Labor and Employment Newsletter

Spain

GARRIGUES

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Contents

1. The internal whistleblowing channel and its impact on labor relations (II)

In this second installment on the recently introduced whistleblower protection law, we analyze the requirements that the new Spanish regulation and the European directive establish regarding the implementation of the whistleblower channel and delve into the way in which it should be managed by companies.

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The internal whistleblowing channel in companies is, in principle, preferential to external channels and public disclosure, which means that, from the point of view of labor relations, the focus of interest should be mainly on this channel. It is true that this preferential nature is relative and, in practice, will be left to the discretion of the whistleblower. The European directive that regulates it requires States to promote " reporting through internal reporting channels before reporting through external reporting channels" (Article 7.2), but only if the offence can be dealt with effectively internally (and who decides whether the offence (or rather the complaint) can be dealt with effectively internally, whether the complainant has to make any enquiries, whether he can simply consider that the conditions for doing so do not exist?) and provided that the complainant considers that there is no risk of reprisals. This provision is reproduced in Article 4.1 of our law, so that the preference for the internal channel, with no control of the whistleblower's assessment of the risk of reprisals, is more theoretical than real. This is the point of Article 28 of the law, which requires, in order to resort to public disclosure, that the communication must first have been made "through internal and external channels, or directly through external channels". The wording is certainly not fortunate and the use of the copulative conjunction "and" does not seem appropriate. But what is relevant is that direct recourse to external channels is allowed, without any indication of preference for internal channels. Moreover, direct recourse to public disclosure is possible if the whistleblower has "reasonable grounds to believe" that the offence may constitute an imminent or manifest danger to the public interest, or if there is an emergency situation, risk of irreversible damage, risk of retaliation or risk of concealment or destruction of evidence.

I have spoken of an internal channel, although the heading of Title II of the law is "internal information system", even though Article 7 speaks of "internal channel". With a regulation that is certainly confusing, it is not very clear whether what is being regulated is a system within which different information channels can coexist. Article 7.1 states that all internal channels shall be integrated into the internal information system, and Article 5.2.b states that the internal system shall integrate the various internal information channels. Can there be different channels for compliance with the law or are these channels intended for other complaints? On the other hand, Article 7.2 speaks of the internal channel, in the singular, and regulates it as if it were the channel foreseen for information or complaints, so there is no difference between the system and the internal channel.

The issue is further complicated by the fact that the management of the internal system can be outsourced (Articles 6 and 12 of the law). However, it is made clear that, "for these purposes" (of entrusting management to an external third party), "the receipt of information is considered to be management of the system" (Article 6.1). External management thus seems to be limited to the receipt of information, although Article 12 speaks of the "management and processing of communications". In any case, it seems that it is the responsibility of the companies, even if the management is outsourced and also covers the processing of complaints (as expressly stated in the European directive for cases of "joint" management), to maintain confidentiality, respond to the complainant and deal with the offence reported (Article 8.6 of the directive).

The law imposes the existence, even in cases of outsourcing (Article 6.3), of a "person responsible for the internal information system", who must in principle be a natural person (Article 8.1), although a collegiate body may be chosen, in which case it must delegate to one of its members the powers to manage the system and process information files (Article 8.2). As can be seen, legal rigor is conspicuous by its absence: Article 8(2) provides for the possibility of opting for a collegiate management body, whereas the option is not provided for at all in Article 8(1), which only refers to the designation of the natural person responsible for management. This lack of rigor is maintained in the regulation of the figure of the person responsible for the system: Article 8.5 speaks of the "person responsible for the system, a natural person or the entity to whom the collegiate body has delegated its functions", when the delegation must be to a member of the collegiate body (therefore a natural person), not to an "entity". In any case, the person responsible or delegated must be a "manager of the entity", who will exercise his or her position independently of the administrative or governing body of the entity. It is not required that they have exclusive dedication, but the second part of the same section 5 of Article 8 seems to suggest otherwise, since "when the nature or dimension of the entity's activities do not justify or permit the existence of a manager responsible for the system, it will be possible for the ordinary performance of the functions of the post or position with those of the person responsible for the system, trying in all cases to avoid possible situations of conflict of interest". This seems to be an ambiguous and convoluted way of saying that the person in charge must be a full-time manager and, when this is not possible, it may be an employee who is not necessarily a manager, who may combine the responsibility for the system with the performance of his or her work. With the added doubt as to when it will be possible to resort to this second solution, and who, and with what criteria, will be able to assess the impossibility of it being a manager (or the justification for it not being a manager).

The law allows for the submission and subsequent processing of anonymous reports through internal channels (Article 7(3)), although this is not required by the directive, which recognizes the power of Member States to decide whether or not to require private or public sector entities and competent authorities to accept and follow up on anonymous reports of infringements (Article 6(2)). This admission of anonymous reports may be highly problematic given the extension, by Spanish law, of the material scope of the directive. The admission, in the complaints channel, of complaints of criminal offences and, above all, of serious and very serious administrative offences, may give rise to situations in which the anonymity of the complainant goes against the rights of defense of possible third parties affected by the complaint, which may exist, provided that they are not interpersonal conflicts or conflicts that exclusively affect the complainant and the accused, who are excluded from the protection of the law (Article 35.2.b). The guarantee of anonymity, on the other hand, is hardly compatible with the consistent system of whistleblower protection provided for in the law.

With regard to the system of infringements and penalties, it should be borne in mind that what are typified are infringements of the whistleblower protection law and penalties are provided for them. These are not applicable to possible administrative or criminal offences reported, which will have their own legal regime. Even so, there are problematic cases, such as that of Article 63.1 b of the law in relation to reprisals derived from whistleblowing. In the labor sphere, the guarantee of indemnity and the prohibition of reprisals already exist, and, in my opinion, the more specific labor sanctioning system should prevail in all those cases in which not only compliance (or non-compliance) with the provisions of the law is at stake. This is another drawback of the Spanish legislator's extension of the material scope of application of the directive.

2. News

Work calendar for 2024 published in the Official Gazette

The Official Gazette has published the Resolution of 23 October 2023, of the Directorate General of Labor, which publishes the list of public holidays for the year 2024, which includes the public holidays scheduled for next year.

3. On the radar

Main employment implications of the investiture agreements

Within the framework of the political agreements that have led to the investiture of the Prime Minister, Pedro Sánchez, several issues of interest in the sphere of labor have been addressed.

Specifically, the agreement reached between the PSOE and Sumar envisages, among other issues, (i) the reduction of the maximum legal working week to 37.5 hours, with no reduction in wages, (ii) the strengthening of workers' guarantees against substantial changes in working conditions and collective bargaining agreements, (iii) an increase in workers' guarantees against dismissal, including an increase in compensation for dismissal and the establishment of minimum compensation, (iv) the progressive increase in the minimum inter-professional wage, (v) the approval of the statute for scholarship holders, (vi) the new regulation of partial retirement and the relief contract, and (vii) the strengthening of time recording instruments, through the use of new technologies and artificial intelligence.

On the other hand, the agreement signed between the PSOE and the PNV provides for a modification of the rules of competition between different collective agreements that will allow for the negotiation of interprofessional agreements at the level of the autonomous regions with priority over any other sectoral agreement or agreement at the state level.

In any case, it will be necessary to await the development of these measures through the corresponding legislative procedure in order to be able to determine what they will finally lead to.

The trade union UGT proposes to increase compensation for unfair dismissals

The trade union UGT has proposed in a recent report to recover in unfair dismissals the processing wages, the 45 days of salary per year of service (instead of the current 33 days) and to establish a minimum compensation of 6 months for short-term employment relationships.

The European Committee of Social Rights will not decide on the procedure for compensation for unfair dismissals until 2025

In March 2022, the trade union UGT lodged a complaint with the European Committee of Social Rights, whose main function is to monitor compliance with the European Social Charter by the member states of the Council of Europe, alleging that the compensation for unfair dismissal provided for in the Spanish system was insufficient. Subsequently, the CC.OO. trade union has joined these claims.

Although the pleadings process has now been completed, the committee has advanced that it will not resolve the dispute until early 2025.

The Bank of Spain will oblige banks to publish the gender pay gap

The Circular 3/2023 of the Bank of Spain of 31 October introduces the obligation for credit institutions and financial credit institutions to report the gender pay gap to the Bank of Spain.

Specifically, a statement on gender pay gap information is added, on a three-yearly basis, to the general periodic information statements to be sent to the Bank of Spain on remuneration. The first submission of information must be made no later than 15 June 2024 on remuneration information as of 31 December 2023.

The Labor Inspectorate intensifies the campaign on the control of equality plans and measures

In line with the provisions of the Strategic Plan of the Labor and Social Security Inspectorate 2021-2023, the Labor Inspectorate is focusing particularly on the verification of the existence and implementation of an equality plan according to the legally required terms.

Failure to have an equality plan in place and registered in accordance with the applicable regulations may lead to fines, prohibition from contracting with the public sector or non-compliance with the requirements for the application of social security bonuses.

4. Judgements

The Supreme Court declares a dismissal for theft of goods to be justified regardless of their value

The judgement of 17 October 2023 of the Supreme Court declares that the appropriation of company products by an employee, regardless of their value (however small), constitutes a very serious offence under the terms of the applicable collective agreement, so that the dismissal must be declared fair.

The decision is based on the fact that, once such conduct was detected, the trust placed by the company in an employee in the position of cashier has been broken.

Compensation in addition to what is provided for unfair dismissal is denied

The High Court of Justice of Galicia, in its judgement of 26 September 2023, dismisses the appeal lodged by an employee who claimed additional compensation to that received for unfair dismissal for having been dismissed without cause, citing the European Social Charter and ILO Convention No. 158.

The court ruled that the claim could not be upheld, as the right of employees dismissed without just cause is safeguarded by the legally provided compensation for unfair dismissal, without it being appropriate to impose additional compensation.

The 30-minute alteration in working time does not constitute a substantial change in working conditions

The judgement of 5 October 2023 of the High Court of Justice of Aragon has rejected the appeal lodged by the legal workers' representatives of the in a collective dispute over the change of timetable which delayed the entry and exit of 304 employees by half an hour respectively.

The court, in line with other rulings on this issue, held that changing the working schedule by half an hour does not constitute a substantial modification of working conditions, nor does it transform the employees' contract.

Refusal of a request for an adjustment of working hours on the grounds of the requirements of the employer's customer is valid

The appeal brought by the employee is dismissed, confirming the validity of the employer's decision to refuse the request to adapt their working hours and to provide services on a 100 % teleworking basis.

The High Court of Justice of Castilla y León in Valladolid, in its judgement of 25 September 2023, considers the company's refusal to do so to be reasonable and proportionate, taking into account its organizational and production needs and, in particular, the fact that it was the company's customer who did not allow telematic contact with the company's employees.

Commissioning an external company to carry out a situation diagnosis when developing the equality plan does not infringe trade union rights

The Madrid High Court of Justice, in its judgement of 15 September 2023, dismissed the appeal lodged by the trade union, which considered that the fact that an external company carried out the situation diagnosis, as part of the implementation of an equality plan, was an infringement of the regulations and a violation of freedom of association.

The judgement emphasizes that the participation of the negotiating committee is in no way impeded by the involvement of a third company in the preparation of the diagnosis. The participation of an external company was merely for the purpose of advising and facilitating the process of drawing up the equality plan.

The company is not obliged to provide ergonomic chairs for teleworking staff

The company is not obliged to provide teleworkers with the ergonomic chair that it provides to employees who provide services in person at the company's workplaces.

This is stated by the Audiencia Nacional in its judgement of 3 October 2023, to the effect that the failure to provide a chair to employees who telework does not constitute any inequality with respect to employees who physically provide services at the workplace, and the provision of an ergonomic chair is not a necessary health and safety measure for all employees who provide remote services.

5. Garrigues Labor - Sustainable

The Council of the European Union adopts the Recommendation on developing framework conditions for the social economy and Conclusions on mental health and precarious work

The Recommendation includes measures promoting the role of the social economy in labor market integration and social inclusion. The Conclusions on mental health and precarious work contain a set of suggestions with the aim of promoting the psychological well-being of employees.

The European Commission approves the first set of sustainability reporting standards to be used by companies

In compliance with the mandate given in the corporate sustainability reporting directive (CSRD), the European Commission has approved a delegated act adopting the first set of reporting standards.

Spain: The CNMV analyzes ESG reporting by listed companies as required by the EU taxonomy

The report looks at the documentation provided by companies and provides some brief general recommendations to help improve the information published.

6. Latin America

These are the labor aspects of the proposed New Constitution of Chile and its effects

The draft text, which will be put to a vote in December, introduces new labor-related developments to which companies will have to pay particular attention.

7. Labor and Employment Blog

Can a dismissal with formal defects be remedied?

Occasionally, a dismissal can be frustrated by not complying with a series of formal requirements. In such cases the labor regulations provide for some options allowing companies to rectify the dismissal and make it valid.

Labor and employment implications on the use of instant messaging applications

The widespread use of new communication tools such as instant messaging applications has legal and labor implications that should be taken into account. We review some rulings in this regard.

Temporary disability does not automatically declare the dismissal null and void

After a year of application of the Integral Law for equal treatment and non-discrimination, the labor courts and tribunals have made a criterion up progressively on the dismissal of employees in a situation of temporary incapacity.

The “necessary” hearing of the employee prior to his/ her disciplinary dismissal

Recently, several court rulings have been handed down on the alleged obligation to comply with the prior hearing of the worker in cases of disciplinary dismissal. These rulings may change the procedure to be followed in future dismissals.

May children's extracurricular activities justify a certain adaptation of the working day in Spain?

Since its introduction in our legal system, the adaptation of working hours regulated in article 34.8 of the Workers' Statute has been gaining ground as a measure to reconcile the work and family life of employees. However, the adaptations requested do not always meet the requirements of reasonableness and proportionality established in the law.

8. Press

The Supreme Court considers that dismissing an employee for economic and organizational reasons, despite having previously hired another worker, is justified

Juan Francisco Argente, *counsel* in the Valencia office of Garrigues, comments for the General Council of Spanish Lawyers on the ruling handed down by the Spanish High Court in a case he advised for a client of the firm.

The Supreme Court declares the dismissal of an employee for the theft of 5 euros worth of products to be justified

Unai Miguel, senior associate in the labor law department of Garrigues' Bilbao office, assesses for *Confilegal* and for *El Correo* the firm's victory in defense of a client before the Supreme Court, where the High Court upheld the dismissal of an employee for the theft of products worth 5.50 euros.

The company is not obliged to provide its teleworkers with an ergonomic chair

The newspaper Cinco Días reports on the ruling won by the company, which was represented by Eloy Castañer, a partner in the Labor Department of Garrigues.

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