduction in their working hours, during the period or work schedule in which such measures are being applied, as notified to the labor authority or, as the case may be, to the National Employment Institute (the agency managing unemployment benefit).

3.2 Penalties

In connection with penalties, the Law introduces the following new features:

- The following are criteria for determining the scale of the administrative penalties applicable in the event of a failure to pay in social security contributions and the incorrect withholding of the worker's social security contribution without paying it in, or the claiming of excessive discounts (articles 22.3 and 23.1.b LISOS, respectively): the minimum penalty will be imposed where the amount not paid in (including surcharges and interest) does not exceed €10,000; a mid-scale penalty will be imposed where the amount falls between €10,001 and €25,000; and the maximum penalty will be imposed where the amount exceeds €25,000.
- In connection with the infringement in article 15.3 LISOS (failure to reserve jobs for workers with disabilities), the maximum penalty will be imposed where, within two years prior to the date on which the infringement was committed, the liable party had already been penalized on a definitive basis for a breach of the statutory obligation to reserve jobs for persons with disabilities or to apply exceptional alternative measures.
- The very serious infringement in article 23.1.k) (withholding the worker's social security contribution without paying it in or claiming an excessive discount) will be penalized: (i) with the minimum penalty consisting of between 100.01% and 115% of the amount of the social security contributions not paid in and discounted from workers, or the amount exceeding the statutory discount, including surcharges, interest and costs; or (ii) with the mid-scale penalty consisting of a fine of between 115.01% and 130%; or (iii) with the maximum penalty consisting of a fine of between 130.01% and 150%.

- Where several infringements pursuant to articles 22.2 and 23.1 a) LISOS (failing to apply for registration, failing to notify new hires, and engaging workers, beneficiaries or claimants of public benefits, respectively) are detected during a single inspection, the penalty will be increased according to the number of workers, beneficiaries or claimants, as detailed below:

NUMBER OF WORKERS, BENEFICIARIES OR CLAIMANTS	PERCENTAGE INCREASE
2	20%
3	30%
4	40%
5 or more	50%

In no case may the amount relating to the infringement stipulated in article 22.2 exceed €10,000, nor may that stipulated in article 23.1.a) exceed €187,515 for each of the infringements.

3.3 Ancillary penalties

Law 13/2012 specifies, among other changes and in connection with the ancillary penalties (article 46 LISOS) applicable if the infringements in articles 15.3, 16 and 23 LISOS are committed, that (i) forfeiture of aid, reductions and relief will be proportional to the number of workers affected by the infringement and will affect those of a larger amount in preference to those of a smaller amount at the time the infringement was committed (this criterion must be recorded in a reasoned manner in the relevant official notice of infringement), and (ii) disqualification from relief will take effect from the date of the decision imposing the penalty.

3.4 Specific types of employer liability

With respect to the specific types of liability (article 46 bis LISOS) for the equality infringements stipulated in subarticles 12, 13 and 13 bis) of article 8 and subarticle 2 of article 16 LISOS, the main new features and changes are as follows:

- Automatic forfeiture of aid, reductions and relief, in proportion to the number of workers affected by the infringement, which will affect those of a larger amount, in preference to those of a smaller amount at the time the infringement was committed (this criterion must be recorded in a reasoned manner in the appropriate official notice of infringement).
- Possible (formerly automatic) disqualification from such relief for between six months and two years after the date of the decision imposing the penalty.
- In the case of the very serious infringements defined in article 8.12 and article 16.2 LISOS and relating to cases of direct or indirect sex discrimination, the above-mentioned ancillary penalties may be substituted by the preparation and

implementation of an equality plan at the company, provided that the company was not already obliged to prepare such a plan pursuant to a piece of primary or secondary legislation or a collective labor agreement or administrative decision. If, on the contrary, the company fails to prepare or implement the equality plan or does so in manifest breach of the terms stipulated in the decision of the labor authority, the substitution of the ancillary penalties will be rendered void and specific penalties may be imposed in the appropriate manner, notwithstanding the imposition of the main penalties.

4. PROVISIONS ON REDUCTIONS IN SOCIAL SECURITY CONTRIBUTIONS

A change is made to Royal Decree-Law 20/2012, of July 13, 2012, on measures to guarantee budgetary stability and the promotion of competitiveness, in connection with the elimination of reductions.

Law 13/2012 provides, effective July 15, 2012, that the elimination of the reductions envisaged in the legislation indicated below (additional to those already excluded by the Royal Decree-Law as originally drafted) will not apply:

- Article 16.3.a) of Law 44/2007, of December 13, 2007, on the regulation of employment outreach companies (*empresas de inserción*).
- Article 7.1 of Royal Decree 1451/1983, of May 11, 1983, regulating, in compliance with the provisions of Law 13/1982, of April 7, 1982, selective employment and measures to promote the employment of disabled workers.
- Letter d) of subarticle three.2 of additional provision six of Law 10/1994, of May 19, 1994, on urgent measures to promote employment.
- Article 4.B).1 of the Order of the Ministry of Labor and Social Affairs dated October 16, 1998, establishing the regulatory bases for granting public aid and subsidies aimed at promoting the integration of disabled persons in the job market at sheltered workshops and on a self-employed basis.
- Article 12.1.b) of Royal Decree 290/2004, of February 20, 2004, regulating supported employment initiatives ("*enclaves laborales*") as a way to promote the employment of persons with disabilities.
- Subarticles 2, 3 and 4 of article 2 of Royal Decree-Law 5/2006, of June 9, 2006, for the improvement of growth and employment.

5. OTHER NEWS OF INTEREST

With a view to strengthening the functions of labor inspection authorities, new provisions are introduced which give them the powers needed to detect and penalize situations of undeclared employment and social security fraud by amending of the Law Organizing the Labor and Social Security Inspection Authorities and the Regulations on the Organization and Functioning of the Labor and Social Security Inspection Authorities.

Changes are also made to the General Regulations on proceedings for the imposition of penalties for labor and social security infringements and on procedures for the assessment of social security contributions.

Lastly, Law 13/2012 creates a notice board of proclamations by the labor inspection authorities on which notices may be posted in cases where it has not been possible to notify administrative decisions.

6. ENTRY INTO FORCE

Law 13/2012 enters into force on December 28, 2012, except for the adaption of the wording on special agreements in the context of collective layoffs and the relevant penalty in the event of breach, which is set to enter into force on January 1, 2013.

This publication contains information of a general nature and therefore does not constitute a professional opinion or legal advice.

© December 2012. J&A Garrigues, S.L.P. All rights reserved. The exploitation, reproduction, distribution, public communication or transformation, in whole or in part, of this document is prohibited without the written consent of J&A Garrigues, S.L.P.