

# Labor and Employment Newsletter

Spain

GARRIGUES

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## 1. The labor measures of Law 4/2023 and their enforceability

**There is considerable uncertainty about the obligation to have protocols under Law 4/2023. It is not possible to conclude from the law whether this obligation will be effective as of 2 March 2024 or whether it is pending regulatory development.**

### Federico Durán López

Law 4/2023, of 28 February (BOE of 1 March), aims, in its words, to guarantee and promote the right to real and effective equality of LGTBI people in different social spheres, including the workplace. In relation to the latter, Article 15, on LGTBI equality and non-discrimination in companies, created a new obligation for companies with more than fifty workers, by virtue of which they must have a "planned set of measures and resources to achieve real and effective equality of LGTBI people, including a protocol for dealing with harassment or violence against LGTBI people".

From the literal wording of this paragraph 1 of Article 15, it is clear, firstly, that companies with more than fifty employees must have a planned set of measures and resources to achieve real and effective equality of LGTBI people, and this, it is added, within a maximum period of twelve months from the date of entry into force of the law (the day after its publication in the BOE: twentieth final provision). Therefore, as of 2 March 2024, all those companies whose workforce exceeds the numerical threshold set by Law 4/2023 would, in principle, be required to comply with this obligation and would have to have this planning of measures and resources. Several voices have already been raised, in the legal debate, recalling the date and the obligation. However, neither is the legal mandate clear, nor is it clear that it is enforceable from the date indicated.

And it is not clear because an initial interpretative doubt arises from the final reference in Article 15(1) itself to the fact that "the content and scope of these measures shall be developed by regulation". It could be argued that the law does not make the clear and precise mandate of the first paragraph of Article 15(1) conditional on the regulatory development provided for, so that the enforceability of the obligation to have a planned set of measures and resources would only be conditional on the passing of the twelve-month period following the law's entry into force, and not on the existence of the aforementioned regulatory development. This regulatory development would simply specify the legislative mandate and specify the terms of its fulfilment, so that it would not be necessary for the application of the legal mandate. It cannot be ruled out that this is the interpretation that, at least initially, the Administration, and in particular the Labor Inspectorate, will sustain when it comes to monitoring compliance with the law.

However, it can also be argued that only regulatory implementation would make the legal mandate enforceable. Note that such development is foreseen to fix the "content and scope" of the measures. It is difficult to negotiate and establish measures whose content and scope (which should be set by the regulatory power) are unknown. Regulatory development, expressly called for by the law, seems necessary in this case in order to have a minimum of legal certainty. And this regulatory development being in the hands of the government (which would already have had a year to do so), it would be difficult to make companies bear the consequences of non-compliance with the legal mandate that requires it. It should be borne in mind that the law states that the content and scope of the measures "will be developed", not that they can be developed.

And another important argument along these lines is that the difference, in this respect, with Organic Law 3/2007, of 22 March, for the effective equality of women and men, is significant. This law regulates the concept and content of equality plans (Article 46), and does not entrust the specifics of such concept and content to regulatory development. What is more, this regulatory development is not even expressly provided for, as no reference is made to it in the third final provision of the law ("Habilitaciones reglamentarias"), which specifies the regulatory developments required of it.

Compliance with the legal mandates was therefore required prior to the enactment of Royal Decree 901/2020 of 13 October, which regulated equality plans and their registration.

Finally, it should not be forgotten that the very ambiguity of the regulation makes it difficult, in the absence of regulatory development, to comply with it. Companies are not required to have an equality plan in relation to these people, and the only defined and enforceable content of the planned set of measures and resources is that they include an action protocol for dealing with harassment or violence against LGTBI people.

Therefore, although it should not be forgotten that in the interpretation of the law by administrative and judicial bodies it may be argued that compliance with its mandates does not depend on the required regulatory development, it can be argued that, until such regulatory development takes place and the content and scope of the measures to be implemented are specified, companies comply with the obligations directly derived from the law if they have an action protocol for dealing with harassment or violence against LGTBI people.

One last doubt: can (or should) equality and non-discrimination measures for LGTBI people in companies be included in the equality plans adopted in them, or should they in any case be subject to a separate formalization? Although nothing is expressly foreseen in this respect, Law 4/2023 (whose systematics can certainly be improved) states (Article 55.3) that "in the elaboration of equality and non-discrimination plans, trans persons shall be expressly included, with special attention to trans women". This mandate, despite the flawed systematics of the law, seems clear that it is not restricted to public employment or to the administrative sphere. The application of the provisions of the law to public employment is contained in Article 11 of the law. The whole of its labor provisions applies to private employment and, in the terms of Article 11, to public employment. Article 55 is included in Title II, referring to measures for the real and effective equality of transgender people and, within it, in Chapter II on public policies to promote such equality. These are public policies to promote equality in general, not reduced to the public sector. The second section of the chapter, which includes Article 55, also refers in general to measures in the field of employment. Public policies do not refer exclusively to public employment but to the labor field in general, as is clearly shown in Article 55(2), which clearly refers to private employment. In this context, the first two numbers of Article 55 provide for actions by the public authorities (but referring to the private sector).

In this context, the first two numbers of Article 55 refer to actions by the public authorities (but referring to the private sector), and number 3 refers to equality plans, and cannot be interpreted as referring to equality plans in the public sector, because the other measures refer to the private sector. This would imply that companies, in the equality plans, must expressly include trans people, with special attention to trans women. And if LGTBI people are also included, would that be enough to fulfil the mandate of Article 15?

All of this is reminiscent of "the contracting party of the first part", a brilliant finding by Marx (Groucho), to whom our legislator should have to pay royalties.

## 2. News

### [The minimum wage for 2024 is published](#)

The royal decree, effective 1 January, increases the SMI by 5% to 1,134 euros per month.

### [Social contribution order for 2024 is published](#)

The Order establishes the maximum and minimum bases and contribution rates as of 1 January 2024. The maximum contribution base is set at €4,720.50 per month.

### [During parental leave, contributions must be paid on a minimum basis](#)

The Red News bulletin publishes the criteria of the Directorate General for Social Security Organization regarding registration and contribution obligations during the eight-week parental leave.

### [The latest amendments on nursing leave, unemployment and collective agreements are repealed and the increase of the minimum wage to 1,134 euros is announced](#)

Royal Decree-Law 7/2023, which modified the nursing leave regime, unemployment and the priority application of regional collective agreements, has been repealed as it has not been validated in the Congress of Deputies. At the same time, the increase of the Minimum Interprofessional Wage (SMI) for 2024 has been announced.

### [The new "anti-crisis measures" regulation extends the minimum wage until 2023, the limitations for certain objective dismissals and includes changes in the area of contributions](#)

Among other measures, the SMI, the partial retirement scheme and the provisions on redundancies resulting from the increase in energy costs are extended, the contribution bases are updated and the contribution for paid and unpaid training placements is regulated.

## 3. On the radar

### [The Ministry of Labour presents the lines of action of the legislature](#)

The Vice-President of the Government, Yolanda Díaz, has presented the main lines of action of her ministry during the 15th legislature.

Specifically, she stressed that the reduction of working time will be one of the Government's legislative priorities. Another important aspect will be to make progress on a new Statute for the 21st century, with the aim of adapting the regulatory framework to the new challenges of the labor market and, in particular, to new technologies.

Finally, in relation to dismissal, the reform of objective dismissal due to supervening unfitness is proposed to prevent "automatic" dismissal after permanent disability, as well as to ensure that maintaining the employment of people in a situation of permanent, absolute or total disability and severe disability is the first option and that dismissal only takes place when it has not been possible to make reasonable adjustments or the change of job would place an excessive burden on the company.

On the other hand, the aim is to adapt the regulations to the European Social Charter, which could lead to an increase in the cost of compensation so that "the termination of employment effectively repairs the damage caused".

### **Negotiations on working time reduction begin**

The first contact has been made in the negotiations between the social partners and the government to reduce working hours to 38.5 hours a week in 2024 and to 37.5 hours a week in 2025. The social partners are going to meet bilaterally to specify in each sector of activity the existing margin for reducing the working day and, subsequently, the conclusions will be sent to the tripartite roundtable.

Within this framework, it has also been proposed to increase the amount of the fines contemplated in the Law on Social Order Infringements and Sanctions (LISOS) in the event of non-compliance in terms of working hours.

### **The term "handicapped" is removed from the Spanish Constitution**

On 18 January 2024, the Congress of Deputies approved the reform of Article 49 of the Spanish Constitution, eliminating the concept of "handicapped".

Likewise, the new wording states that the public authorities will promote policies that guarantee the full personal autonomy and social inclusion of people with disabilities. Now, the constitutional reform continues its processing in the Senate, for its final approval.

## **4. Judgements**

### **The provision of "calendar days" in the collective agreement to regulate sick leave or hospitalization is null and void**

The National Court ruled on the validity of a sectoral collective agreement which established that the five days of leave in the event of illness, hospitalization or surgery without hospitalization of family members or certain relatives, in article 37.3 b) of the Workers' Statute (ET), are calendar days and not working days.

The judgment of 24 January 2024 declares this provision null and void, insofar as the directive requires the leave to be five working days. Furthermore, it considers that the fact that article 37 of the ET merely states that there are 5 days of leave does not prevent the conclusion that we are dealing with working days.

### **An objective dismissal is declared admissible irrespective of whether there are subsequent hires**

In the [judgment of 19 December 2023](#), the Supreme Court upheld and annulled the judgment of the High Court of Justice of the Valencian Community and declared the objective dismissal of an employee to be justified, as the company had hired another employee close to the date of dismissal. That worker had taken on, among others, functions performed by the dismissed employee.

The Supreme Court declared that judicial review must be limited to the legality of the cause and the appropriateness of the measure by virtue of that cause, both of which had been accredited by the company.

## Invalid dismissal does not necessarily imply the imposition of damages

The Supreme Court, in its [judgment of 12 December 2023](#), declares that the objective nullity ex article 55.5.b) of the ET derived from the absence of a cause for dismissal that justifies the dismissal does not lead to the automatic recognition of compensation for non-pecuniary damage.

The claim had been brought by a worker who was dismissed for disciplinary reasons during her pregnancy, which led to the nullity of the dismissal decision. However, the ruling determined that the compensation was not applicable since the motive for the dismissal was not discrimination due to pregnancy, taking into account that five other workers were dismissed in different circumstances, as well as the fact that the company did not know of the worker's pregnancy until the time the letter of dismissal was delivered.

## Disciplinary dismissal for misuse of the company telephone during temporary incapacity is permissible

On 17 November 2023, the [High Court of Justice of Catalonia handed down a ruling](#) in the case of an employee who was disciplinarily dismissed for misuse of the company telephone, which according to company policies was restricted to professional use.

While on temporary disability, the employee had made 27 non-work related calls, 576 non-professional internet connections and used the instant messaging service also for personal purposes. These facts justify the validity of the employer's decision, as the employee had committed very serious breaches which justified the dismissal.

## The Court of Justice of the European Union declares that an employer is not obliged to postpone the holiday leave of a worker who was quarantined for COVID-19

The Court of Justice of the European Union, in its [judgment of 14 December 2023](#), held that an employer is not obliged to postpone the holiday leave of a worker who was unable to take it because he was in quarantine for COVID-19.

The judgment ruled that, during the quarantine period, the worker is not in a situation of temporary incapacity justified by medical authorisation, so that quarantine leave is not comparable to sick leave.

## The use of an online map's app to monitor the time required to attend medical appointments does not entail a substantial modification of working conditions

In the case analyzed by the High Court of Justice of Madrid, in its [judgment of 20 October 2020](#), the appeal by the plaintiffs claiming the existence of a substantial modification of working conditions was dismissed. In the case under analysis, the company had implemented new rules according to which the calculation of the maximum time for certain leaves of absence was calculated according to a map application.

The court held that the use of the map application to control the time needed to attend medical appointments fell within the exercise of the company's power of organization and management.

## 5. Labor and Sustainable

### [Spain: Publication of the Bill for an organic law on equal representation and a balanced presence of women and men](#)

This proposal transposes into Spanish law the European directive on improving the gender balance among directors of listed companies and related measures, although it is more demanding in its scope than the provisions in the EU act.

### [OJEU publishes the first set of sustainability reporting standards \(ESRS\)](#)

They will apply for fiscal years starting on or after January 1, 2024.

### [Takeaways from COP28 from a European perspective](#)

Following the conclusion of the Climate Summit, we analyze the agreements reached and the challenges that the goals it set raise at the European level, in a new edition of 'Garrigues Sustainable dialogs'.

### [The Corporate Sustainability Due Diligence Directive, a step closer to final approval](#)

The Council and the European Parliament have reached a provisional agreement on the future directive on corporate sustainability due diligence.

### [The proposed corporate sustainability due diligence directive: a huge challenge that companies need to be prepared for](#)

Coinciding with the 75th anniversary of the Universal Declaration of Human Rights, the legislation being prepared by the European Union in this area and, more specifically, the proposal for a directive on corporate sustainability due diligence, has been analyzed in a new edition of the Garrigues Sustainable Dialogs, featuring the Chair of the European Parliament Committee on Legal Affairs and experts from Garrigues.

## 6. And also...

### [2024: main new legislation needing to be considered by companies in Spain](#)

Professionals in the various practice areas at Garrigues take a look, from all angles of business law, at the main new legislation that companies will face in the coming year.

## 7. Labor and Employment Blog

### [Dividends will increase the contribution for self-employed business owners](#)

Self-employed business owners are entitled to compute the income resulting from participation in equity capital for the calculation of annual income, which, in practice, it implies an increase in the self-employed business owner's contribution, under the new contribution system applicable to them in force since 2023.

### [Force majeure temporary layoff in Spain: labor solution before a cyberattack?](#)

A judgment by the National High Court opened up the possibility of applying a temporary layoff file as a company is compromised by a hack and cannot go on with its activity as usual.



### [The dismissed workers' legal representative loses this status as the judgment is being resolved](#)

A judgment handed down by the Labor Chamber of the Supreme Court has declared that the status of workers' representative cannot be exercised from the time of the disciplinary dismissal until the court ruling is handed down. This does not violate the provisions of article 67.3 of the Workers' Statute regarding the duration of the mandate of the workers' legal representatives.

### [This is how the breastfeeding leave will be after the entry into force of Royal Decree-law 7/2023](#)

The recently approved regulation eliminates the need of a collective bargaining or individual agreement with the company when approving the accumulation of breastfeeding leave but does not change anything in terms of the duration of this leave.

### [Must the company pay the overtime claimed if there is no record of working hours?](#)

The majority opinion of the labor courts determines that the employer's breach to comply with the obligation to record working hours presume the performance of overtime if evidence is provided by the employee.

### [Infringement of the right to digital disconnection does not justify any additional compensation](#)

The Labor Chamber of the High Court of Justice of Catalonia has determined that subduing an employee to very long working days and untimely working time, thus compromising his right to rest and digital disconnection, entitles the employee to the right to extinguish the contractual relationship, but not to be awarded any compensation associated with the breaching of fundamental rights.

## 8. Press

### [Collective dismissals, reduction of working hours and SMI: law firms foresee a rollercoaster ride in Labor and Employment in 2024](#)

In this article from El Confidencial, we analyze the job outlook for 2024, with the help of our partner Eloy Castañer. Labor restructuring is expected to continue to cope with rising labor costs and stagnant economic growth.

### [Effects on collective bargaining and inflation of the Government's announcements of possible labour reforms](#)

In this article in El Mundo, Eloy Castañer, partner in Garrigues' Labor and Employment practice, assesses the extent to which uncertainty can affect collective bargaining processes and business decisions, both in terms of investment and internal organization.

### [The collective dismissals have affected more than 15,000 workers this year](#)

Braulio Molina, a partner in Garrigues' Labor and Employment Department, told EFE that, in recent months, there has been an "upward trend in the volume of open collective dismissal procedures (ERE) and in the number of workers affected."

**For more information:**

**[Labor and Employment Department](#)**

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