Newsletter

Labor and Employment Law

GARRIGUES

November 2021

Index

1. The common thread of the labor reform

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Just as, thanks to Ariadne's thread, Theseus managed to find the way out of the labyrinth after having taken care of the Minotaur, we would need to identify a common thread, not just to get out, but simply to guide ourselves in the labyrinth that the processing/negotiation of the labor reform has become. The problem is that it is not easy to find this thread, in the generous hypothesis that it exists. But let us make an effort, searching not only in the proposed texts but also in the multiple statements, counter-statements, corrections and denials that adorn the debate.

In a recent conference, the Minister of Inclusion, Social Security and Migration stated that the ultimate objective of the labor market reform would be none other than to promote internal flexibility in companies, so that they would have effective mechanisms for adapting to the economic situation and to market variations at their disposal, without the need to adjust the volume of employment, or at least minimizing the scope of such adjustment. At the same time, he stated that this flexibility should result in fewer use oflo temporary hiring, preventing it from continuing to be used as a means of flexibility, going beyond what would really be required by the temporary hiring needs of companies. Up to this point, the approach is fully consistent with the postulates of flexibility and security in labor relations that inspire the European debate and the most recent regulatory reforms that have been implemented in the various Member States as a result. But let us go into a little more detail and see if what is proposed in the texts brought to the social dialogue table is consistent with this.

More internal flexibility in exchange for greater job preservation is a commendable labor policy objective. Provided that real internal flexibility is actually established, allowing companies to adapt, and that employment protection is not taken too far, in such a way that, in practice, the freedom of enterprise is undermined. Focusing on the former (the latter would take us too far from this reflection, since we should analyze the "employment safeguards", the "prohibitions on dismissal", as well as the growing administrative intervention in collective dismissal procedures and the likewise increasing judicial tendency to question the business options on which they are based, as well as the figure of null and void collective dismissal), the company should opt for an agile and safe procedure for modifying working conditions, for the possibilities of adapting collectively negotiated conditions through the prevalence of company agreements over sectoral agreements and the "unbinding" of agreements, and for mechanisms for the suspension of contracts and reduction of working hours, in order to maintain situations that do not have to become structural in the short term. However, what has been pointed out so far in the draft regulations submitted for the consideration of the social partners goes in the opposite direction. Not only is the regulation of Article 41 of the Workers' Statute (WS) tightened, both procedurally (with a clear commitment to the unionization of the procedures) and in terms of substance (the causes of substantial modification are now equated with those of collective dismissals), but the possibilities for adaptation by company agreements of the sectoral regulations are drastically limited and, at the same time, the procedures for the suspension of contracts and reduction of working hours are complicated and made more rigid. In the proposed wording of Articles 47 and 47 bis of the Workers´ Statute (twenty-seven pages to regulate this issue!), priority is given to the reduction of working hours over the suspension of contracts, administrative control is intensified (in the cases of Article 47, although administrative authorization is not clearly required, there is an ambiguous mention of the "resolution of authorization of a file", that the labor authority "will authorize the file", or that, --the impact of the rushed drafting, I hope--, "the authorization of the file will be understood to be authorized") and the powers of the employer during the application of suspensions of contracts or reductions of working hours are limited. On the other hand, in the new RED mechanism for flexibility and stabilization of employment (Article 47 bis), administrative authorization is now openly required and a complex procedure is established which requires prior "activation" by the Council of Ministers and no less complex provisions for the training and outplacement of workers.

Under these conditions, to speak of a commitment to internal flexibility is openly voluntarist. And of course, in relation to the other point we were referring to, this flexibility regulation, if it succeeds, is far from being an incentive to curb the use of temporary hiring. The Government has been insisting on the need to reduce the rates of temporary employment contracts, presenting it as a European requirement and supporting it by comparing it with other countries. This comparison, however, does not make sense if the procedural and economic costs of dismissal are not included in the equation. Countries with greater "exit" flexibility will logically have a lower rate of temporary hiring, so comparisons should take into account all flexibility instruments, internal and external, and not focus exclusively on temporary hiring rates. In any case, the Government should not have much faith in the virtues of the new flexibility (?) to correct the temporary employment rate, when it proposes an enormously restrictive regulation of fixed-term contracts. This goes to extremes that are difficult to understand, such as the total eradication of the possibilities of contracting for a specific job or service. It is one thing to make adjustments to the regulation of the contract for work or service, but quite another to go to the extreme of the disappearance of the figure. Relying on the fixed-term contract to deal with the demands of seasonality or the intermittency of production would require a much more precise regulation of this contractual figure; and simply referring to the possibilities of objective termination of contracts due to the end of the production cycle, of the contract or of the administrative concession is, directly, to cheat oneself in the solitaire. And even less understandable is the intended disappearance of the permanent construction work contract. This is a figure, product of collective bargaining, based on the possibilities of adapting the legal regulations conferred on it by the third additional provision of the WS and the Law on Subcontracting in the construction sector, which has had a peaceful life, has enjoyed union acceptance and has given rise to little litigation (as has been stated, "in construction, having a temporary or permanent contract makes fewer differences than in all productive activities"; *Informe sobre la situación de la prevención de riesgos laborales en el sector de la construcción en España*, by Durán López, Tudela Cambronero and Valdeolivas García, Madrid, 2008). The fact that it would be advisable to update the figure, through social dialogue, embodied in the general agreement of the construction sector, in they would resort to formulas for indefinite-term contracts (fixed-discontinuous) adapted to the special features of the sector (an update probably necessary after the CJEU ruling of 24 June 2021), does not justify this legislative "irruption", which has been barely debated and barely matured. And which may contribute not to solve problems, but to generate them.

2. News

The Government progresses with the labor reform and announces that it will approved before the end of 2021

The Executive continues negotiations with the social agents and aims to approve the labor reform before the end of the year. In this regard, the main issues on which the negotiation is focusing are, among others, the following:

- Modification of the **temporary hiring regime**: the Government proposes to replace the current modalities with the so-called temporary contracts due to productive causes (limiting their duration to a maximum of six months or twelve if enabled by the sectoral collective agreement) and organizational causes (substitution contracts). It also proposes that the termination of a temporary contract be declared null and void. The possibility of increasing Social Security contributions for companies that terminate temporary contracts has also been raised.

- Modification of **training and internship contracts**, limiting the latter to the duration of one year.

- Strengthening of the **figure of the fixed-term contract** for the performance of seasonal work or work linked to seasonal productive activities.

- Modification in the regime of **substantial modifications of working conditions** and referral, when there is no unitary representation in the company, to the most representative trade unions in the sector as the first option for negotiation.

- **Subcontracting** reform. The joint and several liability for wages and Social Security obligations of the client company will be applied in all cases except when the subcontractor develops a complementary activity, which is strictly disconnected from the productive activity of the main company or its actual or potential purpose. Likewise, the collective bargaining agreement applicable to the sector of the activity carried out in the contract must be applied to the employees of the contract.

- Modification and restriction of the matters in which **sectoral collective bargaining agreements** prevail over company collective bargaining agreements and **ultra-activity of collective bargaining agreements**.

- Implementation of the so-called **RED mechanism for employment flexibility and stabilization**, which establishes three types of ERTE (force majeure, restructuring and sectoral).

All these measures are currently under discussion and negotiation and are not definitive.

The Strategic Plan of the Labor and Social Security Inspection 2021-2023 has been approved

The Council of Ministers has approved the Strategic Plan for the Labor and Social Security Inspection 2021-2023, which is committed to modernizing the entity, providing it with new tools and resources.

Among the measures envisaged in the plan are the following:

- The updating of strategies and intervention plans to deal with the newest forms of labor fraud.

- The creation of the State Office for Combating Discrimination.

- The configuration of a special unit focused on the fight against transnational labor fraud.

- The promotion of new technologies and big data in the design of inspection actions.

- The plan also foresees reinforcing the intervention in collective dismissals, contract suspensions and substantial modifications of working conditions, as well as extending its competences to intervene in the non-application of collective bargaining agreements.

Agreement between the Government and labor unions for the increase in social security contributions up to 2032

The Government has agreed with the trade unions that, as from 2023, and over a period of ten years, an additional finalist contribution will be set which will feed the Social Security Reserve Fund of 0.6 percentage points, of which 0.5 will correspond to the company and 0.1 to the worker.

This final contribution will be maintained until 2032.

The labor calendar for 2022 has been published

The BOE has published the Resolution of October 14, 2021, of the Directorate General of Labor, which publishes the list of working holidays for the year 2022 that includes the working holidays scheduled for next year, as we reported in this alert.

The following days will be common holidays throughout Spain, which will be paid and non-recoverable: January 1, January 6, April 15, August 15, October 12, November 1, December 6 and December 8. In addition, the autonomous communities and municipalities will add local holidays. The communities may also substitute May 1 and December 25 for other days as they are public holidays that coincide on a Sunday.

Criteria for the prevention of occupational hazards in teleworking

The National Institute for Safety and Health at Work has prepared a technical note on prevention criteria for the integration of teleworking in the occupational safety and health management system. It is a guide of good practices with non-mandatory indications on the management of the prevention of occupational risks associated with teleworking.

The guide makes recommendations on the type of preventive organization that best suits the structure of the company considering telework, the adaptation of the occupational risk prevention plan, the evaluation of occupational risks, which reaches the enabled area of the home or place chosen for the development of teleworking, and the planning of preventive measures, mainly training.

Protection under ERTE temporary layoff procedure system extended until February 28, 2022, approval of new minimum wage and other employment measures

The Government and the social agents have reached the VI Social Agreement for the Defense of Employment, as we reported in this alert.

This agreement is included in Royal Decree-Law 18/2021, of September 28, on urgent measures for the protection of employment, the economic recovery and the improvement of the labor market, which maintains the ERTE model for those cases in force as of September 30, 2021, the extension of which may take effect until February 28, 2022 upon request and authorization by the labor authority. Companies affected by new health measures between November 1, 2021 and February 28, 2022 may request a new ERTE modality, which will center around training.

Royal Decree 817/2021, of September 28, which sets the minimum interprofessional wage for 2021, has also been published, under which it is increased to €32.17/day or €965/month.

In addition, Law 12/2021, of September 28, has been published to guarantee the labor rights of persons engaged in delivery in the field of digital platforms, which validates Royal Decree-Law 9/2021.

The Labor and Social Security Inspection starts a communications campaign to companies within the framework of the shock plan against fraud in temporary contracts

The Labor and Social Security Inspection (ITSS) has started, at state level, a communications campaign to companies urging them to transform temporary contracts into permanent contracts, within the framework of the shock plan against fraud in temporary hiring.

In the communications sent, in addition to including the details of the temporary contracts identified by the ITSS, they inform that, if the contracts are not transformed, the corresponding inspection activity may be initiated by the Provincial Labor and Social Security Inspection. In addition, a reminder is included that non-compliance in this matter is typified as a severe infraction by Article 7.2 of Royal Legislative Decree 5/2000, of August 4, which approves the revised text of the Law on Infractions and Penalties in the Social Order (LISOS).

3. Judgements

The Supreme Court admits the validity of security camera recordings even during rest time

In the case analyzed by the judgment of October 13, 2021, the company dismissed a bus driver because, among other breaches, he allowed some passengers to enter without the corresponding ticket and smoked inside the bus. Part of the breaches were committed during the worker's rest time, between the different scheduled routes.

The High Court of Justice of Galicia had determined the nullity of the evidence (and of the dismissal) for breach of the employer's duty to provide information, although it acknowledged that there were signs on the bus warning of the existence of cameras with the following phrase: "for the safety of the drivers".

For its part, the High Court states that the installation of these security cameras passes the triple test of proportionality because: (i) their presence is justified for safety reasons; (ii) it is suitable for the proposed purpose since it allows detecting possible infringements; (iii) it is necessary due to the inexistence of other means to prove non-compliance; and (iv) it is proportionate because the data obtained has been used for purposes of labor control.

The recording obtained by the cameras installed in the vehicle, including rest periods, is admitted since it is considered that during this time it is also possible to commit serious and culpable non-compliance while inside the bus.

Companies are not obliged to carry out COVID-19 screening tests on workers

The Supreme Court, in a ruling dated May 20, 2021, has declared that a company cannot be required to carry out COVID-19 tests on workers, in the absence of a legal regulation that so provides.

The case under analysis deals with the obligation to carry out a Covid-19 screening test for workers with the category of medical transport technician, due to the evident risk of exposure to direct or indirect contact with affected persons by ambulance personnel. The court determined that the company had complied with its risk prevention obligations and dismissed the lawsuit since there were no regulations in force that could require the company to carry out a COVID-19 detection test in the terms claimed by the plaintiffs.

Compulsory professional training is considered as working time

A recent judgment of the CJEU of 28 October 2021 establishes that professional training imposed by the employer pursuant to Article 2 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 is considered as working time.

According to the CJEU, Article 2 of the Directive must be interpreted as meaning that the period during which an employee undergoes professional training imposed on him by his employer and which takes place away from his normal place of work, on the premises of the provider of the training services, and during which he does not perform his normal duties, constitutes working time.

The determining factor in reaching this conclusion is that the employee, during the training period, is at the disposal of the employer.

The Supreme Court declares the invalidity of a post-contractual non-competition agreement with a compensation of 35 euros per month

The Supreme Court, in its recent judgment of October 18, 2021, has determined that a two-year post-contractual non-competition agreement which was compensated only with 35 euros per month (1.76% of the monthly salary) is invalid. The contract stipulated that, in the event of breach of this non-competition agreement, the employee would be obliged to pay the company an indemnity equivalent to the last 6 months of salary.

The High Court concludes that such agreement is not in accordance with the law taking into consideration: (i) the period of duration (2 years); (ii) the meager amount paid; and (iii) the disproportion between the amount received and the sum that the employee would have to pay the company in case of breach.

The acknowledgement of the facts by the employee in the contradictory proceedings does not imply that the company has effective knowledge for the purposes of the prescription period

The High Court, in its ruling of October 13, 2021, determines that the acknowledgment of the facts made by the worker in the contradictory proceedings does not necessarily imply the existence of full and accurate corporate knowledge of the facts imputed and, therefore, should not be counted as the beginning of prescription period for labor misconduct.

Specifically, the decision is based mainly on the fact that the acknowledgment can be denied or qualified by the employee and that it is made during the processing of the file, which does not have to imply that the corresponding verifications are not carried out. In this case, the court upheld the appeal, declaring that the offenses were not time-barred as a result of the aforementioned acknowledgment.

The non-exceeding of the probationary period can be counted for the purposes of collective dismissal thresholds if there has been an abusive or antisocial use of the right

In the case analyzed by the Supreme Court, the company carried out a large number of terminations in the period between March 16 and April 3, 2020. Specifically: (i) it terminated 6 temporary contracts *ante tempus*; (ii) it communicated the non-exceeding of the probationary period to 25 workers; and (iii) it disciplinarily dismissed 34 workers due to diminished performance. Subsequently, on April 6, 2020, it filed an ERTE due to force majeure arising from the healthcare crisis.

The High Court considers that the 25 non-exceeding of the probationary period and the early termination of the six temporary contracts must be computed for the purposes of collective dismissal thresholds because, in light of the factual circumstances, it considers that the company has made an abusive or antisocial use of the right. Consequently, the nullity of the terminations carried out as determined by the High Court of Justice of the Basque Country is confirmed.

4. Articles from the Labor and Employment Law Blog

Towards the standardization of labor compliance

Organizations with an effective labor compliance system in place can improve their reputation and image, strengthening their transparency and business ethics culture. To facilitate this process, an initiative is current underway to develop a UNE standard that helps to improve self-regulation and the development of good practices in the labor relations of companies, through a management system with requirements and recommendations. Continue reading here.

What content must be included in basic copies of employment contracts?

The Supreme Court has clarified what content must be included in the basic copies of employment contracts that companies must provide to the workers' statutory representatives in accordance with article 8 of the Workers' Statute. It has done so in a judgment handed down by the Labor Chamber on May 26, 2021, which confirmed the judgment handed down by the Labor Chamber of the National Appellate Court on October 18, 2019. Continue reading here.

Towards a new way of working (or not) in a labor market without COVID-19

The COVID-19 public health crisis has had an unprecedented impact on the labor market in Spain, making it essential to implement extraordinary measures to offset the effects that this crisis has had on employment. Two main, extraordinary measures have been put in place in the area of human resources and labor relations: temporary collective layoff procedures (ERTE) and remote working. Although these measures already existed in Spanish legislation, they had never been used on such a massive scale and for such a long period of time. Continue reading here.

The Constitutional Court diminishes the value of agreements reached in collective dismissals

Up to recently, whether an agreement was reached with the employees' representatives in a collective dismissal procedure was important. Reaching that agreement meant a (very) significant legal effect: the case law considered that the reasons justifying the collective dismissal had to be presumed to exist and, as a consequence of the above, the employees affected could not question their existence in each of the individual proceedings which they might commence. However, this legal approach which had been adopted by the Plenary Session of the Labor Chamber of the Supreme Court has been overturned by the Constitutional Court, in a judgment handed down on July 12, 2021. Continue reading here.

New ground for a dismissal to be held null and void: discrimination by association

Can a dismissal be discriminatory based on gender and, therefore, null and void, even though the employee that has been dismissed does not form part of a legally protected group? The conclusion reached by the Labor Chamber of the High Court of Justice of Galicia, in its judgment of March 4, 2021, was that it could. Continue reading here.

Prorating special payments: to do or not to do?

It is relatively frequent for employers to prorate, on a monthly basis, the two special payments usually paid in the summer and at Christmas. But … when is it actually possible to do this legally? We analyze it in this post.

Teleworking can help to reduce absenteeism

The pandemic in which we have lived since March 2020 has entailed the unavoidable and unexpected implementation of the teleworking system, without any possibility of previously analyzing the advantages and disadvantages of this type of work, and even without there being sufficient regulations on the matter when it all began. Continue reading here.

3-day weekends: a real possibility?

In a year still marked by the pandemic and by its impact on employment, there is an ongoing public debate in Spain regarding the possibility of reducing working time to 4 days a week. Continue reading here.

As the ODS get older, ESG criteria makes progress, also in a labor environment

September 25 is the sixth anniversary of the approval of the Sustainable Development Goals (SDG) by the United Nations Organization (UNO). Objectives such as gender equality and equal pay for the same work, as well as theprotection of labor rights, are among the UNO's priorities from a labor perspective. Continue reading here.

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5. Garrigues Labor and Employment in the press

An unmissable offer for a problem that cannot be postponed: New mechanisms for judicial decongestion

Article by Felipe Ochoa, principal associate in the Labor Department of Garrigues in Madrid ('Elderecho.com').

Read here

On the obligation not to compete

Article by Misericordia Borrás, partner in the Labor Department of Garrigues in Barcelona ('Diari de Tarragona').

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