NEWSLABOUR

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RSM Spain
Labour Department
Newsletter

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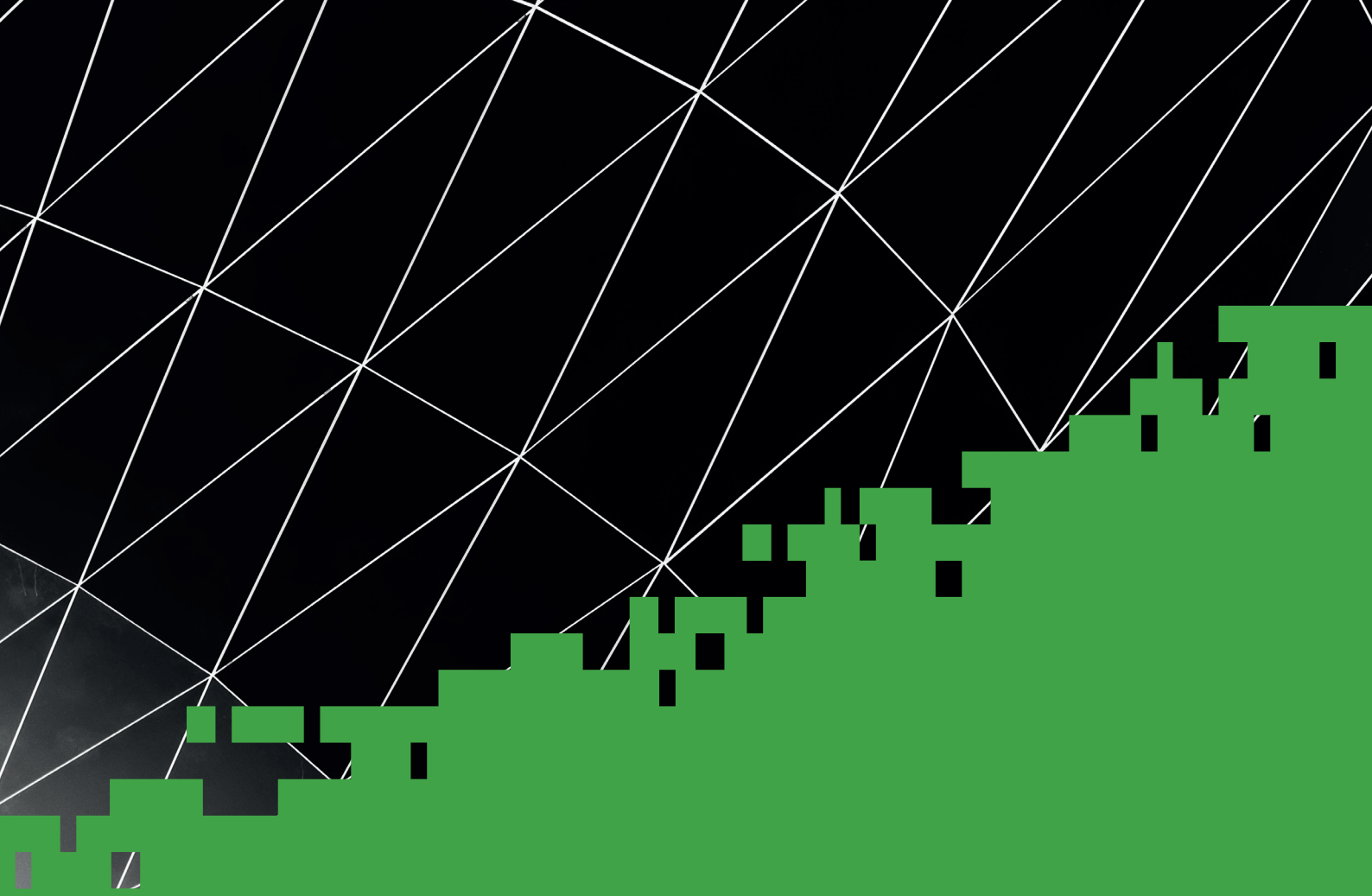

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Editorial

Ignacio Hidalgo and Miguel Capel

Labour news is constantly appearing and, just like every month, we inform you of this news through #NewsLabour.

In this edition, as always, we will deal with the latest judgements on labour cases; with an article on a judgement that has raised a great deal of discussion: The judgement of the Supreme Court of 11 April 2024, which analysed the issue of registering Equality Plans.

You should neither miss our Advice of the Month related to how to act when workers have reached 545 days since the beginning of their sick leave.

Constantly informing and updating our readers. ■

And, as always, we remain at your entire disposal!

Please contact us should you have any queries about these judgements or their application in your company.

Nela Yustres
nyustres@rsm.es

> The courts in a nutshel

What's new on the block?

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

Nela Yustres

The judgement of the Supreme Court of 11 April 2024: A worker acknowledged as being permanently and totally disabled for work renders his services to the Spanish Organisation for the Blind (ONCE) and continues selling lottery tickets, can this worker receive payment in both situations at the same time?

The Labour Chamber of the Supreme Court dismissed the appeal lodged by a worker who had been acknowledged as being permanently and totally disabled for his normal work as a farm worker due to having lost his sight and that, some time later, began rendering his services to the Spanish Organisation for the Blind (ONCE) as a lottery ticket seller, upholding the judgement ruled by the Labour Chamber of the High Court of Justice of Andalucía.

In this respect, the Spanish High Court sustained that work compatible with disability benefits are those of a marginal nature and of little importance that do not require registration or contributions being paid to the social security system, in other words, residual, minimal and limited jobs. However, work that enables regular income to be obtained does not fit into this category and must be included in a social security system.

The judgement of the High Court of Justice of Madrid of 12 April 2024: Does taking voluntary incentivised leave mean the annual bonus must be paid?

The Labour Chamber of the High Court of Justice of Madrid admitted the appeal for reversal lodged by a worker who had taken voluntary incentivised leave due to a redundancy plan (ERE) agreed between the company and the trade unions, hence overturning the judgement ruled by the Labour Court number 21 of Madrid.

The judgement ruled by the Labour Court number 21 of Madrid dismissed the worker's petition for payment of the annual bonus due to it having been the plaintiff who voluntarily decided to join the redundancy plan (ERE), not being disassociated from the company in a compulsory manner and therefore it did not have the individual performance assessment nor the group's targets, based on the dates they were carried out.

The High Court of Justice of Madrid concluded it was not voluntary leave but the company had been the one to have implemented the termination and hence, since it was the company that refused to pay the bonus, it must be proven that it was not entitled to do so, in this case not having provided any situation of lack of assessment of the worker's activity.

Please contact us should you have any queries about these judgements or their application in your company.

Nela Yustres
nyustres@rsm.es

The judgement of the Labour Court number 2 of Albacete of 2 April 2024: Do benefits for risk during pregnancy imply a different contingency to maternity and temporary disability?

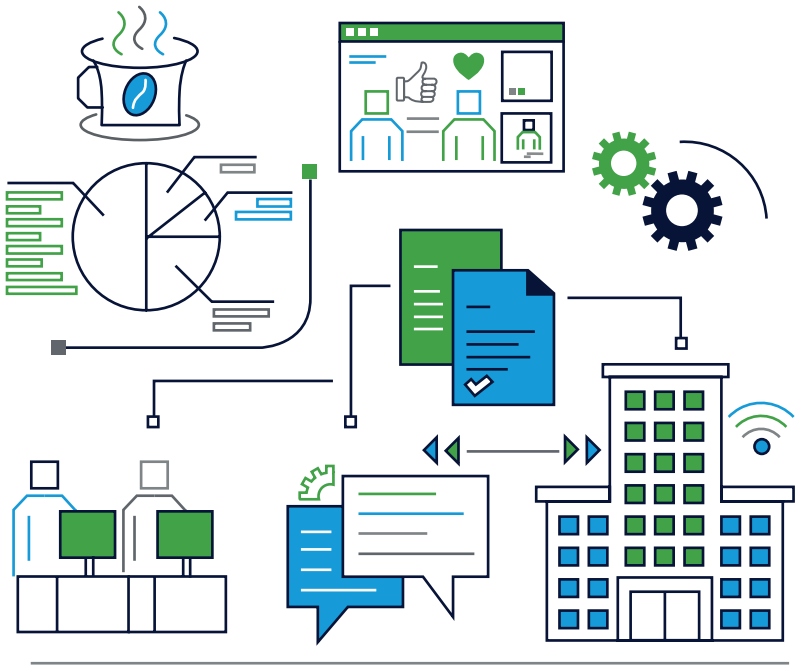
The Labour Court number 2 of Albacete admitted the claim filed by a worker who had petitioned a ruling acknowledging her right to receive benefits due to risks during her pregnancy, with her employment contact being suspended and while it continued to be impossible for her to be reinstated in any job due to her health condition until she had given birth.

The judgement concluded that risk during pregnancy implied a different contingency to maternity and temporary disability and was expressly considered a professional contingency. In addition, even when the worker had been granted sick leave for common illness, the reason for this leave was her pregnancy and the risk situation existed on the date the petition was submitted, since the worker's exposure to agents, procedures or working conditions could have a negative impact on her health.

The judgement of the Labour Court number 2 of Ciudad Real of 8 April 2024: Can daily and weekly rest times overlap?

The Labour Court number 2 of Ciudad Real admitted the claim filed by the plaintiff who had petitioned a ruling on the right for a minimum rest period of 12 hours between shifts and the weekly rest period and the defendant was ordered to pay compensation for the damages caused.

This judgement concluded that the weekly and daily rest periods implied the required legal minimum, which must be taken at different times due to their different purpose and were independent one from the other, so that under no circumstances taking the weekly rest period could result in a reduction in the daily rest period. ■



Please contact us should you have any queries about these judgements or their application in your company.

Paula Hernández Seguí
phsegui@rsm.es

The judgement of the Supreme Court of 20 March 2024: Is the corporate practice consisting of coinciding variable weekly rest periods with public holidays in accordance with the law?

The Supreme Court considered the corporate practice of determining the monthly quadrants by making the variable weekly rest periods coincide with state, autonomous and local public holidays was not in accordance with the law, due to deeming that such working days must be able to be taken by the employees without overlapping their rest days. In this respect, the court considered that public holidays contribute to the workers' rest time in the same way as their daily, weekly and annual rest periods and hence the public holidays must be dealt with separately in order to ensure the workers' rest periods are protected, (based on Article 40.2 of the Spanish Constitution), and the corporate practice consisting of determining variable weekly rest periods at the same time as the aforementioned public holidays infringed such provision.

The judgement of the High Court of Justice of Galicia of 4 March 2024: Can a company send messages to its workers once their working hours have ended if such messages do not require an immediate answer?

The High Court of Justice of Galicia decided to grant compensation to a worker due to his employer having violated the worker's right to digital disconnection and personal data protection by contacting him once his working hours had ended and sharing his personal data without his consent. This worker received work messages once his working hours had ended through emails and WhatsApp messages. At the beginning, the Labour Court dismissed the claim due to considering the worker's right to digital disconnection had not been violated because the employer did not impose an obligation for him to read or reply to such emails and WhatsApp messages after his working hours had ended. The plaintiff filed an appeal for reversal against such judgement that was admitted by the High Court of Justice of Galicia, which overturned the judgement and ruled in favour of the worker, due to considering his right to digital disconnection had been violated and sustaining the argument that this was not only related to the worker's right not to reply to the employer's messages, but also the duty of the company to abstain from contacting the worker. Based on the foregoing, the court ordered the defendant company to pay the plaintiff compensation for violating his right to digital disconnection and another amount for violating his right to privacy, because he had not granted his consent to assignment of his data, the amount of the first one being €300, bearing in mind the messages were not sent very often, and thus, the moral damages caused by the infringement not being serious, and €700 for the second one.

The judgement of the Supreme Court of 11 May 2024: Is acknowledgement of total incapacity for any work compatible with the sale of lottery tickets of the Spanish Organisation for the Blind (ONCE)?

The judgement in question was related to the compatibility of the pension for total incapacity for any work with rendering services as an employee. In the case analysed, the plaintiff had been declared with total permanent disability and later total incapacity for his usual work due to him losing his sight. Once such disability had been declared, the plaintiff began rendering his services to the ONCE as a seller of lottery tickets and, at the same time, he was receiving the pension for total incapacity for any work. The question raised was whether the declaration of the worker's total incapacity for any work was compatible with him rendering paid services as an employee. The ruling of the lower court found in favour of the worker and an appeal was lodged against this by the Spanish Social Security Institute (INSS). The High Court of Justice of Andalusia admitted the appeal lodged by the INSS and ruled against the compatibility of the pension with the earnings the worker obtained from rendering his services. The plaintiff lodged an appeal to the Supreme Court (cassation) to unify doctrine against such judgement, which was dismissed and the ruling of the High Court was upheld, stating that the pension for total incapacity for any work was not compatible with him rendering his services as an employee. This ruling implied a change in the doctrine that has existed up to now and the humanist and flexible criteria was not applied to the compatibility of both situations and it was decided that the compatibility of the benefits total incapacity for any work could only be accepted for work of a marginal nature and of little importance that does not require registration or contribution to the social security system, in other words, residual, minimum and limited work. ■

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

Enrique Mellado
emellado@rsm.es

> Practical law

The challenges of artificial intelligence within the scope of labour relations: the current situation, uncertainties and brief comments about the recent *ArtificialIntelligence Regulation.*

Enrique Mellado

In spite of the increase in business costs due to instruments such as the Intergenerational Equity Mechanism, the greater number of legal disputes caused by negotiations of Equality Plans or the new document requirements, such as the obligation to implement mechanisms related to protocols for digital disconnection or prevention of harassment of the LGTBI community, are just some of the challenges faced in the world of labour relations; implementation of artificial intelligence certainly implies one of these challenges, (currently one of the most uncertain), that business organisations must face within the scope of the legal relationships between employer and employee.

Automated filtering of professional profiles, analysis of the non-verbal expressive language used by potential job candidates or the use of algorithm-based applications that enable absenteeism or productivity levels to be analysed or conduct that could require disciplinary sanctions to be detected are just some of the tools currently used by companies in the management, control and coordination process of their human resources.

However, the real situation is that Spanish labour law in force lacks specific regulation to provide a framework of legal certainty for a crucial issue that is unquestionably of exponential growth: the forecast impact of using artificial intelligence, (also known as **"AI"**), on labour relations. Moreover, there are currently several legal provisions that refer to this issue, (albeit only included in two regulatory sources). On the one hand, Article 22 of the General Data Protection Regulations (**"GDPR"**) states that it is every person's right not to be subject to a decision based solely on automated processing of his or her data, if this produces legal effects concerning him or her or *similarly significantly affects him or her*; and Article 13.2.f) of the GDPR obliges companies to inform their workers about the logic involved as well as the significance and the envisaged consequences of such processing for the data subject. Closely related to the foregoing, Article 64.4.d) of the Spanish Labour Relations Act states that the workers' legal representatives shall be entitled to be informed about *the parameters, rules and instructions of algorithms or artificial intelligence systems that could affect working conditions, recruitment and maintenance of employment.*

> The current Spanish labor legislation lacks a specific regulation that provides a framework of legal security to a transcendental issue of undoubted exponential growth.

In a situation of legislative uncertainty and with the increasing legal challenges for the production sector, after a long processing period that has overcome several hindrances, the so-called Artificial Intelligence Regulation has now been approved by means of the recent legislative resolution of 13 March 2024 of the European Parliament, (commonly and mistakenly categorised as the *Artificial Intelligence Act*), *in which Article Three now offers a flawless and terminologically concise definition of the artificial intelligence system concept, deemed as a machine-based system designed to operate with varying levels of autonomy, that may exhibit adaptiveness after deployment and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments.*

This Regulation, of unquestionable application to the framework of legal relationships existing in the world of labour relations, compellingly claims and states that under no circumstances will its contents prevent the Member States from including legal, regulatory or administrative

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

Enrique Mellado
emellado@rsm.es

provisions that could be more beneficial for workers regarding protection of their rights due to the use of AI; or that employers can include more advantageous conditions by means of a collective bargaining agreement, in such a way that it is structured, (or rather it will be structured), as a indispensible minimum legal regulatory framework that can however be improved by means of legal provisions or a collective bargaining agreement. In fact, we will resort, (unless this humble writer is mistaken), to a need for collective bargaining in order to regulate such crucial issues that have not been dealt with in terms of legal certainty.

The Regulation emphasises a persistent and repeated concept throughout its large number of articles: the risk, defined as the *combination of the probability of an occurrence of harm* and the severity of that harm, and, within this scope, all AI systems are expressly excluded if they individually classify natural persons by means of biometric categorisation and are able to deduce their race, political opinions, union membership, religious or philosophical convictions, sexual life, sexual orientation and a wide combination of subjective conditions that, in principle, should not have any impact on workers rendering their paid services to an employer.

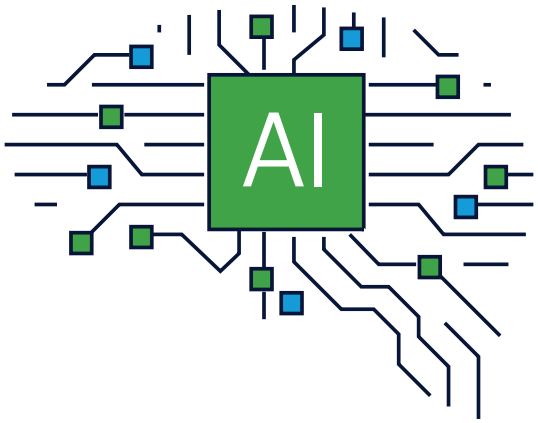
However, the essential part and cornerstone of the Regulation does not consist of excluding the risk but limiting its severity and, in such respect, Article 6.1 defines the framework of the AI systems called high-risk:

(i) On the one hand, artificial intelligence systems intended to be used for the recruitment or selection of natural persons, in particular to place targeted job advertisements, to analyse and filter job applications, and to evaluate candidates. This hence refers to a kind of pre-contractual stage that begins with the company's production needs and ends with the recruitment of the candidate.

(ii) On the other hand, artificial intelligence systems intended to be used to make decisions or have a significant influence on them that affect the recruitment, promotion and termination of work-related contractual relationships, to allocate tasks based on individual behaviour or personal traits or characteristics or to monitor and evaluate the performance and behaviour of persons in such relationships. In this case, in the strict sense, it refers to the labour relation process, from the time the worker is recruited until the possible termination of his or her labour relationship for reasons assessed (even partially) by artificial intelligence that acts as the company's accomplice and ally in its decision-making process.

Lastly, even though still pending definition and specification, the Regulation concludes that a strict liability and penalty system will be applicable in the event of its infringement, when it states that *compliance with this Regulation should be enforceable by means of the imposition of penalties and other enforcement measures*.

In fact, the challenges arising from the progressive and spectacular expansion of artificial intelligence does not only include a production sector that faces this challenge with uncertainty, but also the sector of professional services, in which there is the fundamental, decisive and crucial aim of using available mechanisms to offer a diligent, competent and valid service that covers all the client's needs and, for such purpose, at RSM we provide integral legal advice that ensures all the requirements related to the new labour paradigms can be met. ■



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

Alejandro Alonso Díaz
adiaz@rsm.es

The systems for recording working hours. The real situation of their implementation and current problems arising due to the lack of regulation.

Alejandro Alonso Díaz

As we know, due to being included in the social debate and since **Royal Decree 8/2019 on urgent measures for social protection and combating job instability in working hours** was approved in 2019, all companies must individually record the working hours of their employees, so that these daily working hours records are guaranteed, including their specific working hours both when they begin and when they end.

Therefore, in strictly legal terms, after the aforementioned Royal Decree was approved, Article 34.9 of the Spanish Labour Relations Act is the provision that classifies this matter as follows:

> *"The company **must guarantee the employees' daily working hours are recorded**, which must include **the specific times each employee starts and ends his/her working hours**, notwithstanding the flexi-hours stipulated in this article".*

A series of practical problems are currently arising due to the lack of specification of the text provided above, which we will deal with below, since it does not seem to expressly require registering the interruptions or breaks between the start and end of the employees' daily working hours that are not considered effective working time and, even more important, it does not mention anything about how the registration must be carried out, (its format or features), so that it would be fully valid by deeming that the records meet the requirement to "guarantee" their validity.

What must the features for the daily records be?

Regarding the foregoing, we can say here that the records must be **objective, reliable and accessible**, otherwise it could be presumed that the effective working hours are all those between the start and end times recorded, the employer being responsible for proving the contrary.

These terms that, as can be seen, are far too generic, can be obtained from the **judgement of the High Court of Justice of the European Union, Grand Chamber, of 14 May 2019, C-55/2018**, related to **Directive 2003/88:**

> *"This is because, although the need for special protection could have led the legislator of the Union to expressly stipulate such obligation regarding certain categories of workers, a similar obligation, consisting of setting up a system that allows the measurement of the duration of the daily working hours in an **"objective, reliable and accessible"** way is imposed in a more general manner for all the workers in order to guarantee the effective application of Directive 2003/88 and to bear in mind the importance of the fundamental right included in Article 31, section 2, of the EU Charter, which has been referred to in section 30 of this judgement".*

However, the following considerations can be drawn from the analysis conducted in this article:

- The registration must take place on a daily basis. Weekly or monthly registration is not admissible but the working hours of each employee must be recorded on a day-by-day basis.
- The registration must be at the beginning and end of the working hours. Therefore, in principle, the work breaks need not be recorded.
- The company must keep the records of working hours for a term of four years and they must be made available to the workers, their legal representatives and the Labour and Social Security Inspection Department.
- The regulations do not specify the format or features of the records; in this respect, from Europe it has been specified that they must be objective, reliable and accessible, requirements that are not very specific and neither provide full certainty to ensure the system in question is being suitably implemented.

Which registration systems have been approved or not by Spanish courts?

In this respect, as we have already explained, the law on this specific matter does not state anything about how the records must be registered; hence, in principle, any system

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

Alejandro Alonso Díaz
adiaz@rsm.es

that meets the requirements for reliability, objectivity and accessibility would be valid and such system cannot be changed or altered by the company. In this respect, as examples of the previous explanations, a written document, an Excel spread sheet, an entrance system with a code, card or even biometric systems would be valid, but be careful when implementing and using the latter because they could possibly infringe the employees' right to protection of their personal data.

However, in spite of the obvious lack of specification in the text of the law, the regulations have not undergone any legislative amendment in an attempt to improve its validity, which could have been prohibiting paper records or offering a specific mandatory system in order to achieve greater objectivity.

Due to this situation, as has happened on numerous occasions, the courts and their judicial judgements have been the ones that have been interpreting the legal validity of the systems to control working hours used by companies and, merely for informative purposes, for the purpose of providing the most interesting summary possible, we explain the following:

The **judgement of the Labour Division of the Supreme Court of 5 April 2022, appeal number 7/2020, (the *"Zurich"* case)**, in which an agreement was ruled valid that, according to which, the employees themselves are the ones who must record their working hours every day by merely and simply accessing the company's computer, so that from the time it is opened and closed, the IT tool would automatically record the start and end of their working hours.

The **judgement of the Labour Division of the Supreme Court of 18 January 2023, appeal number 78/2021 (The Spanish Federation of Savings Banks *(Confederación Española de Cajas De Ahorros – "CECA") Case*)**, which considered the agreement was valid stipulating that every day all the staff must enter each working day, the time it begins, the time it ends and the number of hours worked during the day in an application made available to them, in a mandatory manner and, for such purpose, deducting their break times and any interruption that cannot be deemed as effective working hours.

The **judgement of the Labour Division of the National Court of 9 December 2020**, appeal number 218/2020, which approved the registration on paper completed by the workers themselves, due to considering that this system was objective and reliable and did not infringe the doctrine of the judgement of the Court of Justice of the European Union of 14 May 2019 explained above.

What are the consequences of not implementing a register of working hours or not doing this correctly?

The lack of protocols or **policies for recording working hours** and infringement of the regulations and case law related to recording working hours can result in the following legal consequences, among others:

- Possible consideration that the rest breaks, to eat, smoke etc., are considered working hours unless there is another specific regulation otherwise in a collective bargaining agreement related to this matter.

- Compensation for overtime due to longer working hours, both economically and as double contribution to the social security system. For informative purposes, the judgement of the **High Court of Justice of Catalonia of 14 April 2022, appeal number 6963/2021** or the judgement of the **High Court of Justice of the Balearic Islands of 2 May 2023, appeal number 607/2022** considered that if no overtime was worked, it "would be easy" for the company to prove this by submitting the working hours records, otherwise, if they were not submitted, it could be presumed that such overtime was worked, always with the possibility of proving the opposite by means of other kinds of evidence.

  In other words, the lack of records of working hours does not guarantee judicial claims for overtime will be successful, but the company would hold the burden of proof.

- Administrative sanctions for serious infringement from €751 to €7,500, (Article 7.5 of the Spanish Labour Offences and Penalties Act).

- Claims to terminate the labour relationship by applying Article 50 of the Spanish Labour Relations Act, with the resulting severance pay equivalent to the one for unfair dismissal or even compensation for possible damages caused due to violating the right to digital disconnection, infringement of prevention of psychosocial hazards, etc.

After reading this article, if you have any queries, questions or you would like to implement a working hours registration system in your company, please do not hesitate to contact us and we will be delighted to help you and provide you with advice on all the questions you may have about this matter. ■

Please contact me should you require any further information about the practical effects of this judgement.

Ignacio Hidalgo
ihidalgo@rsm.es

> Case of the month

Can anyone explain to me what is happening with severance pay in Spain?

Ignacio Hidalgo

For several months not a week goes by that the economic press does not publish news predicting/warning that the government is preparing an important reform related to severance pay.

Many will be surprised there is such a stir now about an issue that has not been discussed since 2012, (we should remember the reduction in severance pay of the previous 45 days per year worked to the current 33 days that caused such a stir at the time but afterwards we all accepted, and now the so-called salaries during processing have now been completely eliminated, which began to disappear 10 years ago).

The question is: why has something that has already been dealt with become a topic of discussion again? Is it really necessary or mandatory to reform our system for severance pay?

We will attempt to answer each of these questions below.

What is happening with severance pay? Why has something that has been dealt with become a topic of discussion again?

In 2021, Spain ratified the so-called Revised European Social Charter of 1996 (RESC), an international treaty in which Article 24, in a similar way to what happened with the former Convention 158 of the International Labour Organisation (CILO 158), stipulates the following: *"the right of all workers not to have their employment terminated without valid reasons for such termination [...]" and "the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief [...]".*

Of course, the discussion raises the following question: what is adequate severance pay?

For our most representative trade unions at a national level (the UGT and CCOO), the system for severance pay in Spain does not guarantee adequate compensation in all cases, (above all when the termination takes place with not much seniority), and therefore it infringes the RESC. This is why both trade unions have filed claims to the European Committee of Social Rights (ECSR), as the supervisory body, (non-jurisdictional), seeking confirmation that will "force" the government to change the law to adapt our system to the one stipulated by the ECSR.

In their opinion, the problem arising is that both the fact there are legal limitations in the severance pay, (in days per year worked and the maximum monthly payments), and that in cases when there is not much seniority the amount per se could be very low, which makes our trade unions consider that the severance pay could infringe the basic requirement in the international regulations, in other words that it is "adequate".

The ECSR seems to have recently concluded, as proposed by the trade unions, Spanish law related to dismissal might not be in accordance with the RESC. Although the text of the decision and the recommendations in this respect are not yet known nor what in our regulations would actually not be in accordance with the international text, (its publication is expected in July this year), there seems to be no doubts about the trade union claim being admitted.

Since it was already planned a year ago in the government's electoral campaign that labour legislation would be amended to adapt it to the provisions in the ECSR, everything seems to indicate that there will be changes in labour legislation.

However...

Is it really necessary or mandatory to reform the Spanish severance pay system?

In our opinion, the answer to this question is clearly negative or, in other words, since the conclusions of the ECSR are mere recommendations, they would not be binding for Spain and there is nothing to force us to change our current severance pay system, (as has already occurred in Italy, France or Finland where, in spite of having similar claims, with the same conclusions, have

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Please contact me should you require any further information about the practical effects of this judgement.

Ignacio Hidalgo
ihidalgo@rsm.es

not amended their regulations to apply the criteria of the ECSR).

Of course, the government is fully entitled to propose and develop the legislative amendments it deems suitable in its opinion and, by having sufficient parliamentary majorities, the changes are inevitable. Nevertheless these changes must not be justified by the fact there is a legal obligation, as it seems it is intended to do, but due to the existence of a political decision that does not need the support of any international body to be defended.

So why seek justification for what the government intends to do in this decision of the ECSR?

In our opinion, a legislative amendment of the importance that a change in our system of appraised severance pay could imply, (and so easy to calculate that anyone can do it) should be undertaken through the channel of social dialogue, in other words, after the government, trade unions and employers' organisations have held negotiations and, if possible, by means of an agreement being reached that guarantees that all of them accept the new system.

However, if it is considered that Spain is legally obliged to comply with the decisions of the ECSR, it could attempt to avoid the required dialogue process and carry out a reform by means of the government in power adopting a unilateral decision, for such purpose based on this theoretical (and non-existing) obligation.

What can we expect will happen?

We must answer this question from two different standpoints.

In the judicial field, it should not be overlooked that since 2021 different High Courts of Justice in Spanish territory have been publishing judgements in which, based on the text of Article 24 of the RESC and without a claim yet having been filed by the trade unions or a decision being adopted by the ECSR, it was deemed possible to increase the severance pay above the legal maximum based on the possibility that the Spanish regulations could infringe the RESC. On the other hand, other courts have not considered that Spanish law would infringe the RESC, due to not deeming the decisions of the ECSR applicable because they are not binding.

In this field, regardless of the regulations being amended, it can be expected the courts that deemed the decisions of the ECSR were not binding will continue taking this stance and sustaining that, with no change in the regulations, the severance pay system with the current appraisal is perfectly legitimate and applicable. On the other hand, the position of the bodies that were of the opinion Spanish law infringed an international treaty will be reinforced and it cannot be ruled out that this decision will increase its number of followers in the labour jurisdiction.

In this respect, it would certainly be advantageous to obtain unified criteria from the Supreme Court to clarify this issue and provide certainty for any decision on termination that is adopted in the future and until, if need be, labour law can be amended.

In the political or legislative field, presuming that there would be no changes in the government due to the latest political events, in other words, if everything continues as it has up to now, in the next few months we will probably know proposals, as a "test of the political waters", about what changes could take place in the Spanish severance pay system in the second half of 2024.

It has been claimed that the salaries during processing that have been eliminated will be brought back, along with minimum, variable and scalable severance pay bearing in mind the personal factors of the person dismissed, etc. and certainly new more or less imaginative proposals will appear.

What has not been discussed so much is negotiations and social dialogue, perhaps because, before the ECSR adopted a decision, the doubts about its standpoint blocked the position of anybody involved, however this could change now.

What does seem certain is that the second half of 2024 will bring us important changes in labour law that will result in an increase in the costs for dismissal.

It must still be seen to what extent companies act in advance and decide to reduce their staff prior to any amendment... We can all expect some frenzied months ahead. ■

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

Lara Conde
lconde@rsm.es

> Case of the month

The supreme court finally removes the obstacles from the path and allows equality plans to be approved and registered.

Lara Conde

Any company with more than 50 workers must draw up an Equality Plan, in other words, they must develop measures aimed at ensuring the effective equality between men and women and avoidance of discrimination due to gender in the working environment. These Equality Plans must be negotiated with the workers' unitary or union representatives and must be recorded in the Registry and File of Collective Bargaining Agreements, Collective Work Agreements and Equality Plans, (with initials in Spanish "REGCON").

However, in practice both of these issues cause problems and are preventing the Equality Plans from being registered and valid.

On the one hand, the obligation to hold negotiations causes many problems for companies that do not have any legal representatives for their workers since, with a lack of unitary representatives, the regulations grant authorisation for such negotiations to the most representative trade unions of the sector. However, the trade unions very often do not respond to the summons to take part in the negotiations of the Plan based on their agenda or with no justification whatsoever. This situation means that companies must unilaterally draw up an Equality Plan that, in most cases, results in the approval being refused by the competent authorities.

On the other hand, registration of an Equality Plan is also suspended when the authorities fail to reply to the applications for its approval; hence registration in the REGCON is refused due to it being deemed that the procedure has not been fulfilled for the control of legality imposed by the regulations.

Nevertheless, the Supreme Court has ruled on these two issues in the following two judgements, which will certainly help companies implement their Equality Plans.

The judgement of the Supreme Court number 545/2024 of 11 April 2024: Registration of the Equality Plan without holding negotiations due to repeatedly blocking the negotiation process.

In this judgement the validity of an Equality Plan was discussed that had been unilaterally drawn up by the company due to the difficulty they found for the workers' representatives to take part in its negotiations.

The Chamber of the Supreme Court repeated that the Negotiating Committee of the Equality Plan must be set up by means of an agreement reached between the company and the legal representatives of the workers and such Committee cannot be substituted by an "ad hoc" committee. Moreover, it pointed out that the difficulties to reach an agreement on the Plan, due to being unable to set up such negotiating committee and negotiate the plan, do not justify its direct approval without observing the stipulated channel because the Chamber deemed it was possible to use both judicial and non-judicial means to resolve the dispute to require it is negotiated in good faith.

However, as a very specific exception, when the negotiations are repeatedly blocked by the party acting on behalf of the workers, either due to its refusal to hold negotiations or, when appropriate, the authorised bodies unjustifiably fail to appear, the Supreme Court deems that it could be accepted for the company to draw up a unilateral Equality Plan and avoid fulfilment of such obligation, providing it can prove it has made attempts to fulfil the obligation to hold negotiations.

Therefore, the Labour Division of the Supreme Court deemed that the lack of an agreement to draw up the Plan, by failing to set up a negotiating committee, must not prevent the plan from being registered.

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

Lara Conde
lconde@rsm.es

The judgement of the Supreme Court number 543/2024 of 11 April 2024: The failure of the authorities to approve the application for registration and registration of the Equality Plan is equivalent to its approval by the labour authorities.

As mentioned above, companies must register their Equality Plans in the REGCON. Very often the authorities delay providing their reply to the application for approval of the Equality Plan and this prevents it from being registered.

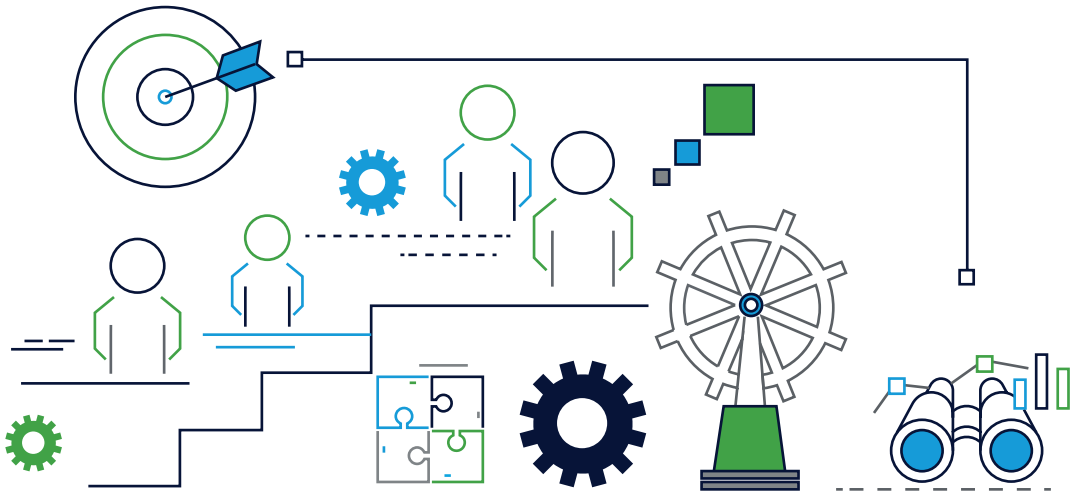
The authorities are allowed a term of three months to decide on whether or not to approve the Equality Plan and it was discussed in this judgement whether or not the lack of reply must be considered approval or refusal.

Up to now the REGCON has refused registration, deeming that the authorities failing to reply must be deemed as refusal because approving the registration of the Plan with no control of its legality would imply transferring the rights related to the public service to the companies. However, the Supreme Court concluded that, when Article 45 of the Spanish Equality Act grants the right to companies to draw up and apply their equality plans, it is not transferring any rights related to the public service to the companies but the purpose is to avoid labour discrimination and hence the registration must be allowed due to the lack of reply being deemed as approval once the term of 3 months to adopt a decision has expired.

Moreover, bearing in mind the regulations, the failure to reply being deemed approval prevents the authorities from subsequently being able to adopt a decision withdrawing its approval. This is to ensure that the rights of private individuals are not invalidated when the authorities do not efficiently perform their duties.

Therefore, its application prevents the authorities from being able to conduct an examination about the intrinsic legality of the alleged act and it can only revise such acts by means of the relevant revision proceedings. Therefore, any administrative decision refusing approval after the aforementioned term has expired would lack any legal validity and the "approved" Equality Plan, due to the authorities failing to reply, would be fully valid.

At present, in spite of the case law already ruled in this respect, the development and registration of an Equality Plan continues to cause a great deal of headaches for companies; hence it is crucial to obtain expert advice and at RSM we are at your entire disposal to provide you with advice on this matter. ■



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

Rocío Vivo Turiel
rvivo@rsm.es

> Judgement of the month

To be reviewed: the policies for use of it media and tools, or their subsequent modifications, if the workers' legal representatives are not involved.

Ignacio Hidalgo

The modifications or *"new specifications"* in the policy for the use of digital devices provided to employees must also count on the participation of the workers' legal representatives, (hereinafter referred to by the Spanish initials "RLT"); otherwise there would be a risk that they could be ruled **null and void**.

This is applicable even if the policy was approved prior to Act 3 of 5 December 2018 on data protection and the guarantee of digital rights, (hereinafter referred to by its initials in Spanish "LOPDGDD"), coming into force, which requires such participation in drawing up the company protocol for IT media and tools, (it should be remembered this is mandatory for all companies regardless of their size).

You should be careful because this ruling of nullity could have serious effects in the labour field. Apart from those related to data protection, it is worthwhile considering, for example, possible violation of the workers' fundamental rights, such as privacy, how it could affect the value of evidence obtained by the employer from such devices or possible administrative sanctions. It is not a trivial matter and hence **your policies may need to be reviewed and you may need to listen to what your RLT have to say**.

Judgement number 225/2024 of the Labour Chamber of the Supreme Court of 6 February 2024 analysed the communication/circular sent by the company as a reminder, defending the criteria for both the use of digital media and access to such tools by the employer, as part of its right to supervision and surveillance.

In this case, a policy already existed drawn up prior to the LOPDGDD coming into force, which was referred to in the employees' contracts and provided by the defendant company individually to its staff, (expecting it to be signed and returned by each of the workers), such communication including a specification of the criteria for use of digital media drawn up **unilaterally**.

The Supreme Court deemed that, far from being a mere reminder, this circular **modified different aspects of the existing policy**, for example, related to greater restriction in allowing the use for personal purposes or, pointed out as being questionable, greater rights of the employer to access and supervise such devices. For this purpose, it sustained that *"such criteria should be decided with the participation of the workers' representatives, both bearing in mind, in abstract, the questionable contents thereof and the contents of new specifications of previous instructions"* and, ruled the circular was null and void.

Article 87.3 of the LOPDGDD makes it clear that the participation of the workers' legal representatives is required to draw up this protocol for the use of digital media and, although it is not retroactively applicable, as stated by the Supreme Court, it is mandatory. Therefore, all **modifications, specifications, restrictions or additions** in the criteria that were already applicable, even if they already existed in the company prior to the LOPDGDD coming into force, must be in accordance with the regulations stipulated in the law in force.

Therefore, at the moment the **RLT must take part in the process**, whether for drawing up and approving the "original" policy for the use of digital devices per se and for its subsequent changes, otherwise it could be ruled null and void.

Moreover, this is not the only mandatory protocol in which a different level of participation of the RLT is legally required, whether a hearing, consultation period or negotiations; hence if you did not give due consideration to the Works Council or Staff Delegate(s) **perhaps your company's policies need to be updated.** ■

Please contact me should you require any further information about the practical effects of this judgement.

Paula Navarro
pnavarro@rsm.es

The Supreme Court considered the notice sent to the workers' legal representatives after the worker had received the dismissal letter was valid.

Paula navarro

Article 53.1 of the Spanish Labour Relations Act, (hereinafter referred to by its initials in Spanish "ET"), stipulates the formal requirements that must be met for objective dismissal, i.e. when the termination decision is based on economic, technical, organisational and production reasons, (ETOP reasons).

The following is a brief summary of these requirements:

a) Written notice must be sent to the worker specifying the reason for his/her termination;

b) At the same time that the written notice is delivered, the worker must be provided with severance pay of twenty (20) days per year worked, proportional by months for the periods of time shorter than one year, up to a maximum of twelve (12) monthly payments;

c) A prior notice period of fifteen (15) days is granted, counted from delivery of the personal notification to the worker before termination of his/her employment contract. In the case referred to in Article 52.c), a copy of the prior written notice must be provided to the workers' legal representatives for their information.

However, regarding this last aspect, regulated in point c) of Article 53.1, this appeal (cassation) for unification of doctrine was lodged as explained below that in summary is as follows: **In dismissals for objective reasons, when must the copy of the dismissal letter be provided to the workers' legal representatives?**

What happened in this specific case

The case in question here dealt with the possible consideration of a "formal defect" due to not having delivered a copy of the dismissal letter to the workers' legal representatives before or at the same time as the valid date of dismissal and that such omission implied a ruling of unfair dismissal according to Article 122.3 of the Spanish Act regulating the Labour Jurisdiction.

It should be specified that the legislator has not expressly stipulated the exact time this notice must be delivered to the workers' legal representatives because it only states the following: *"In the case referred to in Article 52.c), a copy of the prior written notice must be provided to the workers' legal representatives for their information".*

Specifically, in the case of this judgement, by means of a document dated 01.09.2021, the defendant company providing the plaintiff worker with an objective dismissal letter valid as of the same date. After this, on 08.09.2021, the defendant company notified the Works Committee of the dismissal that took place on 01.09.2021 by sending a copy of the dismissal letter to the plaintiff in this case.

Judgements ruled in the proceedings:

(i) In the opinion of the Labour Court number 9 of Valencia, the dismissal was ruled unfair due to considering there **was a formal defect** by not having provided a copy of the dismissal letter to the workers' legal representatives on the date the dismissal was valid.

(ii) In the opinion of the High Court of Justice of the Community of Valencia, in the same way as the lower court, the dismissal was ruled unfair by sustaining that **only** if the notification of the dismissal letter to the workers' legal representatives **was before or at the same time** as the termination of the worker's employment contract, could the control be ensured about the correct use of the objective dismissal channel and the requirement stipulated for individual objective dismissals must be strictly interpreted, rejecting that notification can be provided after this time.

Please contact me should you require any further information about the practical effects of this judgement.

Paula Navarro
pnavarro@rsm.es

This means it was considered a formal defect due to having notified the objective dismissal at a later date and not before or at the same time thereof, this resulting in the decision for the termination being ruled unfair.

So... what was the ruling of the Supreme Court?

The appeal to the Supreme Court (Cassation) to unify doctrine analysed the time when the objective dismissal letter must be provided to the workers' legal representatives; **whether this must take place before or at the same time as the notice is sent to the worker in question or if the notice can be provided at a later time.**

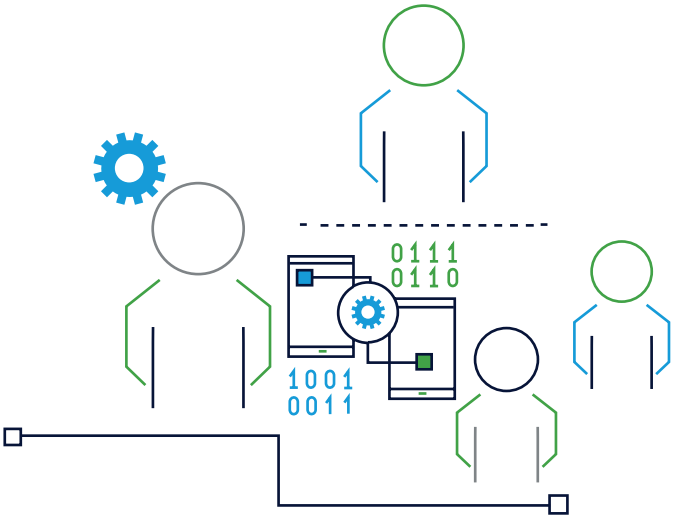
Having lodged the appeal, two contrasting judgements were analysed in which (i) in one of them the termination decision was notified to the Works Committee five (5) business days after the dismissal letter was sent to the worker and the requirement for form was not met hence the dismissal was ruled unfair; and (ii) another one in which the Works Committee was notified ten (10) business days after the dismissal letter was sent to the worker and the requirement for form was considered to have been met hence the dismissal was ruled fair.

The Supreme Court judgement of 3 April 2024 ruled on this question and interpreted the provisions in point c) of Article 53.1 of the Spanish Labour Relations Act, explaining that, as stated in the aforementioned provisions, a copy of the dismissal letter the worker had received must be provided to the workers' legal representatives, the information given through this channel to such representatives being an *"essential part of the legal system to control the institutional difference between collective and objective dismissal"*.

However, the fact the company must provide the workers' legal representatives with a reproduction or copy of the dismissal letter precisely shows that the notification to the representatives cannot take place before it has been sent to the dismissed worker.

In addition, it recalled the grounds in previous rulings and determined that such notification to the workers' legal representatives can hence be sent after such dismissal letter has been sent, **providing it is delivered within a reasonable term that does not infringe the purposes of the legal requirements or prevent the recipients, i.e. the representatives, from exercising their rights they could hold related to the information provided**. Furthermore, in the case under analysis, it was obvious that such notification was sent within a reasonable term and did not affect or change the rights of the representatives or the worker.

Did you find this ruling interesting? After reading this article if you have any questions about this specific matter or a similar situation in your company, please do not hesitate to contact RSM's labour department and we will be delighted to provide you with this labour advice to clear up your doubts. Therefore, if you would like further information about this new judgement and how the issue is developing, please do not hesitate to contact us. ■



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

Francisco de Borja Ortas
fborja@rsm.es

> Advice of the mont

Since 20 march 2024, defendant companies are required to appoint legal counsel to handle their defence in court within a term of two days counted from when notice is served of the claim.

Francisco de Borja Ortas

As we have already mentioned on other occasions, Legislative Royal Decree 6 of 19 December 2023 came into force on 20 March 2024, which made a series of amendments to several aspects in the Spanish Act regulating the Labour Jurisdiction (LRJS) and the Spanish Civil Procedures Act (LEC).

Among these amendments there is an objective for companies to implement measures to improve the control of notifications and fulfil their procedural obligations and, as one of the most important changes, the legal counsel of the Judicial Authorities will require that the defendant appoints legal counsel within a term of two days counted from the date notice is served of the claim being admitted for processing, unless the defendants decide to represent themselves. In order to meet this requirement, details about the legal representative must be provided, including the latter's postal address, email address and telephone number.

Due to the short period allowed to meet this requirement, it is crucial that the notices received from the labour courts are immediately known and, if need be, the aforementioned requirement can be dealt with bearing in mind that it is a preclusive term and some courts are warning that a failure to appoint a professional within the aforementioned term will imply the defendant's express waiver to appear with legal counsel or a labour relations expert.

Moreover, as of the aforementioned date, the first summons of the companies by online means will be valid; therefore companies must pay special attention to the notices they receive through this channel.

In order to avoid possible problems, it is essential to rely on specialised advice on procedural matters. For such purpose, at RSM we are at your entire disposal to provide you with advice, analyse any case and, of course, advise you about which actions would be the most suitable in each situation. ■

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

Yolanda Tejera
ytejera@rsm.es

What should you do when your workers reach 545 days counted from the start of their sick leave? Practical issues to take into consideration.

Yolanda Tejera López

The temporary disability period, as is known very well, is granted for a maximum term of 365 days, which can be extended by a further 180 days when it is presumed that, during this time, the workers can be medically discharged due to being cured.

In other words, the maximum temporary disability term can reach 545 days (12 months + 6 months).

What happens when the term of 545 days granted for temporary disability expires?

Once the aforementioned term of 545 days expires, the Spanish Social Security Institute, (hereinafter referred to by its initials in Spanish "INSS"), can choose one of the following options:

- As an exception, extend the categorisation of permanent disability for a further 6 months, (until such term reaches 720 days), in cases when it is considered that the worker could recover his/her working capacity.

- Open a file for permanent disability, which must be processed and decided within a maximum term of 3 months.

In this second situation, the worker is in "limbo" in which (i) he/she has not been medically discharged even though the term for temporary disability has expired; (ii) he/she is not in a situation that the temporary disability has been extended and (iii) he/she has not been acknowledged as a beneficiary of permanent disability.

Many doubts have been raised about the worker's situation during this term of 3 months when the INSS must decide whether to grant or refuse the permanent disability level.

During this period, the worker will continue receiving benefits for temporary disability, which will still be paid until the worker receives the decision adopted by the INSS.

However, even though the 545 days have expired, the worker will continue receiving the temporary disability benefits but, as of such time, **the company is no longer obliged to pay contributions since the worker's employment contract is in a situation of suspension, not termination.**

But... what happens with the temporary disability allowance of the worker who had been receiving it?

The situation of suspension of the employment contract exonerates the reciprocal obligations to work and to remunerate the work.

This makes us think that, during the period of extraordinary extension of temporary disability, once the maximum term of 18 months has expired, the company's obligation to pay private allowances or benefits, which could have been freely determined by collective or individual autonomy, would no longer be applicable, unless such extension were expressly included in the applicable collective bargaining agreement.

However, the case law of Spanish courts has currently reversed this position by stipulating, in their latest rulings, that the obligation to pay an allowance for temporary disability is *"extended for the whole period that the effects of the temporary disability continue to exist, including the extraordinary extension period once the term of 18 months has expired"*, (judgement of the High Court of Justice of Catalonia of 20-10-23)

This was because it deemed that the temporary disability allowance has *"the same structure and function of regular temporary aid or benefits as the basic benefits granted for such contingency..."*.

And what happens with holidays? Must they be settled at the time the labour relationship is suspended?

In this respect, common practice for years has been that, once the maximum term of 545 days for temporary disability has expired, companies settle the items owed to the worker before processing suspension of the contract.

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

Yolanda Tejera
ytejera@rsm.es

Nevertheless, once again the Labour Divisions of the High Courts of Justice have been rectifying this practice by stipulating that the time for settlement of the holidays, among other items, is when the labour relationship is terminated.

Article 38 of the Spanish Labour Relations Act states that the annual paid holiday periods **cannot be compensated economically**; hence, until the termination of the employment contract due to the worker being declared in a situation of permanent disability, he/she would not be entitled to effective compensation for not taking his/her holidays with a cash payment, which will be paid, in all cases, "at the time the labour relationship is terminated", (judgement of the High Court of Justice of Andalusia of 3 June 2020).

This is even more so, since Spanish courts have been sustaining that workers in a situation of temporary disability are granted holidays until they are declared in a situation of permanent disability, (judgement of the High Court of Justice of Andalusia of 24 May 2018), because we cannot know how many days have been accrued and that must be settled until the date of the decision adopted by the INSS.

Moreover, if the workers do not take their holidays within 18 months after the end of the year they were granted, would they be forfeited?

As we have explained above, Article 38.3 of the Spanish Labour Relations Act states that if the holidays coincide with temporary disability making it impossible for the worker to either partially or fully take them during the relevant calendar year, they can take them once the temporary disability situation ends providing that a period of more than 18 months has not elapsed since the end of the year when they were granted.

It seems clear that once such period has elapsed and the workers have not taken their holidays, they would forfeit them. However, the **judgement of the European Court of Justice of 22 September 2022** recently stated that, once the temporary disability has ended, the employer must encourage the worker to take his/her holidays by offering different possibilities and alternatives for the worker to take them so that if such intention of the employer is not proven, the employee might not forfeit them even though the aforementioned period of 18 months has elapsed, as specified in Article 38.3 of the Spanish Labour Relations Act.

A different matter is payment for the holidays granted but not taken if the labour relationship is finally terminated due to the worker being declared in a situation of permanent disability. In such case, it can be understood from the regulations that under no circumstances would such holidays be forfeited, since the aforementioned Article 38.3 of the Spanish Labour Relations Act does not state anything about economic compensation for these holidays, which the worker can request after the final termination of his/her labour relationship.

There are many issues to take into account when the maximum term of 545 days for temporary disability expires; therefore at RSM we are at your entire disposal to advise you and help you through this period of doubts and uncertainty fully related to the new case law trends of the Spanish courts. ■

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