Labor and Employment Newsletter

Spain

GARRIGUES

January 2023

Contents

1. Criminal law penalties for employment law breaches

Federico Durán López

The recent reform introduced in Organic Law 14/2022 of December 22, 2022 could create legal uncertainty and displays technical defects in definition of infringing conduct.

Various articles defining offenses committed in the field of employment have traditionally been included in the Criminal Code. In the face of certain particularly serious infringements of employment rights, an attribution of criminal liability was brought into play, in an attempt to protect those rights, using the government's most forceful means of coercion. This does not mean that criminal penalties have not been, and should not continue to be, the last resort for achieving co-active fulfillment of the law's requirements. This point is actually made in the preamble to the recent Organic Law 14/2022 of December 22, 2022.

Criminal rules stand as the government's last line of defense for constitutional and social laws, and the valid existence of citizens' rights. The compelling effect of criminal rules is undeniable: a criminal penalty is much more punishing than administrative penalties and may cause offenders to be deprived of their freedom. For that reason, it needs to be thought out carefully which types of conduct are penalized and to what extent or how strongly. The Criminal Code has several rules, as we have mentioned, that contemplate offenses related to a breach of employment rights and do so under the last resort principle which must underlie any implementation of criminal measures. We are not going to discuss these rules, which are already sufficiently well-established in the Spanish legal system. Instead we are going to look at the latest reform, introduced by Law 14/2022 mentioned above, which has been approved without the necessary debate and reflection process. And it has a concerning bias towards using criminal penalties (in a way that conflicts with their nature as a last resort which is how they are described in the preamble) as a tool for contending with an administrative issue that the authorities cannot see how to shift.

Analyzing the new article 311.2 of the Criminal Code, it seems as if the labor authorities, confronted with an interpretation or compliance conflict (we shall not give our view on this) with a few citizens have come to the end of their tether, and said, although not in so many words, "now you'll see". But neither the authorities can come to the end of their tether nor can they act hastily, using extreme penalties, taken from criminal law, to quell an attitude, at least a confrontational one, of a few citizens. We must stress, without giving our view on the facts of the question, that any irritation the authorities may feel by not managing to quieten citizens' claims and interpretations cannot justify a monumental decision of this type to define a new criminal act in the Criminal Code. The necessary debate and the necessary calm reflection process is missing. An amendment to the Criminal Code cannot be the sword of Alexander with which to untie the Gordian knot facing the authorities.

Yet this is most likely to be what has happened. The amendment adding a point 2 to article 311 of the Criminal Code in force, has engendered a rule creating vast legal uncertainty and incurring glaring technical defects, relating to the definition of infringing conduct. Especially, the definition of the infringement: it is considered that the offense is incurred by "those who impose illegal terms and conditions on their workers by hiring them under mechanisms other than an employment contract". Take note of the wording: "illegal terms and conditions by hiring them under mechanisms other than an employment contract". From the way it is expressed, hiring using or under mechanisms other than an employment contract appears to determine, of and in itself, an imposition of illegal terms and conditions. Obviously, this cannot be so. It would be if an employment contract were the only allowed option for hiring a person to provide services. But there are other legal instruments for hiring an individual to provide services, which do not fit the employment contract molds. Freedom of contract allows those other types of contractual relationships. The law is allowed to set out a preference for the use of an employment contract, or even, as appears in the Workers' Statute, a

presumption in its favor, but those other contract options will continue to exist. Freedom of contract, though severely restricted by Spanish employment law, has not disappeared. Therefore, the option of "hiring them under mechanisms other than an employment contract" is strictly allowed by the law to be considered and implemented.

Apart from this, the legal mechanism contains a fallacy in its reasoning: it refers to those who impose illegal terms and conditions *on their workers.* It disregards that the matter in question may well be the individual's classification as a worker, because working under an employment contract is not the only possible form of providing services. If the individuals concerned are denied worker status, then that point will have to be resolved before deciding whether illegal terms and conditions have been imposed. Furthermore, if the "illegal terms and conditions" are imposed in other ways, would there not be an offense? Would this question have to be redirected to article 311.1 of the Criminal Code, which is worded very differently? (it requires the existence of deception or abuse of a situation of necessity, and refers to working conditions that "harm, suppress or constrain" recognized rights). And what if it is pleaded that the terms and conditions are not illegal, just different to the ones set out in the law, or even that they may be more favorable for the interested parties? As you can see, there is a bed of interpretations, creating legal uncertainty.

But by far the most concerning feature of the law is the reference to those purported illegal terms and conditions being "retained in disregard of an administrative request or penalty". The request part can only be puzzling. It has to be taken into account that labor inspectors and labor authorities continue to argue that requests are not subject to appeal, even though in reality they are appealed and there are court decisions in this respect. The legal rules on requests would have to be rebuilt, to provide ways to appeal against them and the consequences of their becoming final. It is inconceivable in a country governed by rule of law to even consider that when faced with a non-appealable request, failure to fulfill that request should determine a criminal penalty. An administrative penalty, on the other hand, although this is not specifically stated, has to be final and even so careful consideration would have to be given to its compatibility with criminal measures against continuing breaches, when administrative law has specific provisions for those types of events.

The law, even if purely from the standpoint of its technical defects, could not fail to be considered and as a result held unconstitutional, so as to restore legal certainty in the field of employment relationships.

2. News update

The new models of sick leave reports and the Spanish Social Security Institute's telematic communication mechanisms to companies are published

The provisions governing the management of medical reports for sick leave are adapted to the recent changes introduced in temporary incapacity processes and incorporate the new sick leave report models.

Publication of the new system on incentives for employment contracts

The law introduces the requirements and conditions on reductions in social security contributions and incentives for hiring, among other issues.

The new Artist's Statute includes novelties on retirement, unemployment and social protection

Royal Decree-Law 1/2023, of January 10, on the improvement of social protection for artists (popularly known as the Artist's Statute) has been published, which will affect professionals in the cultural field.

Social Security Institute (INSS) will send the sick leave reports directly to the companies

Royal Decree 1060/2022 introduces changes to the management and monitoring system for sick leave processes. Among them, it states that medicals' reports on employees will now be sent directly to employers by the authorities remotely.

Changes in the areas of labor law and social security introduced by Royal Decree-Law 20/2022

The legislation introduces measures such as the extraordinary increase in retirement and incapacity pensions, the extension of the regulation of partial retirement with the simultaneous conclusion of a hand-over contract in effect prior to the entry into force of Law 27/2011, of August 1, 2011, or the extension of the validity of the National Minimum Wage for 2022, among other issues

These are the labor and employment changes introduced by the General State Budget Law for 2023

The Budget Law contains several labor and employment provisions, including the contribution bases and rates for 2023, the average revaluation of pensions, the legal rate of interest for money and the public multi-purpose income indicator (IPREM) for 2023, among other elements.

The Startups Law regulates international remote working for foreign digital nomads

The law defines international remote working for carrying out professional or labor activities and the relevant visa requirements and residency authorizations.

3. On the radar

Negotiations on increase to national minimum wage (SMI) continue

Government, employer and employee representatives have not yet sealed an agreement on the increase to the minimum wage, although the goal is to set it before the end of January.

The results (published in September 2022) of a report requested by the Ministry of Labor proposed fourteen gross monthly wage payments of between €1,040 and €1,082. The unions have proposed raising it to fourteen payments of €1,100.

Government approves bill transposing whistleblowing directive

The purpose of the bill on the protection of persons who report breaches of the law and on combating corruption is to transpose Directive 2019/1937 on the protection of persons who report breaches of Union law, more widely known as the Whistleblowing Directive.

The primary aim is to ensure protection for persons, at private or public organizations, who report information relating to breaches of the law, by preventing any type of retaliation for whistleblowers or their environments.

The bill, yet to be laid before parliament, states that companies with more than 250 workers will have to have an internal reporting system within three months following the law's entry into force. Whereas organizations with headcounts of between 50 and 249 workers will have to have the internal channel in place by December 31, 2023.

Ministry of Labor expects to send draft Interns' Statute shortly to employee and employer representatives

The Ministry of Labor expects to complete the new draft of the Interns' Statute to send it to employer and employee representatives, after they failed to agree on the version submitted in October 2022.

The government's objective is to "prevent the precarious conditions associated with training mechanisms" and the new legislation is expected to contain elements such the percentage of the workforce allowed to be made up of interns, payment of expenses or access to the company's services on an equal footing with other members of the workforce.

Preliminary bill for Families Law includes new types of leave

On December 13, 2022, the Council of Ministers approved the Preliminary Bill for the Families Law, setting out new employment legislation, especially on work life balance matters.

On this subject, the preliminary bill sets out three new types of leave: (i) eight weeks of unpaid leave for working parents; (ii) five days of paid leave a year to care for family members or cohabitants; and (iii) four days of paid leave for unforeseen family reasons.

Labor inspectors endorse use of computer tools in their functions

The labor inspectors will issue "automated" infringement notices in cases where they have sufficient information to impose a penalty, extracted automatically from tax and social security public agencies or others attached to the Ministry of Labor.

If submissions are filed by companies, they will be sent to the labor inspector concerned to assess the contents of the infringement report.

They will also continue using their "fraud prevention tool" to identify potential breaches relating to the types of temporary employment contract, also involving cross-references with the information provided by various public bodies.

4. Judgments

Use of logo on vehicle or use of computer tools to determine deliveries are not sufficient elements for illegal loan of employees to exist

In a judgment dated October 4, 2022, the Supreme Court held that use of a business sign on a vehicle or providing computer tools to determine deliveries are not sufficient elements in themselves to determine the existence of an illegal loan of employees.

It validated the decision to outsource part of the business activity, on the basis that the employer company performed all the functions belonging to a business owner. It was evidenced that both companies had sufficient material resource structures to carry out the activity, as well as that the employer fully exercised the powers inherent to a business owner (vacations, organization of shifts, entering into contracts with new workers or disciplinary functions).

Court of Justice of the European Union declares that a worker is entitled not to meet the financial cost of using corrective lenses if needed for work

The Court of Justice of the European Union (CJEU), in a judgment delivered on December 22, 2022, stated that a worker has the right not to meet the financial cost caused to them by using glasses with corrective lenses if the requirements in Council Directive 90/270/EEC of 29 May 1990, on the minimum safety and health requirements for work with display screen equipment are fulfilled.

The judgment declares that the "special corrective appliances" provided for in the law include spectacles aimed specifically at the correction and prevention of visual difficulties relating to work involving display screen equipment. Moreover, it declared that the special nature of the corrective appliance presupposes that it serves to correct or prevent visual problems specifically linked to work with display screen equipment, and that it is, however, for the national court to determine whether the spectacles actually serve to correct visual difficulties relating to the employee's work rather than generic visual problems not necessarily linked to their working conditions.

A la carte working hours do not automatically mean right to work from home

In a judgment delivered on September 30, 2022, Madrid High Court dismissed the appeal lodged by a worker who had requested to work from home three days a week.

The court decided the case by finding that the worker had not evidenced the need for the adaptation, or its reasonableness and proportionality. The judgment moreover stated that the law does not recognize a "right to adapt", instead a "right to request", and therefore the need for that adaptation must be substantiated.

Worker's dismissal after insulting clients in video published on social media held justified

Initially, a labor court had held the dismissal null and void on account of a breach of fundamental rights and ordered the company to reinstate the worker and pay €6,250. However, Asturias High Court upheld the appeal lodged by the company in a judgment delivered on October 18, 2022 and held that the dismissal on disciplinary grounds was justified.

The worker had been dismissed for posting on social media a video in which, dressed in his work clothes, he insulted clients at the store's opening time. In support of the justified nature of the dismissal, the decision stated that freedom of expression does not protect the right to insult and is

not without limits, especially at the workplace. The court held that the worker attacked the clients' rights to honor and compromised the company's reputation, which make the dismissal justified.

Waiting periods are not considered actual working time

The issue resolved by the National Appellate Court's judgment delivered on November 22, 2022 centered on deciding whether the waiting periods for the company's train stewards between the end of a service until the following train must be considered actual working time.

The National Appellate Court held that they are not actual working time because during that period the worker: (i) is not at the company's disposal; (ii) has freedom of movement or freedom over wearing a uniform; (iii) may use the lockers; and (iv) is not assigned any services during the waiting period.

Indefinite strike lasting longer than 5 years held abusive and fraudulent

In a judgment delivered on December 13, 2022, the Supreme Court settled a lawsuit in which the workers had been called out on strike indefinitely in 2012 and the strike was not called off until July 31, 2018.

Faced with this situation, the company itself filed the claim challenging the strike, and the National Appellate Court and the Supreme Court both held that the strike was contrary to the law. The decision was founded on the fact that the strike was used strategically and intermittently over the years on Saturdays, days before public holidays, days linking public holidays to weekends, days following the scheduled return to work after vacation or days falling after periods of sick leave. The chamber expressly stated that the union that called the strike encouraged the workers concerned to evade their obligations under their employment contracts.

Time spent removing personal protective equipment is not actual working time

In the examined case, the judge delivered a decision on a claim filed by the works council which asked for the time spent putting on or removing personal protective equipment (PPE) to be treated as actual working time for workers.

Castilla La Mancha High Court dismissed the claim and stated that the time needed to put on or remove PPE items cannot be considered actual working time. The employer's obligation consists of providing those items of equipment to workers, and it is not specified in any provision that the time employed to put them in place must be considered actual working time. Therefore, as set out in article 34.5 of the Workers' Statute, working time starts when the worker is at their place of work, with all the necessary items of safety equipment in place.

5. And also …

2023: The most significant legal developments that companies should keep on their radar

Garrigues analyzes from every business law angle the most significant legislative changes that are due to arrive next year.

Labor law and outsourcing: increased restrictions on this means of hiring personnel in Latin America

Regulations governing outsourcing in several Latin American countries are hindering the use of this strategic option for companies in certain areas of business.

6. Garrigues Sustainable - Labor and Employment

Directive on corporate sustainability reporting is published

The new EU legislation requires companies to report regularly on the effect of their activities on people and the environment.

Publication of directive on improving gender balance on company boards

The new EU rules, which will have to be transposed into national law, promote more balanced representation on the boards of listed companies in all Member States.

The Council of the European Union publishes its Decision on guidelines for the employment policies of the Member States

Member States will take these guidelines into account in determining their employment policies and reform programs, in line with other initiatives to foster sustainability

Integration of people with disabilities into the job market advancing at a sluggish pace

The International Day of Persons with Disabilities was held on December 3, but one year on, little significant progress has been made in improving employment for this group.

7. Labor and employment blog

One year on from the employment contract reform: what has changed?

In labor law circles we are celebrating an anniversary one year on from the much heralded labor reform published in the Official State Gazette (BOE) through Royal Decree-Law 32/2021 of December 28, 2021, on urgent measures for labor reform, ensuring stable employment and transforming the labor market.

Wage increases can be contained in an inflationary context

In an environment marked by inflation and widespread price increases, collective bargaining plays a significant role in setting the trend in wages at the industry and/or employer level. The wage increase that companies have to assume will be set by the review clause established for the purpose by the collective bargaining agreement that applies to them.

Performance appraisal systems have labor as well as data protection implications

Systems that measure performance are essential for companies, as the individual productivity of their staff directly affects their competitiveness. The implementation and/or modification of these systems, as well as the appraisal of performance, may have legal implications that are not only limited to labor law but also impact other areas such as data protection.

The "only yes is yes" law also introduces employment changes

The legislation introduces rights relating to timetable, functional and geographical flexibility, and the possible suspension or termination of employment contracts. On the other hand, employers are obliged to promote awareness and training of all staff for the purpose of avoiding sexual violence.

Beware: improper behavior at the company Christmas dinner can constitute grounds for dismissal

A judgment handed down by the Spanish Supreme Court has made it clear that a worker, when away from their place of work and outside working hours, is not totally free to act in a manner detrimental to the employer or their colleagues.

International Day of Persons with Disabilities to highlight the role of innovation in advancing an accessible and equitable world

The measures to be adopted by public and private organizations to mainstream people with disabilities include promoting active employment policies and equal access to jobs.

Can companies combat the effects of inflation with a labor-related measure?

Inflation and the general increase in prices that is occurring in Spain and throughout Europe has led companies to consider flexibility measures available under Spanish law to enable them not to have to increase their employees' salaries in the same proportion.

8. Press

Dismissal a la carte, or return to uncertainty

Article by Bernardo Pérez-Navas, partner in Garrigues Labor and Employment Department ('Cinco Días' newspaper).

Protocol in cases of emotional abuse in the workplace and sexual harassment

Article by Javier Navarro and Julián Lozano, partner and principal associate in the Garrigues Labor and Employment Department in Murcia ('La Verdad de Murcia' newspaper).

Debunking the dismissal ban myth

Article by Misi Borrás, partner in the Garrigues Labor and Employment Department in Barcelona ('Diari de Tarragona' newspaper).

For more information:

Labor and Employment Department

Follow us:

GARRIGUES

Hermosilla, 3

28001 Madrid, Spain.

T +34 91 514 52 00 **F** +34 91 399 24 08

garrigues.com