Newsletter

Labor and Employment Law

Spain

GARRIGUES

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Index

1. Contractors/subcontractors and collective bargaining following the labor reform

Federico Durán López

Despite the created expectations, any changes to subcontracting introduced by the recent labor reform have been minimal. When it comes to the collective labor agreements to apply to employees of contractors or subcontractors, precedence must be interpreted as exactly that because there is neither an unconditional obligation for contractors to apply the industry collective agreement for their activity nor are company collective agreements always subject to industry collective agreements in relation to setting pay terms.

One of the subjects that sparked the greatest interest in the recent labor form, apart from the rules on types of contract, was how the rules on contractors and subcontractors would be defined, especially regarding the applicable collective labor agreement at those companies. Contrary to the expectations that had been built, and contrary also to a few opinions that had already been expressed, any changes in this respect have been minimal. In subarticles 1 through 5, 7 and 8 of article 42 of the Workers' Statute, there are actually no further changes than the substitution of "empresa", i.e. "company", for "empresario", i.e. employer, and "workers" becoming "working persons". The new addition to the law is the inclusion of subarticle 6 on collective bargaining. Therefore, the options for contracting out activities or services, which are protected by free enterprise, remain the same as they were under the previous legislation. There is no restriction on these practices, contrary to the announcements heard in the early stages of the reform process.

Subarticle 6 now tells us that "the applicable collective labor agreement for contractors and subcontractors shall be that for the industry of the activity conducted at the contractor or subcontractor, regardless of their corporate purpose or legal form", although this is "unless another applicable industry collective labor agreement exists, as determined in title III".

A first conclusion to be drawn is that the collective labor agreement applicable to contractors will be that relating to the activity conducted at each contractor, not that relating to the principal company's activity. The principle that the collective labor agreement applicable to the company is the one that includes the activities conducted by the company in its functional scope remains unaltered. The lawmakers have not accepted the arguments put forward during the negotiation process for the reform that contractors should have to apply the industry collective labor agreement for the principal company, not to mention its company specific agreement. And it is important to underline that the exception where, under title III, another industry agreement is applicable, does not invalidate that conclusion. It is impossible to see how any industry collective labor agreement, other than that relating to the activity conducted by the contractor, may be applicable under title III. And there is no way that the exception could be interpreted to mean that an industry collective labor agreement may provide that it is applicable to any contractors providing services to the companies included in the scope of application of the agreement, whatever their activity and even if they do not fall within their functional scope. Clauses of this type, of which there have been examples in Spanish collective bargaining processes, are, in my opinion, clearly illegal: a company not falling within its scope of application cannot be expected to be bound by a collective labor agreement. And the definition of its scope cannot be arbitrary or fall outside the representative authority held by the bargaining parties. It is a different matter where the industry collective labor agreement contains the obligation, for the companies falling within its scope, to require the observance of certain working conditions by the companies to which they contract or subcontract out any activities or services. Although this would an obligation for the principal companies not for the contractors or subcontractors. The exception, therefore, may only be raised in events where, due to the nature or characteristics of the contractor, a specific "multifunctional" industry collective labor agreement, so to speak, is applicable which may happen with special employment centers or temporary employment companies.

However, if the company has its own collective labor agreement, “it shall be applied, as determined in article 84”. There has not therefore been any alteration to the rules on determining the applicable collective labor agreement as contained in title III. It is not being said that contractors have to apply the industry agreement for their activities, instead that, if an industry agreement is applicable, under the rules in that title III, this will be the agreement for the activity conducted by the contractor. Although if the company has its own collective labor agreement, the rules in article 84 of the Workers’ Statute apply.

What are these rules? Bear in mind especially that the law refers to article 84, not to subarticle 84.2. Therefore, the rule in subarticle 84.1 applies first and foremost, which sets out the principle of the “sovereignty” of every collective labor agreement, without any type of hierarchy existing among them (aside from the options of coordinating bargaining scopes under article 83.2 of the Workers’ Statute), and their scope of application depends on what “the parties agree” (article 83.1 of the Workers’ Statute). This principle leads to application, as determined by the courts, of the prior in tempore rule whereby there may be a company agreement that takes precedence over any industry agreement that potentially includes the company in its scope. In this case, the company agreement is fully applicable and is not subject to the provisions in the industry agreement. If the company agreement benefits from this right to take precedence as a result of being signed at an earlier date (or as a result of a change of bargaining unit occurring after the term of the industry collective labor agreement has expired; judgment by the Supreme Court, Labor Chamber, of October 5, 2021, appeal 4815/2018), it is not conditioned, in any respect, by the provisions in the industry collective agreement.

It is when no company agreement that takes precedence exists, and only then, that we have the event in article 84.2, which defines, as an exception to the untouchability of collective labor agreements during their term, the possibility that the rules in a company collective labor agreement coexisting with another industry agreement may take precedence over the industry agreement in relation to a number of matters, from which pay has now been excluded. The previously existing rules have not therefore been altered in any substantive way. The new provisions have simply excluded, through the new wording of subarticle 84.2, the ability of a company collective labor agreement coexisting with another industry agreement negotiated while it was in force to take precedence over that industry agreement in relation to determining base salary and pay supplement amounts.

This has not been properly understood in a few commentaries on the reform, which have argued that company agreements are always subject to the pay rules in industry agreements, and that, in relation to contractors, the industry collective agreement for the contractor's activity must apply, without any further options for the company than using the provision in article 84.2 of the Workers’ Statute. To the contrary, applying the rules contained in article 42.6 and article 84 of the Workers’ Statute leads us to the following conclusions:

- If a company (contractor) has its own collective labor agreement which takes precedence, that agreement will apply fully, and not be subject, in relation to any point, to the rules in any industry agreement potentially applicable to the company.

- If the company (contractor) does not have its own collective labor agreement, the industry agreement that includes the company's activity in its functional scope will apply.

- If the company (contractor) is subject to the industry collective labor agreement, it will be able to negotiate its own collective labor agreement which, as an exception to the rule in 84.1, may affect the industry collective agreement, by taking precedence over that agreement as regards the rules on the matters mentioned in article 84.2 (which contains that exception), and now, after the reform, determining base salary and pay supplements have been excluded from those matters.

The rules, therefore, continue to be fundamentally the same. The structure of collective bargaining as enshrined in title III of the Workers' Statute has not been altered, and therefore, there is no unconditional obligation for contractors to apply the industry agreement for their activity nor are company collective labor agreements subject in every case to industry agreements in relation to determining pay.

2. News

Social security contributions order for 2022 has been published

Order PCM/244/2022, of March 30, 2022, implementing the statutory provisions on social security, unemployment, business income protection, wage guarantee fund and occupational training contributions for 2022 has been published, with backdated effects to January 1, 2022. The order determines the maximum and minimum contribution bases and rates starting on January 1, 2022.

The maximum contribution base has been set at €4,139.40, whereas the lowest amount is €1,166.70, as we reported in this alert.

Government approves layoff limits, labor measures for specific sectors and increase in guaranteed minimum income

Royal Decree Law 6/2022, of March 29, 2020, adopting urgent measures under the National Plan in response to the economic and social consequences of the war in Ukraine, published in the Official State Gazette on March 30, has introduced a number of labor and social security measures which came into effect on March 31, 2022.

The royal decree has introduced limits on layoffs for companies benefiting from the support granted under the new legislation, and precluded the increase in energy costs from being used as an objective ground for dismissal until June 30, 2022. This same limit applies to any companies adopting the measures consisting of reduced working hours or suspended contracts under article 47 of the Workers' Statute on grounds related to the invasion of Ukraine.

For further details see our alert.

Legislation adopted on procedure applicable to RED Mechanism for Employment Stability and Flexibility

Royal Decree 4/20222 of March, 2022 adopting urgent measures to support the agricultural sector as a result of the drought, provides for the creation of the RED Fund for Employment Stability and Flexibility contemplated in article 47 bis.6 of the Workers' Statute which is aimed at meeting future funding needs arising from the RED Mechanism in respect of social security benefits and exemptions, including the costs associated with training.

It also sets out rules on temporary coverage of the RED Fund's financing and defines the procedure applicable to the RED mechanism, which will allow companies to apply for measures consisting of reduced working hours and suspension of employment contracts. These were described in this alert.

Job evaluation tool published for fulfillment of equality obligations

The job evaluation tool has been published on the Ministry of Labor and Social Economy's website, which can be used to assist with fulfilling pay equality obligations. It is a voluntary model which may be used to complete the pay audit as an integral part of the status diagnosis for the equality plan and for creating the pay register, as we reported in this alert.

Directive on work-life balance for parents and carers will have to be transposed in August 2022

Directive (EU) 2019/1158 on work-life balance for parents and carers dated June 20, 2019 states that it must be transposed by August 2, 2022 at the latest.

The directive provides for the right to four months' paternity leave and parental leave to be taken before the child reaches up to the age of eight, something that each member state must specify. The directive also includes carers' leave equal to five working days a year per worker and requires member states to adopt the necessary measures to ensure flexible working arrangements, as well as the right to time off from work on grounds of force majeure for urgent family reasons in the case of illness or accident making the immediate attendance of the worker indispensable.

Negotiations on the Intern's Statute begin

Implementing the provisions in the labor reform, two negotiating panels have been set up to tackle the negotiation or bargaining process for the Intern's Statute.

The Intern's Statute will define the content of training activities, students' rights during those activities, along with their social security rights, and other elements. The aim of the legislation is to ensure that interns carry out activities at companies as part of their training process, and that it is presumed that an employment relationship exists where their activities fully or partially match those of employees, and otherwise wherever the activities carried out by the trainee do not fall within the range of work experience arrangements defined in the law.

Spanish public employment service's contract forms modified following the labor reform

The Spanish public employment service (SEPE) has published an information notice on the adaptations made to its contract forms as a result of the labor reform. In relation to temporary contracts, codes 401/501 for contracts for specific project work or services have been removed, and new forms have been added for employability enhancement and labor market integration contracts with codes 405/505.

Forms have also been introduced for fixed-term employment contracts linked to programs financed out of European funds (codes 406/506), for contracts by universities for teaching and research employees (codes 409/509) and for contracts for performers in public performances (codes 407/507). Lastly, new forms will be used for the new training contracts under article 11 of the Workers' Statute.

Government proposes including leave for painful and incapacitating menstrual periods

The Spanish council of ministers has approved a bill reforming Organic Law 2/2010, which includes the right to leave for medical symptoms caused by incapacitating menstrual periods.

It proposes that, on producing a doctor's report, workers should be allowed to stay at home for a few hours in their working day or for a few days if the pain prevents them from working. Social security would cover the worker's pay for their sick leave, which would be paid right from the first day.

Other labor and employment matters on the table: a Workers' Statute for the twenty-first century and the possibility of co-management of companies

The Labor Minister, Yolanda Díaz, has announced that a committee of experts will be set up to draw up a "major reform of Spanish labor and employment law", by creating the "Statute for the twenty-first century". She has also proposed a debate on the possibility of implementing mechanisms for greater participation by workers' representatives and co-management of companies as is happening in other countries (most especially in Germany).

3. Judgements

Supreme Court determines interpretation methods on application of the minimum wage

The Supreme Court has delivered two judgments setting out its view on interpretation of the salary that must be compared against the new minimum wage. Namely, its judgment of January 26, 2022 states that the amount received in respect of a length of service supplement is part of the salary that must be compared against the minimum wage. And its judgment of March 29, 2022 determines that the rule described above applies to all pay supplements.

A substitute representative on the list who becomes representative is entitled to choose reinstatement if dismissal is held unjustified

In a judgment on March 15, 2022, the Supreme Court determined that workers' representative status is automatically acquired after the previous representative has resigned and takes effect against third parties even if the company is unaware of this fact.

Therefore, in the case decided by the court, it was recognized that the worker who was substitute on the list was entitled to choose reinstatement insofar as her dismissal was held unjustified and occurred after she had become representative.

Supreme Court allows video surveillance camera recordings to be used as evidence

A Supreme Court judgment on March 30, 2022 examined whether proof consisting of video surveillance recordings produced by the company to support the worker's dismissal on disciplinary grounds should be allowed as evidence. After the dismissal had been held null and void at lower instances, the Chamber held that evidence consisting of the reproduction of video surveillance camera recordings was a justified, suitable, necessary and proportionate measure against the sought aim, and therefore fulfills the proportionality requirements. The claimant was not notified that he was being captured on video while he was at work or of the use of those images for disciplinary purposes. However, the video surveillance was continuous, random checks were made, and the

workers' representatives had been informed of the use of cameras to prevent a problem relating to products inexplicably going missing at the establishment.

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

The supreme court judgment on April 5, 2022 held to be valid an agreement on recording working time which included a general correction factor of two hours per day. The agreement in question included this correction factor of two hours per day (and of 30 minutes per day for uninterrupted working hours), relating, for example, to rest periods, lunch breaks, unpaid leave or any type of break or rest period. 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.

Monetary claim dismissed for overtime only reported by the worker while working remotely

In the case examined in a judgment on March 8, 2022, the Galicia High Court determined whether the worker had worked overtime remotely and whether her overtime work could be substantiated. The Chamber held that her overtime hours had not been substantiated because time was recorded using a system that was turned on and off by the worker, and her overtime hours strangely appeared only when she was working remotely, not when she was working in-person at the workplace. The worker did not produce any proof either that the company required her to be at home outside her timetable to perform her tasks.

Severance amount does not have to be included in letter of dismissal on objective grounds sent to the worker

The Supreme Court reiterated its principle, by recalling that it is not mandatory to specify the exact amount of severance for dismissal on objective grounds. Namely, in a judgment on March 9, 2022, it recalled that the formalities associated with notification of a dismissal on objective grounds are: (i) written notification expressing the ground for dismissal; (ii) notice period; and (iii) making available the statutory severance.

However, the court said, this does not imply an obligation to expressly state the amount made available in respect of statutory severance, especially if we bear mind that it is done simultaneously with delivery of the dismissal letter.

A collective layoff on structural grounds linked to COVID-19 is lawful

The Supreme Court has given its view on application of what is known as the "dismissal ban" under article 2 of Royal Decree-Law 9/2020 to determine that, if the ground for the dismissal is of a structural nature, even if linked to COVID-19, the company can use a dismissal on objective grounds.

In particular, its judgment on April 20, 2022 determines that the company has to substantiate that the reasons underlying the decision to terminate the contract are structural not temporary, which means that a temporary suspension of contracts is not an adequate mechanism for mitigating the effects of the situation. If those arguments are substantiated, the collective layoff is lawful, and the provisions in article 2 of RDL 9/2020 do not apply.

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

Examining the time recording system implemented by a company, the Supreme Court has determined in its judgment on April 19, 2022 that it is not credible to make the time recording 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 found in other judgments, and authorization may be required for working overtime, the company cannot reserve the power to authorize the recording of hours 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.

4. Garrigues Sustainable - Labor and Employment

Environmental obligations of companies in the workplace and lack of regulation in Spain: the current challenge

Spanish law cannot be left out of the progress we are witnessing in environmental matters at both an EU and international level. Given the situation, businesses need to be ready to face the challenges set by Europe and how this will affect their production processes, paying special attention to the supervisory role that workers' statutory representatives will be acknowledged to have.

5. Articles from the Labor and Employment Law Blog

Work related accidents during a coffee break: the fine red line between effective working time and personal activities

A recent judgment by the Italian Supreme Court considered that accidents during rest periods should not be considered as work-related accidents. In Spain, several judgments have dealt with the issue on a case-by-case basis.

Am I entitled to occupy my desk? The courts rule on "hot desks"

The National Court has upheld the decision by a company to reorganize its workstations, occupying space according to availability. It considered that this does not constitute a material modification of working conditions.

How telework is affecting occupational health

April 28 marks the celebration of World Day for Safety and Health at Work, proclaimed by the International Labor Organization (ILO). The celebration consists of an international campaign aimed at promoting safe, healthy and decent work. It also honors the victims of occupational accidents and diseases. Currently, one of the topics raising the most concern is the impact of telework on occupational health.

From telework to the metaverse: a challenge for regulating employment relationships

The “metaverse” has probably been one of the most repeated terms in the first quarter of 2022 and is also certainly one of the topics least understood by the majority of the public. The possibilities offered by this form of virtual reality are perhaps infinite, but it is worth asking whether it might also give rise to a paradigm shift in the way work is traditionally organized, and even in more contemporary arrangements such as telework.

Members of the Health and Safety Committee are not granted additional guarantees when they act on behalf of the Company

The Supreme Court has clarified that members of the health and safety committee acting on behalf of the company do not have the same guarantees as members of the Works Council, given that the performance of their functions is not conditioned by the fear of retaliation.

Does unfair competition constitute grounds for disciplinary dismissal?

The employer may opt for disciplinary dismissal in cases in which the employee commits unfair competition. To do so, as stated by the Supreme Court in its judgment of December 21, 2021 (Rec. 1090/2019), it is essential to accredit that the company proceeded with dismissal as soon as it became aware of the employee’s conduct.

Workers with Covid-19: is the termination of a contract during the trial period null and void?

One of the main features of a trial period is that, while it lasts, both parties can terminate the employment contract without having to allege any grounds whatsoever. However, the termination of a contract during the trial period when the worker has or may have COVID-19 is giving rise to very different judgments.

6. Garrigues Labor and Employment in the press

Can the calculation of variable retribution be modified at the Company's whim?

Article by Misericòrdia Borràs, partner of the Labor and Employment Departament at Garrigues (Diari de Tarragona).

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