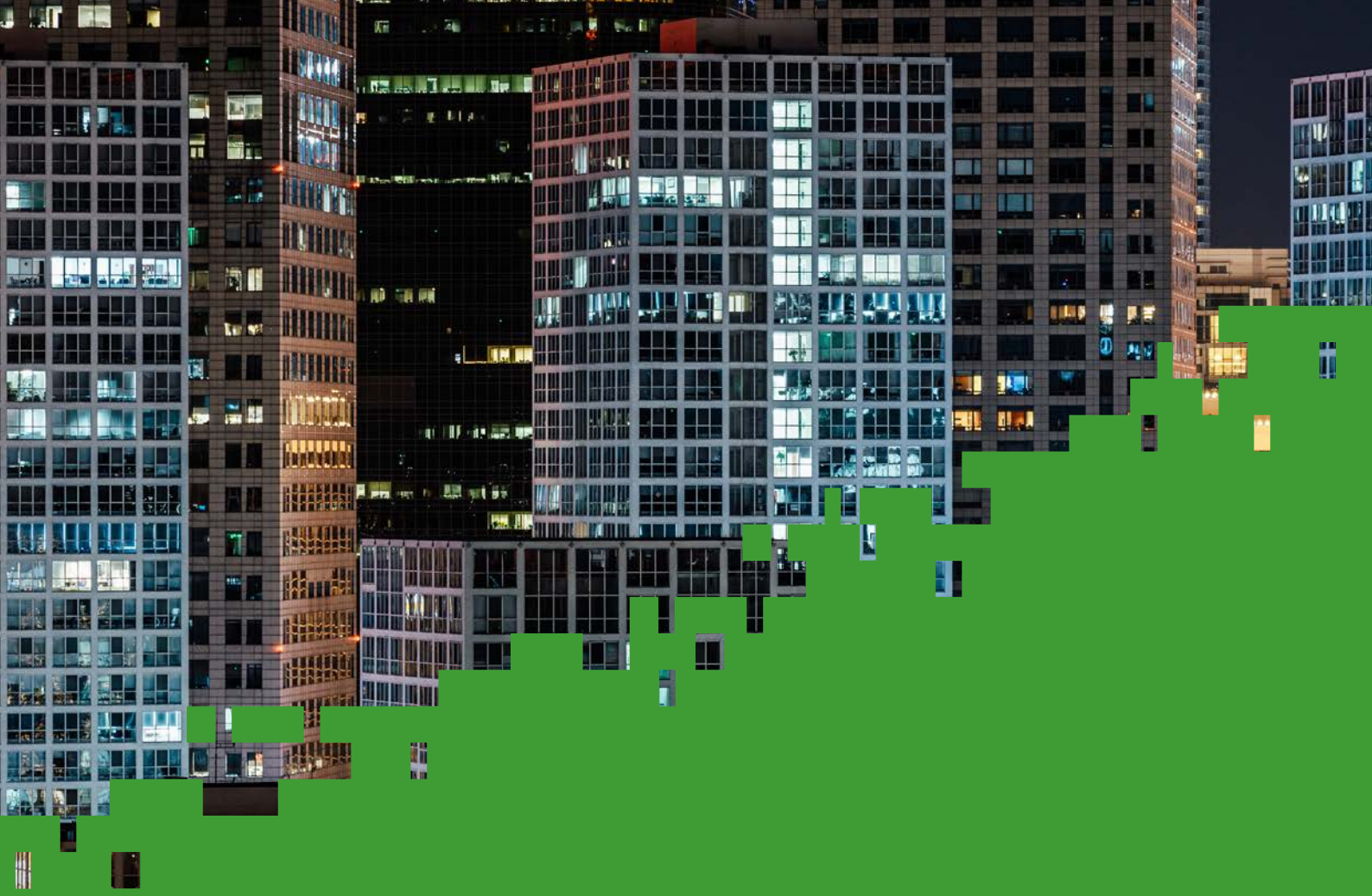
NEWSLABOUR

N_38
October 2024

RSM Spain
Labour Department
Newsletter

THE POWER OF BEING UNDERSTOOD
ASSURANCE | TAX | CONSULTING | LEGAL



CONTENTS

Editorial

Ignacio Hidalgo and Miguel Capel

Several new events related to labour law occurred last month and, as usual, #NewsLabour has compiled both the most important judgements and practical day-to-day aspects as well as an analysis of cases.

In this edition we deal with some judgements of great interest, such as the one ruled by the Spanish National Court on the need for pay slips to meet certain minimum clarity and transparency requirements.

You should not miss the article #Práctical Law either, related to measures for a work-life balance for posts with particular responsibility.

As always, we ensure our readers are informed and up to date. ■

Moreover, we remain at your entire disposal!

Please contact me if you would like further information about this issue.

Gadea Saldaña
gsaldana@rsm.es

> The courts in a nutshe

What's new on the block?

As always, every month we can find judgements and legal news that particularly draw our attention due to their special features or importance; we provide an overview of some of them below:

Gadea Saldaña

Judgement of the Spanish Supreme Court of 15 October 2024: Are single parent families entitled to extend their maternity leave?

The Supreme Court recently dealt with the issue of what happens when there is a newborn baby in a single parent family. In this respect, in order to protect equality among minors, it was ruled that the parent is entitled to extend his/her leave from 16 to 26 weeks in order to avoid discrimination due to the situation of the baby's birth.

This is because the type of family in which a baby is born cannot lead to a discriminating factor for newborn babies because they all have the same needs and their constitutional rights to equality and non-discrimination due to birth must be observed, hence ensuring protection of the minor's interests.

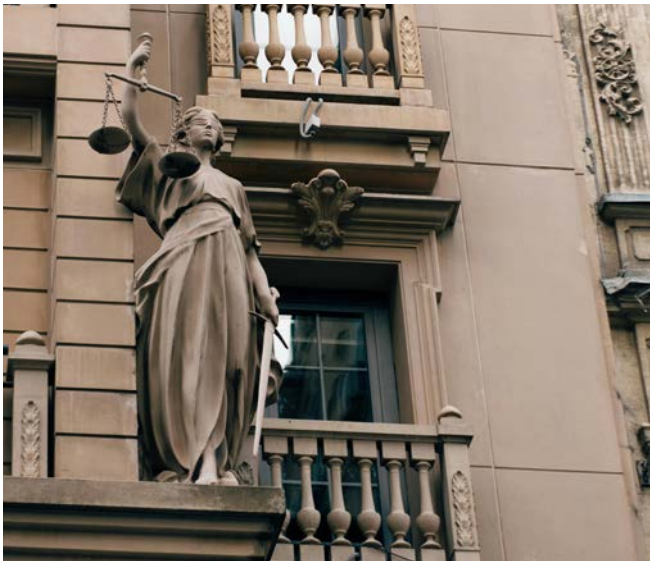
Judgement of the Supreme Court of 24 September 2024: Is dismissal after a trial period granted "according to a collective bargaining agreement" fair or unfair?

In this judgement, the Spanish Supreme Court upheld workers' right to a stipulated trial period and, if this is not included in the contract and the employer eventually terminates the contract, such termination could be ruled unfair dismissal. Therefore, the court stated that any contractual clauses in which a trial period is not specified and no reference is made to this in the collective bargaining agreement could be ruled null and void.

Judgement of the Supreme Court of 24 September 2024: Voluntary leave, can the right to reinstatement be exercised in any company in the group?

The Supreme Court ruled on the possibility of a worker being reinstated in another company in the group that the employer belongs to. In this respect, the court considered that such reinstatement can take place in any company in the group providing the collective bargaining agreement applicable to such group of companies specifically includes this possibility. As such situation is not included in the ordinary regulations, this must imply a benefit in favour of the workers and must be stipulated in the collective bargaining agreement, providing the right to reinstatement is in a job of the same or similar category to the one held prior to the worker's leave. ■

The Supreme Court ruled on the possibility of a worker being reinstated in another company in the group that the employer belongs to.



Please contact me if you would like further information about this issue.

Francisco de Borja Ortas
bortas@rsm.es

> Practical law

Measures for a work-life balance for posts with particular responsibility: right, compatibility and impact.

Francisco de Borja Ortas

We are aware of the fact, and therefore act accordingly, there are certain jobs that, due to their particular responsibility, are more demanding and require a higher commitment from the worker to be able to cover the needs required for such post. We are referring to expansion managers, heads of operations, international development managers etc. who, in most cases, require this level of special dedication due to the time they must spend travelling, (in many cases abroad), attending meetings and demands that, due to the kind of post, make it difficult for such post to be compatible with any kind of measure for a work-life balance that could be included in collective bargaining agreements or Article 37.6 the Spanish Labour Relations Act.

All this is not because the worker is not entitled to request and be granted such measures, (which all workers benefit from), but because the very nature of their post can make it incompatible to apply them. We can consider a worker who requests shorter working hours for legal guardianship; however the kind of job requires that he/she opens new work centres abroad and this needs continual travel to other countries. It is obvious this is incompatible with shorter hours or the worker requiring a specific timetable, which raises the question about adaptation of the worker's job and the feasibility of continuing his/her duties with the same working conditions.

Please contact me if you would like further information about this issue.

Francisco de Borja Ortas
bortas@rsm.es

Due to this situation, in these cases mentioned above, even being aware of these circumstances, the worker requests to exercise this right that the regulations also automatically grant to him/her, such as shorter working hours, hence a measure the company could resort to is a kind of functional relocation within the company, enabling a new job to be assigned to the worker with the same professional category, without this implying a lower salary or a change in his/her professional level.

In this respect, since the company could consider it is absolutely impossible and unfeasible to apply shorter working hours to the worker's current job, it could propose the possibility of functional relocation to a job that is within the same professional category, without this implying a lower salary. This business decision has been supported by the Spanish courts, as can be seen by the judgement of the Constitutional Court 153/2021 of 13 September 2021, which ruled as follows:

"It is considered that, in accordance with the defendant company, the measure consisting of temporarily assigning other services to the worker did not cause the worker any harm whatsoever. She did not undergo any "reduction in her professional category", because she continued performing the same duties with her same professional nursing category and in the same group; she did not lose her place in the ICU due to her pregnancy or her place was kept in the paediatric ICU, which she returned to when she began working full time again and she also continued taking her training courses. Under these circumstances, as stated by the challenged court decisions, it cannot be considered that she was caused any "professional downgrading" or any "hindrance in her professional career", as alleged by the appellant."

The Constitutional Court ruled that, providing the decision is based on the company's justified organisational needs and does not imply any reduction being caused in the professional category or duties performed, it cannot be considered that any professional harm has been caused and hence the business management can adapt such job to the other one that, always within the same professional category, could make this measure for a work-life balance possible as requested by the worker.

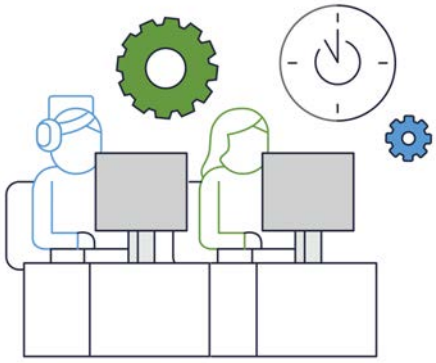
Impact on Receiving Fringe Benefits

Along with functional relocation, the issue is also raised about receiving the fringe benefits that the worker had been granted due to his/her duties of responsibility, above all regarding the bonus payable for such job. Case law has been clear when determining that the fringe benefits linked to the specific duties of the job cannot be vested and hence they cannot be applicable to cases in which the worker no longer performs the duties for which the fringe benefits were granted.

In this respect, the judgement of the High Court of Justice of La Rioja 237 of 3 Novembre 2005, ruled the following:

"The fringe benefits granted for the job are no longer applicable in cases of functional relocation, unless there is a legal provision or agreement otherwise that guarantees they will be received, which is something that Spanish case law has repeatedly upheld, (for example the judgements of the Supreme Court of 27-7-93, 20-12-94, 5-2-96 and 7-7-99)."

Therefore, a worker's functional relocation that has been accepted as a measure for a work-life balance can imply that the bonus payable for the worker's previous job is no longer applicable, because it was subject to performing specific duties that resulted in such fringe benefits being payable. However, this measure cannot be considered a substantial change in the employee's working conditions, since it does not affect his/her basic salary or other fundamental terms and conditions of his/her contract. ■



Please contact me if you would like further information about this issue.

Enrique Mellado
emellado@rsm.es

> Case of the month

Case of the month: from the negotiating rigidity and reinforcement of the trade union's position to the anticipated legal certainty for negotiating and registering equality plans.

Comments on judgements numbers 543 and 545 of the supreme court, both ruled on 11 april 2024.

Enrique Mellado

The framework of the current legal relations between employers in the labour relationship and employees subject to the rights of control and business management is undergoing a continuous and hectic process of legal change and updating. These new legislative changes have an unquestionable impact on labour relations, documental obligations, such as Protocols to combat LGTBI harassment, (the contents of which, still uncertain, will depend on the agreement signed between the government, trade unions and employers' association announced by the Ministry of Employment on Monday, 3 June 2024), or the special negotiating features regarding effective equality between men and women, just some of the requirements that must be unavoidably fulfilled that are faced by a production sector already congested by *the turmoil and hyperactivity* that for years has characterised the legislative technique applied to labour issues.

> All the companies that, due to employing more than 50 workers, were forced to hold negotiations and register an Equality Plan in order not to be deemed to have committed conduct.

In a production situation still overwhelmed by the devasting effects of the spread of COVID-19 and the consequences that were caused to the business sector, **Royal Decree 901/2020 regulating equality plans and their registration**, (hereinafter referred to as **"Royal Decree 901/2020"), was published on 14 October 2020 in the Official State Gazette**; as well as Royal Decree 902/2020 on equal pay for men and women. Both of these regulations, which include important measures in labour legislation related to equality between men and women, implemented a rigorous negotiating process for registering Equality Plans requiring that, in addition to the rigorous content of mandatory fulfilment, an audit must be conducted by analysing quantitative data to enable conduct related to discriminatory payment to be detected.

However, there were certainly two issues that have raised the most interpretive doubts and caused a higher level of uncertainty for all the companies that, due to employing more than 50 workers, were forced to hold negotiations and register an Equality Plan in order not to be deemed to have committed conduct that could not only lead to monetary penalties but also the express prohibition to enter into contract with the public sector:

- On the one hand, setting up a negotiating committee and appointment of persons authorised to act in the name and on behalf of the workers in companies without legal representatives.

- Specifically, Article 5.3 of Royal Decree 901/2020 obliges companies that have no legal representatives to send a summons to the most representative trade union organisations of the sector in which the company operates so that, within a term of 10 days, they respond to such summons and set up a negotiating committee, without which the Equality Plan would have a formal defect that would lead to the file being null and void and hence the impossibility for such plan to be registered.

Please contact me if you would like further information about this issue.

Enrique Mellado
emellado@rsm.es

- Through a legislative technique not only aimed at reinforcing the role of the trade unions but also the use of trade unions by companies without legal representatives, the regulations prevent, (albeit not expressly but tacitly), *ad hoc* committees from being set up appointed by and among the workers on the company's staff. This negotiating anomaly, unlike what occurs in cases of a collective bargaining nature that could result in more harmful effects for the economic rights and working conditions of employees, such as the redundancy plan (*expediente de regulación de empleo*), the mechanism of not applying the collective bargaining agreement or the significant modification of collective working conditions will soon be faced with firm critics and could even be subject to a challenge by the Spanish Business Organisations Federation (CEOE).

- On the other hand, the effects caused by the authorities failing to reply after the Equality Plan has been registered in the Collective Bargaining and Equality Plans Registry (**"REGCON"**) due to there being a legislative omission of not specifying whether this is of positive or negative nature.

Moreover, the aforementioned circumstances, far from providing legal certainty, lead to a concerning and ambiguous framework that requires action to be taken by the Courts and Tribunals to resolve the following absurd questions that are frequently raised: What happens if no trade union authorised to set up a negotiating committee responds to the summons within the term of 10 days granted for such purpose? And if, in spite of responding to the summons, no action is taken, infringing the good faith that must be applied to the negotiating process and preventing the Equality Plan from being registered? Would this not entitle the company to unilaterally implement the Equality Plan? Would the lack of reply from REGCON prevent the Equality Plan from being registered that has been negotiated, implemented and filed, according to the rules of good faith and business diligence for the negotiations, due to the lack of action by the authorities?

These incognitos have been subject to interpretation by the courts and tribunals and, up to now, have led to very different and sometimes contradictory judicial rulings: Some have decided that *ad hoc* committees are legitimate when set up due to the lack of response to the summons sent by the company; others deem that they are null and void by a rigorous and strict application of Article 5.3 of Royal Decree 901/2020; based on the juxtaposed legal interpretations, they also analysed the effects stemming from a lack of reply from the authorities once three months have elapsed counted from the Equality Plan being filed. Endless rulings, to suit everyone's tastes, which did not reach a unified consensus on the interpretation of both the aforementioned disputed issues: Unilateral registration due to the situation of a trade union impasse and the positive or negative nature of the authorities failing to reply.

Fortunately, the recent judgements ruled by the Labour Chamber on 11 April 2024 have provided a situation of legal security and certainty and have offered criteria that, albeit not to everyone's liking, mainly resolve the aforementioned incognitos and, above all, enable the negotiations to be unblocked and speed up registration of Equality Plans:

- On the one hand, we refer to the judgement of the Labour Chamber of the Supreme Court number 543 of 11 April 2024, which ruled the positive nature of the authorities failing to reply once 3

Please contact me if you would like further information about this issue.

Enrique Mellado
emellado@rsm.es

months have elapsed, counted from the Equality Plan being filed, which means that, if there is no decision in this respect, (a frequent and regrettable practice that has caused considerable harm to numerous companies that, based on their diligence, have held negotiations according to the legal provisions), this will result in its final approval and no other decisions otherwise will be accepted in the future.

- On the other hand, the judgement of the Labour Chamber of the Supreme Court number 545/2024, on the same date, ruled the legality of the Equality Plan unilaterally negotiated by the company when there is no reply from the trade unions authorised to act in the name and on behalf of the workers on its staff. Furthermore, many of us consider this is based on correct legal criteria where a serious interpretation was conducted of the regulations in situations of impasse, in which the Labour Chamber drew such conclusion based on the following considerations:

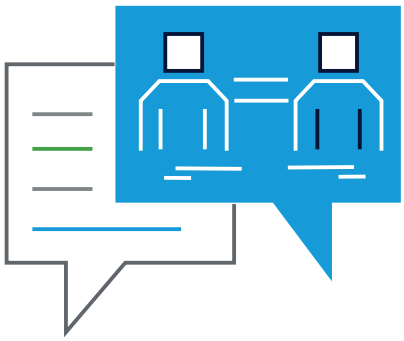
  - Firstly, *ad hoc* committees cannot be set up within the scope of negotiations of Equality Plans.

  - However, registration of an Equality Plan now implies an obligation that must be fulfilled by companies employing 50 or more workers, (the infringement of which could result in high monetary liabilities or prohibition to enter into contract with the public authorities, among others), and infringement of this obligation would be impossible in cases such as the one it ruled on: lack of legal representatives and failure of the authorised trade unions to reply to the summons.

  - The authorised persons are allowed a term of 10 working days to reply to the summons sent by the company and the latter is not required to make any subsequent or successive attempts once the term granted for such purpose has elapsed.

  - Failure to reach an agreement due to the actions of those other than the company cannot result in it being impossible to register the Equality Plan, because otherwise inactive positions would be allowed aimed at preventing compliance with a legal obligation.

These rulings have an unquestionable practical function that provide legal certainty to questions that have not been answered up to now; and once again the defective legislative technique has required that action needed to be taken by the courts and tribunals to resolve the incognitos that, as usual, have led to harm being caused to the already congested business sector. ■



Please contact me if you would like further information about this issue.

Alejandro Duque
aduque@rsm.es

> Judgement of the month

Is your company protected from sanctions being imposed? Find out if your pay slips comply with the law.

Alejandro Duque

More and more companies are faced with sanctions due to not complying with the clarity and transparency standards in their workers' pay slips. However, could your company be at risk? Are the current practices in your organisation sufficient for managing your pay slips? A recent judgement ruled by the Spanish National Court has once again placed a focus on the importance of pay slips complying with the regulations in force in order to avoid labour disputes and sanctions.

What must a pay slip actually contain?

Judgement 73/2024 of 18 June 2024, ruled by the Labour Division of the National Court, involved a class action filed by the General Employment Federation (CGT) against Easyjet Handling Spain. The basis of the dispute lay in the clarity of the items included in the company's pay slips, in particular remuneration terms such as "variable holidays" and "back pay". The lawsuit claimed that the pay slips must include a detailed description of the origin, item, unitary price, value and number of units paid, alleging that the lack of clarity violated the workers' right to understand how their wages were calculated.

This case raised a question that should be asked by all companies: Are our pay slips providing the required transparency for the employees to fully understand their wages? Spanish regulations (the provisions in Article 29.1 of the Spanish Labour Relations Act and various ministerial orders) require that pay slips must be clear and detailed so that the workers can understand their remuneration themselves.

Is it sufficient to offer additional support for queries about pay slips?

Easyjet defended this claim by alleging that its pay slip software, connected to the Spanish social security system, restricted its ability to provide the details claimed by the trade unions. The company also sustained that the workers had been provided with a support protocol to clarify any doubts they could have about their pay slips, which should be deemed sufficient. However, the National Court was clear when it ruled that this additional support did not exonerate the company from its obligation to provide clear pay slips right from the start, since the employer is responsible for guaranteeing wage transparency, not the worker.

More and more companies are faced with sanctions due to not complying with the clarity and transparency standards in their workers' pay slips.

This raised an interesting consideration: Is your company relying on alternative solutions instead of ensuring that the pay slips comply with the legal requirements right from the start? The judgement stipulated that companies must guarantee, with no exceptions or conditioning factors, that their pay slips are sufficiently understandable, even if their IT system has limitations.

What risks can your company face if it does not comply with the required clarity in its pay slips?

Companies that do not ensure transparency in their pay slips could be subject to claims being filed by their employees and possible administrative sanctions. The National Court made it clear that no technological limitation could justify infringement of the legal standards for clarity in pay slips. Therefore, all companies operating in Spain must ensure that their wages management system is adapted to the regulations and, if necessary, improvements must be made.

→

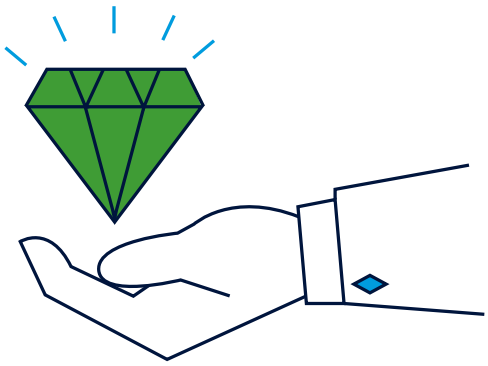
Please contact me if you would like further information about this issue.

Alejandro Duque
aduque@rsm.es

Conclusion: A transparency standard that is becoming more and more demanding.

The judgement reinforced companies' commitment to transparency in labour relations and stressed that clarity in pay slips is not only a formal requirement but an essential guarantee that the workers' rights can be effectively exercised.

Is your company actually prepared to comply with this transparency standard? Does your pay slip system have the capacity to provide all the detailed information required by the law in force? In an environment that is becoming more and more demanding, this is a good time to review your practices and ensure that your company complies with the legal requirements. Remember: Prevention is the key factor to avoid sanctions and to ensure your labour relations are based on trust and transparency. ■



Please contact me if you would like further information about this issue.

María Rubio
mrubio@rsm.es

> Advice of the month

Why is a right to switch off policy needed?

MARÍA RUBIO

It is irrefutable that companies already have a long catalogue of labour obligations to implement; a list of plans, protocols and policies that is becoming even longer as time goes on. Today we will focus for a moment on one of these labour duties and we do so, even though it is not new, by referring to something that has not been observed by some companies: **The right to switch off policy**.

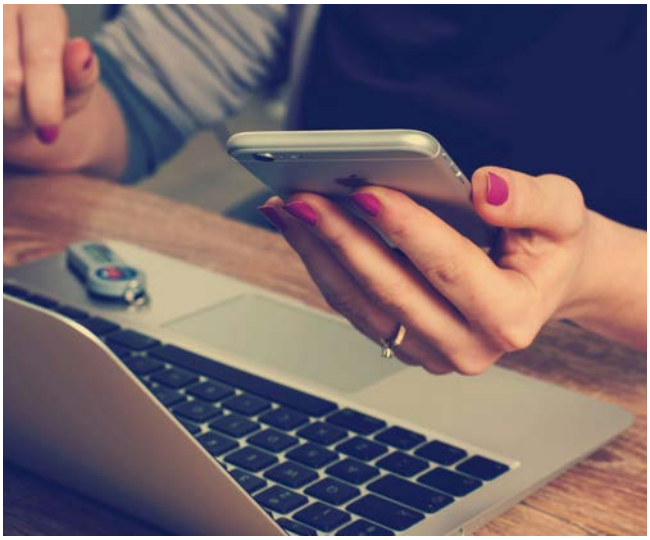
As we have mentioned above, observing the right to switch off is not a recent obligation; since 2018 the Personal Data Protection and Guarantee of Digital Rights Act, (with initials in Spanish "LOPDPGDD"), stipulates (in its Article 88) that, after a hearing has been held with the workers' representatives, the employer **must draw up an internal policy for its workers**, including those holding executive positions, where the ways must be defined for exercising the right to switch off along with the staff training courses and awareness raising actions about the reasonable use of technological tools to avoid the risk of computer fatigue. In fact, companies must implement a right to switch off policy in a real way and ensure it remains active.

What could happen to a company that does not observe its staff's right to switch off?

Violation of this right to switch off could lead to the Labour Inspection Department **proposing an infringement procedure and sanctioning the company** with fines of up to €225,018, (according to the Spanish Labour Infringements and Penalties Act – "LISOS"), depending on the seriousness of the violation and the facts of the case.

However, we have also seen that the courts or tribunals can (i) acknowledge the plaintiff worker's right to termination of his/her contract with compensation due to infringement of the company's obligations related to switching off, (such as sending emails after working hours, as in the case of the judgement of the Labour Court nº 8 of Barcelona of 25 May 2022, which ruled that the labour relationship was terminated and ordered the company to pay the worker severance pay) or (ii) order the company to acknowledge the worker's right to switch off and hence not send any further messages after working hours, (related to this is the judgement of the High Court of Galicia of 4 March 2024, which also ordered the company to pay compensation due to it violating the worker's right to privacy and disclosing personal data).

In fact, in order to avoid possible labour contingencies, we recommend that companies remember to implement the relevant right to switch off policies, ensuring that they provide training courses and correct monitoring of the stipulated measures and guidelines. ■



RSM

THE POWER OF BEING UNDERSTOOD
ASSURANCE | TAX | CONSULTING | LEGAL

RSM Spain
BARCELONA | MADRID | GRAN CANARIA | PALMA DE MALLORCA | TARRAGONA | VALENCIA | SEVILLA