Labor and Employment Newsletter

Spain

GARRIGUES

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Contents

1. Market unity and collective bargaining

The latest collective bargaining reform aims to give greater prominence to regional and even provincial agreements. However, it does not affect the priority of application of previous agreements over time or the rules relating to company agreements.

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One of the tasks of sectoral collective bargaining is to ensure conditions of business competition that prevent the pursuit of competitive advantage based on labor costs. Sectoral collective bargaining, therefore, must refer to the market in which economic activities are carried out and be complemented by company-level bargaining; the structure of collective bargaining should be based on national sectoral agreements and company-level agreements. The prominence of provincial agreements is a legacy of the past and, in most cases, lacks economic logic. The reform introduced by Royal Decree-Law (RDL) 2/2024, however, moves in the opposite direction: it goes against the unity of the market, revalues provincial agreements and calls into question the organizing role of national sectoral agreements. In any case, laws contain objective mandates, beyond the intentions of their promoters, and must be interpreted accordingly. The lack of social dialogue, the absence of intervention by consultative bodies or the suppression (by the clearly abusive use of the decree law in this case) of parliamentary discussion, make the technical invoice of the law very deficient and allow for a corrective interpretation not only of its letter but also of its (political) intention.

The first thing to bear in mind is that the amendment introduced **in no way affects the mandate of article 84.1 of the Workers' Statute (WS)**, which enshrines the priority of application of prior agreements in time (the rule of prior in tempore), and the impossibility of their being affected by subsequent agreements, which remains fully in force. With the nuances that may derive from possible agreements on the structure of collective bargaining (article 83.2 of the WS, to which article 84.1 refers; not 83.3), following the reform of RDL 2/2024, there is still no hierarchy between agreements in Spain. The applicable agreement is the previous one in time, whether it is a company or sectoral agreement with one or other territorial scope, and it cannot be affected by other agreements while it is in force.

The only exception to the rule in Article 84.1 is paragraph 2 ("except as provided for in the following paragraph"), which exempts the application of the general rule by allowing a sectoral agreement to be affected by a company agreement during its term in the matters indicated in the provision itself. Therefore, **the sectoral agreements which, under the new rules of Article 84.3 and 84.4, may be concluded are not excluded from the application of the provisions of Article 84.2**, and may be affected, during their term, by company agreements in relation to the matters indicated.

Article 84.3 and 84.4 do not derogate from Article 84.1, nor do they exclude the application of Article 84.2.

The regulation in Article 84.3 and 84.4 is related to the provisions of Article 83: "notwithstanding the provisions of the preceding Article". It is stated as a gateway to the new regulation, **which is added to Article 83, but without modifying or altering it.** Article 83 does not prevent the new regulation being introduced, but it neither alters nor repeals it. The wording is completely different in Article 84.2 and in the new Article 84.3, which means that they are not rules containing equivalent regulations. 84.2 is an exception to 84.1 and 84.3 is an addition to the provisions of Article 83, in the context of which it must be interpreted.

Company agreements are not affected by the new regulation; they continue to be governed by the rules contained in Article 84.1 and the doctrine on succession of agreements and changes in bargaining units must remain in force. Article 84.3 itself refers to the priority of application of collective agreements and interprofessional agreements of the autonomous community over **sectoral agreements** or state-level agreements. **A company agreement in force and with priority of application may not be affected by regional agreements or interprofessional or sectoral agreements concluded by virtue of the provisions of Article 84.3 in relation to Article 83.2 of the TE, nor by provincial agreements with the priority of application of paragraph 4 of Article 84.**

Article 84.3 allows collective agreements and interprofessional agreements to be negotiated at the autonomous community level, which will have priority over sectoral agreements or agreements at the state level. These are two different concepts, sectoral agreements and interprofessional agreements, which are covered by two different sections of Article 83.2 of the WS and must therefore be considered separately.

Firstly, **(sectoral) collective agreements at the autonomous community level** can be negotiated, which will have priority over those at the state level, provided that their regulation is more favorable for employees (assessed as a whole, without the "gleaning" technique). Therefore, these are agreements that improve on the state agreements:

- They must be at the level of an autonomous community (a single autonomous community).
- They must be agreements regulating working conditions and not the structure of collective bargaining, in relation to which the more favorable nature of one or other regulation cannot be assessed.
- Under no circumstances may company agreements with priority of application be affected.
- In no case may negotiations be held, even for the purpose of improvement, on the conditions expressly excluded by Article 84.5.

Interprofessional agreements (article 84.3 in relation to article 83.2 second paragraph) may also be negotiated at regional level, which, if they are on the structure of collective bargaining, may be applicable, as they were before, at the level of the corresponding Autonomous Community. But if there is a state interprofessional agreement on the structure of collective bargaining, the priority of application of the regional agreement is not clear. Article 84.3 does not explicitly establish it, and the rule that the regional agreement must be more favorable for the employees shows that it is thinking of agreements regulating working conditions, not the structure of collective bargaining. Therefore, **it can be argued that state interprofessional agreements on the structure of collective bargaining are not affected and that regional interprofessional agreements do not have priority of application over them.**

What sense, then, would there be in mentioning interprofessional agreements in the new Article 84.3? Probably the only meaning is given by its connection with paragraph 4: the regional interprofessional agreements on the structure of collective bargaining may establish the priority of application of provincial agreements (of the corresponding autonomous community) over state sectoral agreements (or supra-provincial agreements), provided that their regulation is more favorable to employees. And this, even if there is no provision in this respect in any interprofessional state agreement that may exist. **The structure of collective bargaining established by a state interprofessional agreement cannot, therefore, be altered by a regional interprofessional agreement, with the exception that the latter may enshrine the priority of application of provincial agreements, in the terms of Article 84.4.**

In principle, agreements on specific matters (Article 83.3) could be considered to be excluded from the new rules of priority of application of Article 84.3. This expressly refers to "autonomous community interprofessional agreements", which are those referred to in Article 83.2 WS. The agreements on specific matters in Article 83.3 are distinguished by the legislator from the interprofessional agreements: "These agreements, (on specific matters) as well as the interprofessional agreements referred to in paragraph 2 (...)". Thus, we are in the presence of two different figures: interprofessional agreements (Article 83.2) and agreements on specific matters (Article 83.3). The new Article 84.3 refers to interprofessional agreements and not to agreements on specific matters. And paragraph 4 refers to agreements within the trade concluded "in accordance with Article 83(2)". Therefore, **Article 83.3 has not been affected by the new regulation, and with regard to agreements on specific matters, which may be state or autonomous, the rule of the priority of application of autonomous agreements does not apply.**

Finally, **provincial agreements "with autonomous community coverage"**, when provided for in interprofessional agreements of the corresponding autonomous community, will have priority in application over state sectoral agreements, if they are more favorable to employees. The reference to "state agreements" is incorrect and probably unnecessary, but in any case, it must refer to state agreements setting working conditions other than the agreements on specific matters in Article 83.3 of the TE, for the reasons we have already indicated.

This priority of application of provincial agreements does not extend to company agreements, for the reasons already stated, and for the very restriction of the general wording of Article 84.3 to sectoral agreements, in the light of which the subsequent references to agreements must be interpreted. Moreover, the express reference in Article 84.4 to Article 83.2 of the TE, places us within the scope of this provision and leaves aside agreements on specific matters in Article 83.3 which, as we have already indicated, are not affected by the priority of application of regional agreements and agreements introduced by the new regulation of Article 84.3 and 84.4.

2. News

The accumulation of newsletter leave, the priority application of regional collective agreements and unemployment protection is finally approved

Following the failure to validate the previous royal decree-law introducing these new features, which was repealed, Royal Decree-Law 2/2024 has been published, which re-approves them with certain changes, such as the possibility of extending the priority of application to provincial collective agreements.

3. On the radar

The Council of Ministers approves the elimination of the automatic termination of contracts due to permanent disability

The Government has approved the reform of Article 49.1.e of the Workers' Statute. This **amendment** will eliminate permanent incapacity as an automatic cause for termination of the employment relationship.

Companies will be obliged to make the necessary reasonable adjustments so that people with disabilities can exercise their right to work, even if they acquire the disability after they have started their professional activity.

The Mixed Group of the Congress of Deputies proposes a bill to amend the Workers' Statute with important new features

We highlight some of the modifications to the Workers' Statute (WS) included in the the Mixed Group's **proposed bill**:

- In terms of working hours, it establishes a maximum of 35 hours a week and the compensation of all overtime with rest breaks.
- Subcontracting of main and permanent activities is prohibited and compulsory subrogation is required in the event of a change of contract.
- Regarding dismissals, the declaration of unfair dismissals is eliminated, and dismissals can only be classified as justified or null and void. If the dismissal is considered unjustified or has formal defects, it will be declared null and void, allowing the employee to choose between reinstatement or compensation. All dismissals must follow an adversarial procedure.
- In the area of collective dismissals, it is included that the labor authority has the power to authorize or refuse it after the consultation period.
- New paid leave is included and the number of days of paid leave is increased.

The Ministry of Labor will soon try to reach an agreement with the social partners on the reduction of working hours

The Ministry of Labor wants to reach an agreement with the social partners (trade unions and employers) before starting the parliamentary process of the legal change that aims to reduce working hours.

For their part, the employers' organizations do not rule out the possibility of reaching an agreement, although they state the need to carry out the analysis sector by sector or at each negotiating table.

One of the most controversial issues, which has been rejected by the employers' organizations, is the possibility that the Labor and Social Security Inspectorate (ITSS) will be able to monitor working hours directly and remotely in real time.

Collective claim for increased overtime pay admitted

The European Committee of Social Rights (ECSR) has admitted the collective complaint filed in January by the union UGT against Spain. The complaint argues that Spanish law does not require the payment of "enhanced remuneration" for overtime and that this leads to a violation of Article 4.2 of the European Social Charter.

Since the claim has been admitted, the government and the employers' organizations can make submissions.

The Labor Inspectorate will give priority to examining possible abuses in terminations during the probationary period

The ITSS is launching a **campaign** to verify possible breaches of regulations related to the termination of employment contracts due to the non-exceeding of the probationary period.

Specifically, it will focus on reviewing with greater attention contracts that are terminated for not exceeding the probationary period after having exceeded their maximum duration or that have been previously hired to perform the same functions.

Question referred to the CJEU for a preliminary ruling on the consideration of travel in an employer's vehicle as actual working time

The claim of the applicant trade union **in this reference for a preliminary ruling before the Court of Justice of the European Union (CJEU)** is for a declaration that the time spent travelling by company vehicle from the base to the site (at the start of the working day) and from the site to the base (at the end of the working day) is to be counted as actual working time.

The Ministry of Labor and Social Economy submits to public hearing the regulatory development of Law 4/2023 regarding LGTBI measures

Article 15 of Law 4/2023 establishes the obligation for companies with more than 50 employees to have LGTBI measures and provides for the regulatory development of this obligation. By virtue of this provision, the Ministry of Labor and Social Economy has submitted for public hearing the proposal for a royal decree developing the planned set of measures for equality and non-discrimination of LGTBI persons in companies.

Among other issues, the proposed regulation states that the planned set of measures provided for in Article 15 of Law 4/2023 must contain, at least, the following issues: (i) equal treatment and non-discrimination clauses, (ii) measures for access to employment, (iii) professional classification and promotion that avoid discrimination, (iv) training, awareness and language; (v) promotion of diverse work environments, (vi) leave and social benefits and (vii) inclusion in the disciplinary regime of the agreements of behaviors that infringe on sexual freedom or sexual orientation.

4. Judgements

Individual telework agreements are not subject to collective bargaining

A trade union sued for a declaration that the company's unilateral implementation of the collective teleworking scheme and the violation of freedom of association were null and void.

The Audiencia Nacional does not agree that individual telework agreements should be subject to collective bargaining, recalling also the reasoning of another judgement in which it stated that the fact that the contract is a contract of adhesion does not mean per se that it is null and void, but that this situation should be taken into account when interpreting it and analyzing the validity of some of its clauses.

The refusal to adjust working hours following an investigation by a private detective is in accordance with the law

The employee requested a change in his working hours to care for his mother, who was allegedly unable to care for herself after a stroke. However, an investigation revealed that the mother lived with her daughter and was able to go out on her own, which led the company to deny the request. The employee sued for accommodation and compensation for pain and suffering.

The judgement of the High Court of Justice of Galicia of 19 March 2024 dismisses the employee's appeal, arguing that the detective's monitoring was appropriate, necessary and did not violate his privacy or his dignity or that of his family members. Furthermore, the court concludes that the

employee's fundamental rights were not violated, and that the adaptation of the working day was not justified, as neither cohabitation nor total dependence on the mother was demonstrated.

The copy of the letter of objective dismissal can be given to the workers' representatives five working days after delivery to the employee

The Supreme Court's ruling of 3 April 2024 confirms that the company may hand over the copy of the letter of dismissal for objective reasons to the workers' legal representatives five working days after it is given to the employee, as "in no way prejudices or affects or conditions either the rights of the representatives to whom the information is addressed or those of the dismissed employee himself".

The Supreme Court declares meal tickets to be non-wage payments

The Supreme Court's ruling of 19 March 2024 emphasizes that meal tickets were not paid to those who worked at home and it is not proven that they are in the nature of wages, as they are linked to the meal expenses that employees must bear on days when they work away from home (whether at the workplace or at a client's).

The time limit for challenging a substantial modification of working conditions expires 20 days after the communication to the workers' representatives

The workers' representation had challenged the unilateral implementation of a new job system after the statutory period of 20 working days had elapsed since the communication of its implementation.

The Supreme Court dismisses the appeal lodged by the trade union on the grounds that the action had lapsed.

5. Labor and Sustainable

The regulation banning the entry of products made with forced labor on the EU market takes further steps in the process

The European Commission will establish a database in relation to specific geographical areas or products where such a risk may exist.

6. And also…

Shorter working hours: a global trend reaching Latin America

In our new Latin American Labor newsletter, we analyze the trend towards shorter working hours. While in countries such as Chile the working week is already being reduced from 45 to 40 hours and in Colombia from 48 to 42; in other jurisdictions such as Mexico and Peru there are also some proposals on the table in this regard, but they have not yet been finalized.

7. Labor and Employment Blog

The new obligations of the European directive on pay transparency and equal pay that will have to be adopted in Spain in the next few years

The 2023 directive on equal pay for men and women contains a series of pay transparency measures that Member States will have to adopt. Although Spanish legislation already contains measures in this area, the directive goes further. It is therefore advisable to prepare for the regulatory changes that will come with its transposition into Spanish law. We analyse the main new features.

Fighting child labor in the world: Spanish companies' obligations to eradicate it

On the World Day against Child Labor, we recall the obligations that companies in Spain must comply with in order to eradicate child labor in the world. These measures translate into reporting duties on their own personnel and those of the companies in their value chain in terms of human rights, including child labor. We also note the forthcoming regulation that expressly establishes human rights due diligence obligations and prohibits the entry into the European Union of products manufactured with forced child labor.

The definition of 'person with a disability' for the calculation of the 2% reserve quota

The definition of the concept of 'person with a disability' includes those who are recognized as having a permanent total disability (IPT), absolute disability (IPA) or severe disability (GI) pension and pensioners of passive classes who are recognized as having a retirement pension or a retirement pension for permanent incapacity for service or uselessness. The latest and expected regulatory changes would corroborate the possibility for these persons to be employed and therefore to be counted towards the 2% reserve quota.

How the Supreme Court calculates periods of inactivity in permanent-discontinuous contracts

We analyze the pronouncements of the Spanish High Court on the period to be taken into account when determining the length of service bonus, the length-of-service bonus, professional promotion or severance pay in permanent-discontinuous contracts.

Reduction of maximum working hours: 4-day week or fewer hours on an annual basis?

The question of whether or not working hours should be reduced is being discussed in different countries. There has been a lot of talk in recent years about the possible reduction of the working week to 4 days. But this change is not without debate because of the impact it will have on the organization of companies. For a legislative change in this respect, the formula for implementing such a reduction remains to be decided: eliminating one working day a week or reducing the maximum working day on an annual basis.

8. Press

The protection of regional agreements will benefit employees, but it generates legal doubts and predicts conflicts

Our Employment Law partner José Manuel Mateo analyses the new regulation that protects regional collective bargaining agreements against state agreements, in this press article.

Living in Spain and working in France or Portugal: CJEU opens the door to 'cross-border' benefits

In this article, Jesús Merino, senior associate in Garrigues' Employment Law department, analyses the ruling of the Court of Justice of the European Union (CJEU) on cross-border employees.

Social partners seek alternatives to reduce the bargaining burden on companies

In this article, Clara Herreros, a partner in Garrigues' Employment Law department, comments on the effects of the labor regulations that have progressively increased the burden of collective bargaining.

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