Newsletter Labor and Employment Law

GARRIGUES

Spain

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Index

1. Employment contracts following the reform

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Now the labor reform is fully operative, its effects on employment and on employment contracts are starting to be delineated quite clearly. Looking beyond the objectives announced by the lawmakers and the aims sought by proponents of the change to the legislation, the behavior of the labor market allows us to identify the trends that will predictably take shape while the legal framework introduced by Royal Decree-Law 32/2021 is in effect.

The effects on employment, firstly, do not appear to have been significant. The behavior of the data for employment, hires and social security payers has continued to depend on the economic cycle and the behavior of economic activity. The change to the legislation has not had any noticeably significant influence, to date. It should not be forgotten that the Spanish unemployment figure for July, according to Eurostat data, was at 12.6%, almost doubling the European average (6.6%). This, combined with the slowdown in the numbers being registered for social security payments and after considering the statistical change caused by the replacement of temporary contracts with permanent contracts for intermittent work, which I discuss below, that the labor market figures have to be assessed cautiously.

More significant changes have been arising, however, in relation to employment contracts. Due to the stated aim of the reform being to reduce temporary employment and the resulting replacement of temporary jobs with permanent jobs, the change to the legislation focuses on strengthening the grounds needed for temporary contracts, on limiting their duration and on strengthening the prohibition of back-to-back fixed-term contracts. This makes the rules on temporary contracts much less flexible than in our neighboring countries. The limit on the duration of temporary contracts (6 months, renewable for up to 12) is stricter than the requirements normally found in a comparison of legal systems (12 / 24), the requirement for grounds is less flexible (oddly the contract for launching a new activity which has become established in other countries' laws continues to be absent in Spanish law) and the rules on back-to-back contracts are less flexible. If we add to this the non-existence within our borders of any law limiting application of the dismissal legislation to cases where the employment contract been in effect for longer than a given length of time (six months in Germany, two years in Great Britain), we may conclude that, as we have mentioned, when it comes to companies' options for temporary contracts, Spanish law provides less flexibility, as a general rule, than the laws of our neighboring countries (which, paradoxically, is no guarantee of lower temporary employment. To the contrary, this figure is lower for countries that are more accepting of temporary contracts).

The consequences of this on employment contracts have not been long in coming. From one angle, the trial period has resurged as a tool for guaranteeing the temporary nature of employment contracts over the first few months after they are signed. The option of covenanting a six month trial period for qualified technical staff and a two month period for other employees (three, at companies with fewer than 25 workers), provides, in actual fact, a very flexible initial temporary relationship (despite the restrictions on termination of contract in a trial period that arise in the case law at times). There continues to be protection against termination of contract without cause during the trial period (although, subject to the requirement that an unlawful ground cannot exist), and there is no severance cost, which is not the case if a temporary contract is signed. Although voices have been raised alerting against using the trial period in this way, this aim of ensuring an initial temporary relationship has to be considered as part of its nature. It should not be forgotten that, in Germany, for example, the existence of a trial period is expressly stipulated as one of the grounds for temporary contracts.

Moreover, and doubtless much more importantly, a flurry of replacements of temporary contracts with permanent contracts for intermittent work has started. The permanent contract for intermittent work is, in my opinion, the centerpiece of this reform as far as employment contracts are concerned. It is the element of flexibility that companies have at their disposal for organizing their employment contracts under very inflexible rules on temporary contracts. The permanent contract for intermittent work avoids the limits imposed on temporary contracts and on back-to-back contracts; ensures the availability of labor in the company's periods of high activity levels, and eliminates employee costs in periods of inactivity without needing to resort to other mechanisms for suspending or terminating contracts, which are more costly procedurally and financially; avoids the legal uncertainty caused by the need to evidence the grounds for temporary contracts; and casts off interpretation discrepancies and penalty proceedings which, in view of the existence of a punishable infringement for every worker hired temporarily with a breach of the requirements, and the stipulated penalty amounts, may be very serious, and even affect the continuity of the business. And all of this has no further cost than increasing the future severance payment, in the event of termination of the contract, from twenty days instead of the twelve days associated with temporary contracts. At the same time, it offers workers a stable relationship with their employers and may even guarantee, if they covenant this with their employers, a minimum period of activity for them.

Implementing adequate provisions on permanent contracts for intermittent work in collective labor agreements, by adapting them to the particular characteristics of the industry, or of the company even, may also make them more attractive to employers and provide greater certainty to workers. The broad range of options for provisions in collective labor agreements (including by agreement with the employer) on all matters relating to being called to work in periods of high activity levels, places the specifics of the legal rules on this contract in the hands of employer and employee representatives. And the statutory rules on permanent contracts for intermittent work entered into for subcontracting arrangements or administrative concessions also provide ample scope for industry-wide collective bargaining. The technical legislative defects in this respect (it makes no sense to say that collective agreements may set a maximum length for periods of inactivity between subcontracting arrangements, and then say that in the absence of any provision in the applicable collective labor agreement that period will be three months. This only makes sense if it were said that collective labor agreements must determine a maximum length. If it were optional to determine a maximum length it is not logical to require a maximum length in the absence of any provision in the applicable collective labor agreement) allow industry-wide collective labor agreements to explore more reasonable regulations.

In that respect, for example, the Agreement to amend the VI general collective labor agreement for the construction industry (published by Decision dated July 23, 2022, in the Official State Gazette on August 5, 2022) provides an extremely useful guideline: "the maximum period of inactivity shall match the time period in which it will not be necessary for the worker to provide services because the employer's activity does not require them or because there is no need to increase the workforce, in the province where the employer signed the employment contract". This, combined with the other regulations on the contractual mechanism in article 25 of the collective labor agreement, provides an example of the options it offers to employers and of the greater protection to be enjoyed by workers.

If events continue on this course, and incentives are given to other devices, such as the industry-wide job vacancy services stipulated in the law, the permanent contract for intermittent work may take shape as a core contractual mechanism, as we have said, in our system of employment relationships. And the reduction in temporary employment that it involves is a real reduction and not, as has been said in a few unfounded criticisms, purely formal or statistical.

2. News

Government proposes a minimum wage increase amounting to 60% of Spanish average wage

The Ministry of Labor has called upon a committee of experts to determine the exact amount of the minimum wage increase, although the commitment it has made is that it will amount to 60% of the Spanish average wage.

The decision is expected to be adopted in November 2022, which is the month when the year's average inflation figure will be published, and it is predicted that the monthly minimum wage could amount to €1,078, gross, in 14 payments.

Government approves package of measures for energy saving, energy efficiency and reducing natural gas dependency

The Official State Gazette has published Royal Decree-Law 14/2022 of August 1, 2022 on economic sustainability in the field of transport, in relation to grants and support for studies, and on measures for energy saving, energy efficiency and for reducing dependency on natural gas. As we reported in this alert, the law introduces obligations relating to air-conditioning in public and private buildings, and raises questions as to how it applies in the workplace.

Organic Law 10/2022 on the comprehensive guarantee of sexual freedom introduces rights and obligations in the labor law field

On September 7, 2022 the Official State Gazette (BOE) published Organic Law 10/2022 of September 6, 2022 on the comprehensive guarantee of sexual freedom which regulates the duties of prevention and awareness-raising in the workplace and places victims of sexual violence on an equal footing with victims of gender violence or terrorism, as we reported in this alert.

The law establishes the obligation on employers to promote working conditions that prevent the commission of offenses and other types of conduct against sexual freedom and moral integrity in the workplace, with a special emphasis on sexual harassment and harassment based on sex.

New contribution system based on earnings from self-employment approved and Government considers raising social security maximum contribution base

In this alert we announced the publication of Royal Decree-Law 13/2022 of July 26, 2022, establishing a new contribution system for self-employed workers or independent contractors and enhancing protection for enforced inactivity.

The new royal decree-law amends the contribution system under the Special Social Security Regime for Self-Employed Workers or Independent Contractors which will be based on the self-employed individual's annual income instead of a simple election of contribution bases.

The Government is further considering a gradual increase in the maximum contribution base under the General Regime, which will also involve adapting the maximum pension.

Although the Government originally considered the option of removing the maximum limit it was ultimately decided as part of the Toledo Accord the increase of the maximum contribution base to be phased in gradually. The social security maximum monthly contribution base currently stands at €4,139.40.

Law encouraging occupational pension plans published

On July 1, 2022, the Official State Gazette published Law 12/2022 of June 30, 2022 to encourage occupational pension plans, which amends the revised Pension Plans and Pension Funds Law, approved by Legislative Royal Decree 1/2002 of November 29, 2002. The published law includes rules on the new open public occupational pension funds and introduces a new "simplified" occupational pension plan, as we reported in this alert.

New comprehensive law for equal treatment and non-discrimination also applies in the employment context

In this alert, we reported the publication of Law 15/2022 of July 12, 2022, the comprehensive law for equal treatment and non-discrimination, which is aimed at ensuring and promoting the right to equal treatment and non-discrimination and respecting the equal dignity of people.

The law applies to equality and non-discrimination in access to employment, working conditions, including pay and dismissal conditions, career advancement and occupational training. Illness cannot be a reason for differences in treatment unless they arise from the treatment process for the illness, from the objective limitations it imposes for performing certain activities or from reasons related to public health.

Measures laid down for monitoring animal welfare at abattoirs by installing video surveillance systems

On August 24, 2022 the Official State Gazette published Royal Decree 695/2022 of August 23, 2022 establishing measures for monitoring animal welfare at abattoirs by installing video surveillance systems.

This legislation lays down a set of requirements for installing and running a video surveillance system. They determine that abattoirs must first expressly, clearly and concisely inform the workers and any workers' representatives, if they exist, in writing, of the existence of this system and the conditions it must meet. The legislation will come into force on August 24, 2023, except for small abattoirs, for which it will come into force on August 24, 2024.

Spanish council of ministers approves Bill for Organic Law, which includes the right to leave for medical symptoms caused by incapacitating menstrual periods

The council of ministers has approved and laid before the Spanish parliament the Bill for an Organic Law amending Organic Law 2/2010 of March 3, 2010 on sexual and reproductive health and voluntary termination of pregnancy.

The bill allows leave with full pay covered by the social security system for painful or incapacitating periods. Amendments may be made during the bill's passage through parliament.

Household employees to have unemployment benefit

Royal Decree-Law 16/2022 of September 6, 2022 to enhance the working and social security conditions of employees in household services introduces unemployment protection for household employees and other social security measures (household employees will be entitled to the same treatment as for other employees).

It moreover amends Royal Decree 1620/2011 of November 14, 2011 on the special employment relationship of household employees (by determining they are presumed to have a permanent contract and removing unilateral withdrawal) and the Workers' Statute (providing wage guarantee cover for these employees), among others.

Extension of restrictions for layoffs linked to grounds arising from the war in Ukraine

The Government has extended until December 31, 2022 the restrictions for laying off employees on objective grounds at companies benefiting from support related to the invasion of Ukraine, as we reported in this alert.

Royal Decree-Law 11/2022 of June 25, 2022, adopting and extending certain measures to respond to the economic and social consequences of the war in Ukraine extends until December 31, 2022 the provision determining that the increase in energy costs cannot be an applicable objective ground for laying off employees at companies benefiting from the types of direct support granted in the legislation.

CJEU advocate general concludes that employer has to pay the cost of a worker's corrective lenses to continue working with display screens

An advocate general of the Court of Justice of the European Union (CJEU) has concluded that the employer has to provide workers with glasses with corrective lenses (or cover their cost) that correct damaged eyesight and allow employees to continue working with display screen equipment.

In the proceeding the court examined article 9 of Council Directive 90/270/EEC of May 29, 1990, on the minimum safety and health requirements for work with display screen equipment. These conclusions are not binding, so we will have to wait for the CJEU's reply to the submitted request for a preliminary ruling.

3. Judgements

Supreme Court reiterates that it is lawful to readjust time off work for union duties for union delegates where size of workforce reduces

In a judgment delivered on July 14, 2022, the Supreme Court reiterated its principle that readjusting the time off work for union duties for union delegates after the size of the workforce has reduced is not a breach of freedom of association at the workplace. The judge recalled that, in these cases, the employer may adapt the time off work to the actual number of workers with whom union delegates have to perform their duties.

In the examined case, the workforce reduced to below 751 workers as a result of the termination of a number of employment contracts, which justified the employer's decision to reduce the amount of time off work allowed for the union delegate, without this involving a breach of the fundamental right to freedom of association. The Supreme Court also stated that, if the workforce returns to its previous size then the allowed time off work will have to be readjusted.

Existence of proof breaching fundamental rights in a dismissal proceeding may result in dismissal being held null and void or unjustified depending on its connection with termination of the employment contract

In a judgment delivered on July 26, 2022, the Supreme Court examined a dismissal on disciplinary grounds based on images recorded by a hidden camera, obtained with a breach of fundamental rights. The debate centered on determining whether the dismissal has to be held null and void or unjustified, bearing in mind that it was uncontested that the images had been obtained by breaching fundamental rights.

The court settled the issue by noting that the existence of a null and void dismissal must determined by having regard to the "connection" between the breach of fundamental rights and the dismissal concerned, with an examination of the circumstances. Therefore, a dismissal does not always have to be held null and void where there has been a breach of fundamental rights in obtaining an item of proof.

Unilateral reduction of pay supplement is a breach of employer's salary obligation and worker's right to claim it does not become statute-barred

In a judgment delivered on June 13, 2022, the Supreme Court found that the worker's right to action to claim an unpaid pay supplement does not become statute-barred, although the option to claim specific pay differences does become statute-barred within a year. The Supreme Court held that the unilateral reduction of the pay supplement by the employer nine years earlier did not qualify purely speaking as a material modification to working conditions "but rather as a breach by the employer of its salary obligation, with the resulting breach of the worker's right to receive the covenanted compensation". Therefore, due to the ongoing nature of this obligation, the court held that the right to receive the contested supplement does not become statute-barred, although the right to claim any amounts that had fallen due and were not paid, or claimed does.

National Social Court holds to be invalid a clause requiring workers to provide personal email addresses to employer

In a judgment delivered on June 27, 2022, the National Appellate Court held that the law precludes the practice by employers of asking employees to provide their personal email addresses in certain procedures at the company.

It moreover declared that labor union organizations have the right to hold an email list or have a virtual tool on which they can publish the necessary union notices freely and without obstruction. In the specific case examined, the judgment noted that the only suitable means of distributing labor union information is to have an email list, because it must be ensured that there is no interference in union activities.

The judgment also declared that the employer did not evidence the existence of containment measures adopted as a result of the pandemic, and confirmed that, in any event, the obligation contained in article 11 of the law on remote working was fully applicable.

Justified dismissal of employee who took leave that had been denied when requested from employer

The Murcia High Court has confirmed the dismissal of a worker who failed to come to work despite denial of her application for leave. In the case examined in the judgment of July 18, 2022, following the company's refusal to grant her request, the worker decided not to come to work, and so made up her mind to "take decisions for herself". The court determined that, in view of her failure to return after the company's requests, her absences are unjustified which under the applicable collective labor agreement is serious misconduct which entitles the employer to dismiss her.

Madrid High Court ratifies dismissal on the ground of engaging in private activities during remote working hours

The Madrid High Court, in a judgment delivered on July 18, 2022, has held to be justified the dismissal of a worker due to engaging in private activities during working hours, and leaving his work duties unattended. The worker forged daily activity reports, and abandoned his workspace during his remote working hours, without having requested the employer's permission or having informed the employer afterwards. These breaches, evidenced as taking place following the signature of a remote working agreement, are considered to justify dismissal on disciplinary grounds.

4. Garrigues Sustainable - Labor and Employment

A guide to prepare gender-sensitive pay audits is published

The Ministry of Equality has prepared, together with the Ministry of Employment and employee and employer representatives, an informative document that seeks to facilitate compliance with pay audit obligations.

The EU reaches provisional political deal on balanced gender representation on the boards of listed companies

Listed companies should aim to have at least 40% of non-executive director positions filled by members of the under-represented sex, or 33% of all director positions, including executive directors. The deal also sets out guidelines for selection processes.

5. Articles from the Labor and Employment Law Blog

Dismissal null and void due to a cold?

The new Spanish comprehensive law for equal treatment and non-discrimination raises questions about whether the cases in which a dismissal can be declared null and void may be broadened.

How does the Government's energy efficiency plan affect heating and air conditioning at companies? Questions from the labor point of view

The recently approved energy saving and efficiency measures directly affect the temperature that companies must have in their facilities but, at the same time, raise questions that leave room for interpretation as well as doubts about coexistence with other regulations.

What role can companies play in the area of mental health?

On occasion of the publication by the Ministry of Health of the National Mental Health Strategy for 2022-2026, we reflect on how preventive action can contribute to an increase in the level of mental health of workers.

Bicycles for public servants: energy saving measures in the Administration

In light of the risks posed by the current high dependence on energy, it is essential to implement measures that facilitate a reduction in the consumption of energy in the short term. These measures also apply to public servants.

New changes coming in relation to conciliation

The recent changes that have taken place in our personal and working environments, together with the needs of families particularly evident as a result of the pandemic, have again brought to light the issue of conciliation between personal, professional and family life. The following is an analysis of several proposals of conciliation in a national, European and international environment.

Yes, to social taxonomy, but no to the burdens: the big new challenge for companies

Social taxonomy, which classifies economic activities significantly contributing to social goals in the European Union, will be a new challenge for companies, given that it is not based on technical criteria, but rather on international principles and standards. Investors are already adapting their policies and incorporating metrics aimed at valuing these aspects in their investments, and for this very reason companies cannot afford to lag behind.

Personal days: keys to determining whether they are recoverable days and whether they are to be included for calculating fulfillment of the maximum annual working hours

In order to know how personal days should be treated at each organization, it is essential to check how they are defined in the collective labor agreement and look at the company's standard practice.

Employer of record: the intermediary that makes it easier to hire employees in other jurisdictions

The concept of "local legal employer" or "employer of record", which enables companies to access talent in other countries, has burst onto the scene as a new form of hiring in the midst of the telework boom.

Diversity and equality make their way into companies

The introduction of inclusive policies that enable a suitable working environment for LGBT workers is becoming increasingly more common. This commitment takes place under the current legislation and by looking forward to the regulations that are currently being passed.

Celebration of World Refugee Day: regulation recognizing their right to work

June 20 is the World Refugee Day. We take this date to remember that refugees deserve the same treatment as other nationals in terms of the possibility of working. This is what is stated in national and international regulations.

Private investigators and video surveillance: a new variation giving greater leeway to the practice of monitoring workers on CCTV

The courts are allowing a growing amount of leeway for using closed circuit television (CCTV) cameras to monitor suspicious conduct of workers without informing the employees in advance. There have been an extensive number of cases already, yet even more variations on the issue continue to arise; for example, what happens if the cameras are installed by a private investigation agency hired by the employer? This very question was recently addressed in a judgment of the High Court of Justice of Castilla y León.

"For the love of green": labor law will be greener than ever

Labor relations in the next few decades will be marked by the green transition and the impact that it will have on the world of work.

Total or absolute permanent disability automatically terminates employment contracts

The Supreme Court has clarified that the decision handed down by the body that declares the total or absolute permanent disability of an employee is sufficient to terminate the employment contract without the need for any other formalities.

Paternity leave under the legal spotlight

2019 saw the approval of the regulation giving maternity and paternity leave equal treatment, with both parents being able to choose the same days' paid leave. However, some of the loose ends of the new regulation are now being addressed by the courts.

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