GARRIGUES

Labor and Employment Newsletter

Special Edition: Working time monitoring and the right to disconnect

Spain

July 2022

Index

1. Working time record keeping, the right to disconnect and the regulating role of the law

Federico Durán López

A few years on from when they came into force, neither working time record keeping nor the right to disconnect have implementing regulations able to provide a response to increasingly complex employment relationships.

Over recent years various provisions have been introduced into Spanish law in relation to both working time record keeping and monitoring, and to the so-called right to disconnect. The National Appellate Court had supported the obligation to keep working time records, an obligation that was denied by the Supreme Court until in Royal Decree-Law 8/2019 the legislature added paragraph 9 to article 34 of the Workers' Statute, requiring companies to ensure that records are kept of daily working hours, including the exact start and end times of the working day.

At a later date to that amendment of the legislation, the Court of Justice of the European Union (CJEU), in response to a reference for a preliminary ruling submitted by the National Appellate Court (in an at least unusual move to rebel against the principle set by the Spanish Supreme Court), held, in a judgment dated May 14, 2019, that member states must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured, although it leaves it to the discretion of those same member states to determine the specific arrangements for implementing the system, having regard to the particular characteristics of each sector of activity, or even of each business, such as its size. In keeping with this last point (when the amendment of the legislation was made the advocate general's conclusions that preceded the judgment had been published), article 34.7 of the Workers' Statute sets out that the Government may lay down "specific provisions on the obligations to keep working time records, for any sectors, jobs and professional categories which due to their particular characteristics so require". And all of this is "without prejudice" to the flexible working time arrangements that are enshrined, among others for reasons relating to reconciling work and family responsibilities, in that same article 34 of the Workers' Statute.

The Government has not passed legislation either on the particular characteristics that record keeping may have in certain cases (including for certain "professional categories"), nor has it been clarified how the record keeping obligation cannot prejudice flexible working hours. It will have to be determined what terms and scope those flexible hours will have to comply with to allow a different record keeping system to that described, as a general rule, in article 34.9. In their absence, the approach to working time record keeping (in Spanish law and in the CJEU judgment, which has again used the trump card relating to protecting health and safety at the workplace to act in relation to matters that should fall within the powers of the member states) seems clear and precise, but it is simplistic and hard to reconcile, because of its simplicity, with the current complex and diverse characteristics of the system of production, with the conditioning factors of the organization of work and with the growing influence that information technology is having.

All of this explains the relative failure of the goals of the reform (to control and reduce overtime) and the difficulties with interpreting how they need to be implemented. As things stand, there has been judicial support for record keeping systems to require workers to record absences (so that they are not measured as actual hours worked: national appellate court judgment dated November 10, 2019); for the company's authorization to be needed to extend working hours (national appellate court judgment mentioned above) or work overtime (national appellate court judgment dated March 31, 2021); for record keeping based on self-reporting by workers to be allowed (national appellate court judgment dated December 2, 2020); and for it is valid to allow a half-hour "correcting factor" for

uninterrupted working days or two hours for split working days in the measured time, to cover break periods or periods of no actual work (supreme court judgment dated April 5, 2022).

It has been rejected in the case law that the hours reported on timekeeping systems activated by the workers themselves always have to be considered overtime, where remote working is involved (Galicia high court judgment dated March 8, 2022, delivered by the La Coruña court). However, an employer's authorization given after additional hours of work reported as such were worked has been held unlawful, and workers have been required to be identified on records produced to the workers' representatives (national appellate court judgment dated April 19, 2022).

There are no simplistic answers to (increasingly) complex scenarios. The legislature should not try to legislate with principles that are also uniform because not even the specific characteristics contemplated in the law itself have been implemented, which are very diverse scenarios and in many of these a conventional "clocking in and clocking out" (or start and end time) record keeping system makes no sense. And where collective bargaining has attempted to provide detailed rules it also has given rise to complex legislation with overly elaborate procedures and excessive red tape. Look no further than the banking collective labor agreement or the working time record keeping agreement at a bank which are dealt with in the national appellate court judgment mentioned above, dated April 19, 2022.

This same approach, after the necessary adjustments and additions, may be adopted in relation to the "right to disconnect". If we examine article 88 of Organic Law 3/2018 of December 5, 2018, the right to disconnect it proclaims cannot be more vague: that right is affirmed "in order to safeguard, outside the working hours established by law or collective bargaining, respect for employees' breaks, leave and holidays, as well as their personal and family privacy". Writing a right into law and determining how it is applied are two very different things however and so in relation to how this right is to be exercised the legislature defers first to collective bargaining (or to an agreement with the workers' representatives) (article 88.2 LO 3/2018), and then to a decision by the employer, after hearing the workers' representatives (article 88.3). Leaving aside this contradiction, no further progress has been made either in relation to the specific arrangements. It is only mentioned that the right to reconciliation of work and private and family life has to be reinforced and in particular the right to disconnect has to be preserved "in cases where all or part of the employee's work is performed remotely or from the employee's home in relation to the use of technological tools for work purposes".

Moving to collective bargaining, a good example is the agreement on remote working and other flexibility mechanisms at Telefónica Servicios Audiovisuales SAU, published by Decision dated April 22, 2002 of the DGT in the Official State Gazette on May 12, 2022. In the fourth paragraph of point 2.10, it simply reproduces the legal mechanism, with no further additions than a reference to the company's internal regulations and any agreements that may have been achieved. And paragraph 6 of point 2.16 once again reproduces the legal mechanism, adding that the right is "without prejudice to any exceptional scenarios set out in the applicable legislation".

Neither the forms of exercising the right to disconnect nor the terms on which it has to be exercised are inferable from either the law or the agreement. And this shows, even more clearly than in relation to working time record keeping, the limits within which the law (and collective bargaining) is able to act. It is illusive to seek to provide detailed rules on such complex and diverse issues. We have to be aware of the limits of the law. It should probably be enough to make a general proclamation of the type contained in Organic Law, and to rely on the workings of employment relationships along with the individual and especially the collective counterweights operating in them. That general proclamation can serve as an interpretation principle when confronted with the types of disputes that may arise over that right to disconnect and are impossible to foresee in detail.

2. Working time monitoring. An overview of relevant legislation

Companies have had to keep working time records since 2019

Royal Decree-Law 8/2019 introduced the obligation to keep records of workers' working hours and retain those records for four years, as we informed in our alert dated March 12, 2019.

The rules require companies to ensure that records of daily working hours are kept, indicating the specific start and end times of each employee's working day, without prejudice to flexible working hours.

How working time records are organized and documented must be agreed in collective bargaining or specified via a company agreement. In the absence of either, the employer may decide following consultation with the workers' legal representatives.

Two months later, the technical standard for labor inspectors on working time record keeping was published. The requirements for working time record keeping and how it must be established continues be the subject of debate among analysts and there are unsettled issues.

3. A few recent judgments on working time monitoring

An agreement on working time record keeping which included a correction factor of 2 hours a day is valid

The supreme court judgment dated April 5, 2022 held to be valid an agreement on working time record keeping which included a general correction factor of two hours a day. The agreement in question included this correction factor of two hours a day (and of 30 minutes a day for uninterrupted working hours), covering, for example, rest breaks, a lunch break, unpaid leave or any type of break or rest time. It also included a provision whereby workers could not work overtime, although they would be compensated for any excess hours worked after applying the correction factor, with time off, on which contributions would be paid as if the hours were overtime.

The Supreme Court confirmed the National Appellate Court's decision and stated that the agreement does not contain any irregular terms, does not alter any timetable arrangement or modify the collective labor agreement and does not entail a loss for the workers.

Record keeping of actual time worked cannot be made subject to authorization by a superior

Examining the working time record keeping system implemented by a company, the Supreme Court has determined in its judgment dated April 19, 2022 that it is not credible to make the timekeeping system conditional on authorization by the company of work over and above the normal working hours.

The court noted that although overtime must be covenanted as has been specified in other judgments, and authorization may be required for working overtime, the company cannot reserve the power to authorize the recording of hours already worked by the worker, because this determines a lack of reliability of the time recording system. It held therefore that the superior's authorization after the event to ensure that the self-reported time matches the time appearing on the recording system as actual work should be removed.

National Appellate Court determines validity of working time record keeping linked to application used to contact users in contact center industry

The national appellate court judgment dated February 9, 2022 examined a case in which the recording system is linked to the application contact center workers use to contact users. Accordingly, recording starts when workers enter their passwords and stops when workers log out of the system.

The records cannot be modified, although supervisors can add remarks with periods of time that do not have to be counted for the purposes of keeping working time records. The National Appellate Court concluded in relation to this that the system is valid and reliable for keeping working time records and fulfills the requirements in the law.

End of working day cannot be determined by employer by setting an estimated time

The national appellate court judgment dated February 15, 2022 regarding a case in which workers sign to confirm their start time on a "taking up service" document and their finishing time ("leaving service") is determined by the employer by setting estimated times. The judgment concluded that the working time record keeping system does not log the start and end times of working days.

It held that including estimated (rather then actual) times is not a genuine record of the end of the working day. Additionally, although the National Appellate Court recognized that there is no legal obligation to do so, the judgment notes that "timekeeping logic" requires the use of computer software for working time record keeping.

Connection failures that stop employees working remotely during working hours are measured as actual working time

The national appellate court judgment dated May 10, 2021 determined that workers are entitled to have any connection failures that stop them working, such as power or internet outages, which occur during remote working, count as time actually worked.

The judgment arrived at that conclusion primarily for three reasons: (i) employees working at the workplace were not required to recover working time; (ii) under the principle that workers are not responsible for the media and tools used in their work, if the cause is not attributable to the worker it has to be attributed to the employer; and (iii) a power cut does not relieve the employer of its obligation to provide work to the worker, and moreover, the employer is able to pass on salary costs to the party responsible for the power supply..

4. Right to disconnect. An overview of relevant legislation

2018 Data Protection Organic Law enshrined right to disconnect in labor and employment law

The Data Protection Organic Law wrote a number of elements into law for the first time including the right to privacy in the use of digital devices, the right to disconnect, the use of video surveillance, the recording of sounds or geolocation, as we discussed in our alert dated December 2018.

More than three and a half years after the law entered into force, elements related to the right to disconnect and data protection in the workplace are still on the agenda.

The law recognized the right to disconnect for employees. This right seeks to ensure that employees' breaks, leave and vacation are respected, as well as their personal and family privacy:

- This right must be governed by the terms determined by collective bargaining, or in their absence, by the terms agreed between the company and the workers' statutory representatives, in view of the nature and subject-matter of the employment relationship.

- The right to disconnect must be set out in an internal policy prepared after hearing the workers' representatives. The policy must define the ways in which the right to disconnect may be exercised, along with initiatives for training and raising awareness over making reasonable use of IT tools. In particular, the rights to disconnect of employees working remotely must be preserved.

Digital Rights Charter recognizes right to disconnect

On July 14 the Government presented the Digital Rights Charter, which is not of a legislative nature, but seeks to acknowledge the challenges in relation to application and interpretation posed by the adaptation of the rights to digital environment, and to suggest principles and policies relating to them in that context.

One of the elements that the Charter treats in depth is the right to disconnect, which had already been introduced into labor and employment law via the Data Protection Organic Law.

For further details, see our alert published on July 15, 2021.

Remote Work Law regulates right to disconnect and monitoring of working hours of remote workers

Law 10/2021 on remote work ensures the right to disconnect for workers performing their work remotely, together with the working time record keeping obligation for remote work, as we analyzed in this alert.

In relation to the right to disconnect, the law states that, outside their working hours, workers, particularly those working remotely, have the right to disconnect. Additionally, the company's duty to ensure the right to disconnect involves a limit on the use of communications technology during rest periods, as well as respect for the maximum length of working hours and whatever limits and precautions on working hours are provided for in the applicable statutory or collective bargaining rules. The company, after hearing the workers' legal representatives, has to prepare an internal policy defining how the right to disconnect may be exercised.

Collective agreements or contracts may set out the appropriate means and measures for ensuring that the right to disconnect is exercised effectively in remote work and the appropriate organization of daily working hours so as to make them compatible with ensuring rest times.

The mandatory record keeping system must faithfully reflect remote working time, without prejudice to flexible working hours, and will have to include the start and end of the working day, all of which must be in accordance with collective bargaining terms.

Portuguese law on remote work governs the right to disconnect in the country

Law no 83/2021, of December 6, 2021, amending the remote work rules and creating the right of workers to disconnect, has been in force since January 1, 2022.

Employers have an obligation not to contact their workers, regardless of where they perform their work, during rest periods, except in force majeure events. Non-fulfillment is subject to a penalty for an administrative infringement. The alert prepared by our colleagues in Portugal summarizes the key components of the law.

European Parliament issues resolution with recommendations to the Commission on the right to disconnect

The European Parliament published a resolution on January 21, 2021 calling on the Commission and on member states to ensure protection of the right to disconnect. To achieve this, the European Parliament requests that the Commission submit a proposal for a directive on the minimum standards and conditions to ensure that workers are able to exercise effectively their right to disconnect and to regulate the use of digital tools for work purposes.

5. A few recent judgments on the right to disconnect

Not replying to an email during a vacation period is not cause for dismissal on disciplinary grounds

In a judgment dated February 21, 2022, Madrid High Court found that an email sent to a worker during a vacation period did not have to be answered, and also that the sending of emails during a worker's vacation period is not compatible with that worker's right to disconnect.

In this judgment the court analyzed the dismissal on disciplinary grounds of a worker accused of breaches including not dealing with a number of emails sent by the company. After examining the various emails, the court found in the judgment that there had not been a serious and culpable breach on the part of the worker and noted that an email sent during a worker's vacation did not have to be answered.

The right to disconnect is not breached by using WhatsApp if it is a habitual communication medium in the employment relationship

In the judgment delivered by the Asturias High Court on March 29, 2022, the court examined a case in which the company communicated with the worker via the WhatsApp instant messaging app, as it had done on earlier occasions.

The worker considered that his rights had been breached, explaining that the sending of communications outside his working hours to his personal phone amounted to a breach of his right to privacy, of his data protection rights and of his right to disconnect.

Confirming the lower court's judgment, the court held that WhatsApp was the habitual communication medium used by both worker and employer to deal with work-related matters, and therefore the worker's right to disconnect had not been breached by using the application in the examined case. Additionally, the court took into account that the worker had not previously expressed refusal or objection in relation to using this communication medium.

Online training outside working hours is working time and therefore does not breach right to disconnect

The judgment dated November 4, 2020 delivered by Madrid High Court examines the penalty imposed on an air controller who refused to complete a mandatory course outside his normal working hours.

The court noted that an employer cannot impose an obligation to connect remotely outside the workplace and in rest time, because that right to disconnect is an unquestionable minimum protected by statutory and constitutional law. The judgment found in particular that the right to disconnect includes the right to switch off all devices or communications media, to stop receiving communications during periods of rest.

The right to disconnect is not affected, however (nor therefore the right to personal and family privacy) by the fact of the employer ordering the performance of actual and paid work by the employee outside normal working hours, because we are no longer dealing with rest time, because it is working time.

Therefore, in the examined case the right to disconnect was not breached, insofar as hours spent on the online training were considered hours of actual work and therefore did not involve a breach of the right to disconnect.

National Appellate Court declares that limits on right to disconnect cannot be imposed unilaterally by the employer

The National Appellate Court, in a judgment dated March 22, 2022, examined the remote work agreement signed by the workers and rendered a few of its clauses null and void in view of the legislation in force.

In the examined case, the employer had included in the agreement references to the existence of emergency events which justify the use of workers' digital devices in rest time. The National Appellate Court recalled in relation to this that the right to disconnect entails a limit on the use of technology during rest time and, although no right is absolute in nature, the limits to that right must be subject to the terms determined by collective bargaining.

It determined in short that the limits cannot be set unilaterally by the employer and held the clause on the right to disconnect null and void.

More information:

Labor and Employment Department

Follow us:

GARRIGUES

Hermosilla, 3
28001 Madrid España
T +34 91 514 52 00 - **F** +34 91 399 24 08

garrigues.com