

Labor and Employment Newsletter

Spain

GARRIGUES

July 2023

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1. The new social rights and covering their cost

Companies do not have an unlimited capacity to take on their new employment obligations.

Federico Durán López

For years now we have lived in an accelerated recognition process of new social rights, defined in increasing detail and, if you will allow me the expression, becoming ever more “sophisticated”. This is happening in the domain of legislation and in that of public policy. In the first case, legislative reforms have been continual and they all move in the direction of increasing the options of benefiting from certain rights and protecting those who decide to actually use them. I have nothing to object, except that the process is, more often than not, the result of outbidding, for political and electoral reasons, or otherwise comes from mere sudden ideas, and often lacks deeper thought, to consider the organizational and production-related requirements of companies and the conflicts that may arise among the workers themselves. It is forgotten that companies do not have an unlimited capacity to take on these new obligations and that they are, above all, organizations existing to produce, as efficiently as possible, goods and services to be placed on the market for the satisfaction of society’s needs.

Companies are therefore having costs imposed on them which hold back their efficiency and lower their competitive position in markets open to competition by economic operators from other countries. The benefits associated with questions completely unrelated to the production process are many, and therefore, without denying those benefits, their costs ought to be socialized. The recent Royal Decree-Law 5/2023 is good proof of this (I will not go into the fact itself of approval of the decree-law, which will doubtless go down in the history of law and will test the already extreme indulgence of the Constitutional Court over the extraordinary and urgent need that has to exist for the approval of decree-laws, in addition to requiring an assessment of this new practice of using these decree-laws (which are for urgent matters) as a way around the consequences of the dissolution of parliament and the resulting expiration of the bills of law under consideration). The lengths of existing types of leave have been increased, new types have been created (parental leave for eight weeks, “force majeure” leave for four days a year) and the position of workers has been made stronger when they request an adaptation or reduction of their working hours. And that is not all. By moving away from the legal aspects within which the law operates, and entering fully into the domain of interests or social issues, what has happened is companies have had a guardianship role imposed on them within the scope of those social issues which should fall completely outside their responsibility. Moreover they have not been able to articulate this very well: “in the exercise of this right”, is repeated in the decree-law, “encouraging shared responsibility between women and men will be taken account and, additionally, avoiding the perpetuation of gender-based roles and stereotypes”. Is that really the responsibility of employers? And how could they do so without becoming involved in workers’ private and personal lives? Reading a few of these provisions brought Asterix to my mind: these Romans are crazy! And the Spanish are not the only Romans, the Europeans are too. To prove my point: the recent EU Directive of May 10, 2023 (2023/970) on equal pay states that, when companies establish their pay structures, “in particular, relevant soft skills shall not be undervalued.” (article 4.4). I have had nightmares since reading the directive, prompted by imagining a client sending me their pay structure and asking me whether they have undervalued soft skills or what they have to do so as not to undervalue them.

In the second domain I mentioned, that of political decisions, the situation is even more alarming. There was a time in Spain when, somehow, populist promises were held back so as not to start a race in demagoguery which could be dangerous for the basic balances in the system. The Toledo Accord, for example, enabled certain matters to stay out of the political debate, because a race of promises or concessions could have undermined the bases of the social security system. That

accord has, largely, gone up in smoke, the necessary points of agreement to ensure the sustainability of the employee welfare system have evaporated, and it will not be easy to recover them. The fundamental component of that system, social security, is today more fragile and has a long way to go before ensured sustainability appears on the horizon.

But beyond the domain of social security, it is as if the floodgates have opened. From the child benefit existing years ago, known as “baby checks” (it was a common joke that it was the first money some people earned with their own effort) we have moved to all types of support: free public transport passes, interrail passes for young people aged up to thirty (young people aged thirty!, traveling free thanks to the taxes we all pay: the infantilization of society), support of various types, and the latest discovery/proposal: a €20,000 payment to all young people on reaching eighteen (which we are assuming is not means tested, therefore is also for those from wealthier families), so that they can study or become independent. It appears that a few politicians had in mind a type of society that exists in oil states, where the jobs that need doing are performed by immigrants and nationals have a lifelong annuity that saves them from having to work. The only problem is that here we do not have oil and so we have to ask who is going to pay for the graces and who will fund the *dolce far niente*. A sensible society ought to criticize any such type of proposals, in which it is not specified, clearly, how they are to be funded and who is going to bear the cost, in other words, what efforts society will have to make to fund them. There is no such thing as public money. Money is generated by society, through wealth creating activities, and the government takes a portion of the generated wealth to meet collective needs, which makes its use public, but not its source. Those needs do not include this type of gracious payments. Of course it may be that there are politicians, and society should be aware of that also, who consider that money is never a problem because money is printed by a machine and it is only a question of printing more.

A last point: the obsession for language “without a gender bias” makes, in the decree-law, the lawyer into “a professional person of the law” and a court procedural representative “a professional representative person” to avoid using masculine words in Spanish, even through the decree law later uses the masculine form of “appellant” or “public prosecutor”.

2. News update

[These are the social security rules applicable to workers relocated abroad](#)

A new piece of legislation defines in detail the cases in which relocated workers will be treated as having registered status for social security purposes, such as in the absence of a bilateral agreement, where such an agreement does not apply to the specific case concerned, or the maximum period for keeping up contributions in the worker’s country of origin has ended.

[Royal Decree 668/2023 amends the regulations on pension plans and funds](#)

The royal decree contains, among other new legislation, implementation of the rules on simplified occupational pension plans, the rules on the non-discrimination principle and the provisions on merging plans where corporate transactions result in the same company becoming sponsor of more than one occupational pension plan or sponsor of an occupational pension plan and at the same time policyholder for one or more employee welfare and pension benefit plans.

[The Royal Decree implementing the RED Mechanism provides that closures of work centers will require six months’ notice](#)

The RED Mechanism for employment flexibility and stabilization created in the recent labor reform allows measures for the reduction of working hours and suspension of employment contracts. The

legislation also amends the regulations governing collective layoff procedures by providing for six months' notice in the case of closure of a center.

Whistleblowing channels at companies in Spain: the key aspects of the new law protecting whistleblowers from all angles

The law protecting whistleblowers requires companies with 50 or more workers to have an internal whistleblowing system in place and sets out fines of up to €1,000,000. We will be looking at this from various different standpoints: labor law, data protection, criminal law, corporate governance and anti-money laundering and counter-terrorist financing.

Basic equality and diversity obligations at a glance

The proliferation of equality and diversity regulations has meant that companies need to remain attentive to a whole set of obligations.

End of the extraordinary measures implemented in the workplace due to COVID-19

The order declares the end of health crisis and the termination of the extraordinary measures such as those related to the minimum interpersonal safety distance of 1.5 meters between workers or the promotion of teleworking, among others.

Options for paid leave and 'à la carte' working hours are broadened and other employment measures relating to work-life balance are approved

Royal Decree-Law 5/2023 transposes, among others, the EU Directive on work-life balance for parents and carers which, before the end of the legislative session, was passing through parliament as the Families Bill.

Publication of the V Agreement for Employment and Collective Bargaining (V AENC)

The agreement is signed by CEOE and CEPYME, and the labor unions CC.OO. and UGT, and its objective is to promote collective bargaining.

3. On the radar

The Ministry of Labor and the unions announce that they have signed the Interns' Statute which has not yet been published

In June 2023, the Ministry of Labor and unions UGT and CC.OO. announced the signature of the wording of the Interns' Statute, without the participation of the employers' association CEOE. The statute has not yet been published.

According to the information given by the signing parties, employers will have to cover the costs interns incur in the performance of their tasks and they will be entitled to the vacation and rest periods determined in the law or in the applicable collective agreement.

Moreover, a limit will be placed on the maximum percentage of interns, which will not be able to go above 20% of the workforce (this figure may be increased to 30% by collective labor agreement), as well as the maximum number of curricular internship hours that students will be able to work for (not

more than 25% of the hours making up the ECTS credits) and extracurricular hours (not more than 15% of the hours making up the ECTS credits).

Call for applications published for grant of the “Equality at the Company” badge and provisions adopted on said badge in R&D&I

[Order IGD/703/2023 of June 28, 2023, approving the rules on the grant of the “Equality at the Company” badge and calling for applications related to 2023](#) was published for companies wishing to apply for the badge.

The “Equality at the Company” badge recognizes the work of companies and entities committed to equality which stand out for the application of policies for equality between women and men in working conditions, in organization models and in other areas, such as the company's services, products and advertising. To be able to receive it, companies must, among other requirements, have an applicable and registered equality plan, monitor its implementation, and, for companies that cannot prepare an abridged income statement under the Capital Companies Law and have a board of directors, at least 30% of their board members must be women.

Additionally, [Royal Decree 669/2023 of July 18, 2023, on the Gender Equality Badge in R&D&I](#) has been published for the recognition and promotion of companies primarily engaged in research, experimental development, transfer of know-how and/or transfer of innovation, which prove they have achieved standards of excellence in gender equality in these areas.

The Ministry of Labor reminds companies of their obligation to adopt preventive measures in high temperatures

Royal Decree-Law 4/2023 introduced the obligation to provide suitable measures to prevent risks caused by adverse weather conditions, including a ban on performing certain tasks at times of day with extreme temperatures, as we reported in this [alert](#).

To reiterate this obligation, the Ministry of Labor and Social Economy has sent out more than 100,000 notifications to companies in sectors presenting a higher risk related to high temperatures to remind them of these measures.

The Government approves the Annual Plan for Promoting Decent Work

The Council of Ministers has approved the [Annual Plan for Promoting Decent Work 2023](#), proposed by the Ministry of Labor and Social Economy and drawn up in conjunction with the autonomous community governments. It is a shared point of reference, which, together with the Spanish Strategy for Active Support to Employment 2021-2024 (mentioned in our [January 2022 newsletter](#)), set out the legislative framework for the coordination and enforcement of employment activation policies throughout Spain, and will be used by public employment services as the basis for designing and managing their own policies.

The European Parliament approves a resolution on strengthening social dialog

On June 1, 2023, the European Parliament approved a [resolution on strengthening social dialog](#), in which it stresses that social dialog, including collective bargaining, is a crucial tool for the well-functioning of the social market economy and calls for social dialog to be protected in order for social partners to regulate themselves autonomously, ensuring total legitimacy and strong progress on collective agreement coverage.

The European Parliament urges the Commission and member states to monitor its implementation to, among other things, identify situations from which social partners have been excluded or in which

they were inadequately involved in national-level consultations on Union and national policy, and ensure that the obligation to consult the social partners is respected when provided by the legislation.

New labor legislation comes out of the last Council of Ministers meeting

At the last meeting of the Council of Ministers held on July 18, 2023, a number of labor measures were approved, such as the [rules on the new Vocational Training system](#) and the calls for applications for [support for training actions related to the National Catalog of Professional Qualifications](#)

4. Judgments

Justified dismissal based on faking sick leave after the employer informed that it was going to investigate a number of cash discrepancies

The Madrid High Court, in a [judgment dated May 12, 2023](#), has held a dismissal of a worker who went on sick leave immediately after the employer informed her that it was going to investigate a number of cash discrepancies it had detected to be justified. The worker, who was the person responsible for the company's accounting records, claimed she was not aware of the discrepancies and that same afternoon failed to show up at the workplace, sending a report by an emergency department so that two days later she could submit a medical certificate for sick leave due to lumbago.

Her sick leave was determined to be fake, as a result of proof obtained by a private detective showing that the worker was perfectly able to move and lift weights, without any sign of lumbago. The High Court considered that there had been a violation of contractual good faith and a breach of trust as a result of the worker leaving her job after being informed of the cash discrepancies and requesting a medical certificate for sick leave.

The Supreme Court determines that the simple fact of denying the adaptation of working hours does not necessary imply discrimination based on sex

In a [judgment rendered on May 25, 2023](#), the Supreme Court established that the measures designed to enable workers to achieve a balance between work and family life have a constitutional dimension, although this does not mean every decision on the adaptation of working hours must imply discriminatory treatment based on sex.

In the examined case, the worker asked for a reduction in working hours with a specific timetable and, although the company granted the requested reduction in working hours, it denied the timetable requested for organizational reasons, because agreeing to it would create excess capacity on the shift that the worker wanted to work in.

The Supreme Court held that these reasons are not of a discriminatory nature, but rather linked to organizational requirements to ensure suitable coverage of the service in the respective shifts which. Accepting the timetable requested by the employee would generate a need to reorganize the workforce so that the worker can exercise her right, leading to the conclusion that the refusal is not connected with any discriminatory reason based on sex.

The null and void nature of a dismissal is rejected where the decision was taken before the worker went on sick leave

Vigo Labor Court no 5, in a [judgment dated April 19, 2023](#), held that a dismissal taking effect on the same day as the worker went on sick leave was unjustified although not null and void, because it had been evidenced that the employer contacted the worker by phone two days earlier to notify her of the dismissal.

In the examined case, the worker provided services for an autonomous community government authority, which signed a dismissal report on the worker on February 20 to take effect on the following day. Although the worker had been on sick leave since February 19, it was evidenced that the company contacted the worker by phone on February 17 to notify her of the dismissal. The declaration that the dismissal was null and void requested by the worker on the basis of Law 15/2022 was rejected and the dismissal was held unjustified.

The right to freedom of association is not breached by stopping the actions of members of a works council who have been dismissed on disciplinary grounds

In the examined case, several members of the works council claimed their right to perform their duties as workers' representatives until a final court judgment was rendered declaring that their dismissals on disciplinary grounds were justified. The Supreme Court ruled, in a [judgment dated April 25, 2023](#), that, following the termination of the workers' contracts, the working relationship or employer-employee connection had been broken, and therefore their representative role had also been severed. It therefore confirmed that a breach of the right to freedom of association had not occurred, so long as the applicable legislation has not expressly provided for an extension of the enhanced protection for performing representative duties. Nevertheless, it also confirmed that the workers could have requested a stay of enforcement of the challenged decision during the proceeding for protection of the freedom of association and failed to do so.

The National Court supports a suspension of employment contracts based on the decline in demand in recent months and the adverse forecasts for the following year

In the examined case, the company carried out a suspension process for employment contracts based on production-related reasons, by submitting that there had been a decline in demand since October 2022, which worsened in the following months and that the forecasts for 2023 were along the same lines.

In a [judgment dated April 17, 2023](#), the National Court held that a decline in orders that is forecast to continue in the future is an adequate reason for planning the suspension of contracts adopted as a preventive measure to adjust the workforce to production needs in 2023. The National Court took the view that, by suspending contracts, the company seeks to provide itself with a flexible buffer of jobs which may be adapted to the production needs arising in the future.

5. Garrigues Labor and Employment and Sustainable

[The procedure for a European regulation on ESG ratings has started](#)

The initiative aims to strengthen the reliability, comparability and transparency of these activities.

[The European Parliament approves its position on the Directive on Corporate Sustainability Due Diligence](#)

With this vote, the European Parliament has taken another step in the approval of the Due Diligence Directive (known by the acronyms CS3D/CSDD), aim of which is to ensure that companies operating in the internal market adopt measures to identify, prevent, mitigate, bring to an end and remedy the adverse human rights and environmental impacts of their activities, as well as those of their subsidiaries or value chains.

6. Labor and Employment Blog

[What happens when an employee with an indefinite-term contract for seasonal work does not respond to the call to resume work?](#)

[It is not a case of 'everything goes' when you are working from home: justice marks the red lines of remote working](#)

[Is dismissal by email a possibility in Spain?](#)

['Telework-related accidents': the fine line between work and personal life when your home is your office](#)

[Additional severance to the statutory amount for unjustified dismissal: exception or general rule?](#)

[New employer obligations to ensure equality for LGBTI and trans employees](#)

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