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Brief handbook on Spanish Labour Law

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Content

Collective Labour Law

Abbreviations

Abbreviation	*Spanish*	*English*
AN	Audiencia Nacional	National Audience
CE	Constitución Española (1978)	Spanish Constitution
Cód.Civ.	Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil	Royal Decree of 24 July 1889 publishing the Civil Code
CP	Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal	Organic Law 10/1995, of 23 November 1995, on the Penal Code
ET	Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores	Royal Legislative Decree 2/2015, of 23 October, approving the revised text of the Workers' Statute Law.
LAS	Ley 19/1977, de 1 de abril, sobre regulación del derecho de asociación sindical	Law 19/1977 of 1 April 1977 on the regulation of the right to trade union association
LEBEP	Real Decreto Legislativo 5/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto Básico del Empleado Público	Royal Legislative Decree 5/2015, of 30 October, approving the revised text of the Law on the Basic Statute for Public Employees
LETA	Ley 20/2007, de 11 de julio, del Estatuto del trabajo autónomo	Law 20/2007, of 11 July, on the Statute of Self-Employment
LGSS	Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social	Royal Legislative Decree 8/2015, of 30 October, approving the revised text of the General Social Security Act.
LISOS	Real Decreto Legislativo 5/2000, de 4 de agosto, por el que se aprueba el texto refundido de la Ley sobre Infracciones y Sanciones en el Orden Social	Royal Legislative Decree 5/2000 of 4 August 2000, approving the revised text of the Law on Offences and Penalties in the Social Order.
LOLS	Ley Orgánica 11/1985, de 2 de agosto, de Libertad Sindical	Organic Law 11/1985 of 2 August 1985 on Trade Union Freedom
LPRL	Ley 31/1995, de 8 de noviembre, de Prevención de Riesgos Laborales	Law 31/1995, of 8 November 1995, on the Prevention of Occupational Risks

Abbreviation	*Spanish*	*English*
LRJS	Ley 36/2011, de 10 de octubre, reguladora de la jurisdicción social	Law 36/2011, of 10 October, regulating social jurisdiction
RDLRT	Real Decreto-ley 17/1977, de 4 de marzo, sobre relaciones de trabajo	Royal Decree-Law 17/1977 of 4 March 1977 on Labour Relations
SAN	Sentencia de la Audiencia Nacional	Ruling of the National Audience
STC	Sentencia del Tribunal Constitucional	Ruling of the Constutional Court
STS	Sentencia del Tribunal Supremo	Ruling of the Supreme Court
STSJ	Sentencia del Tribunal Superior de Justicia	Ruling of a Superior Court
TC	Tribunal Constitucional	Constitutional Court
TS	Tribunal Supremo	Supreme Court
TSJ	Tribunal Superior de Justicia	Superior Court of an Autonomous Community

Individual Labor Law

Elements and Subjects of the Employment Contract

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1. Elements of the employment contract

The employment contract is not defined in our legal system; however, its concept can be extracted from the definition of employee included in Article 1.1 ET. Therefore, the employment contract can be described as an agreement between the employer and the employee by which the latter voluntarily undertakes to personally provide certain services on behalf of the employer and under his direction, in exchange for remuneration.

The essential elements of the employment contract are consent, object and cause:

a) From a legal point of view, consent is understood as "the manifestation of express or tacit will, by which a subject is legally bound." Therefore, this first essential element is subject to being a "basic requirement for the perfection of the contract, which consists of the manifestation of the will to celebrate it and following its object and its cause" (Articles 1254, 1261 and 1262 Cód.Civ. On the contrary, if consent is given by mistake, violence, intimidation or fraud, it would be understood as affected by "vices of consent", and the employment contract would be void (Articles 1266, 1267, 1269 Cód.Civ.).

b) The object of the contract is generally identified with the provision. That is the procedure with which the employee is obliged, which the employer can demand of him. Therefore, it would be understood as the benefit or service the employee undertakes to provide and the remuneration or salary he will receive. The object of the contract must always be certain or determinable, possible and legal. Article 1271 Cód.Civ. determines the limits of the object of the contract in terms of all those things that "are not outside the commerce of men, even those that are future".

c) The cause is the aim pursued with the contract that gives rise to its formalization. The cause for the employee is the economic consideration that he must receive, and for the business side, it is the service provided. Likewise, the cause must be lawful and true.

The absence of these essential elements in the employment contract may determine its total or partial nullity.

Thus, an employment contract is defined by its object, that is, by the notes that characterize the services or benefits offered by employees in favor of the employer, and which can be summarized in the following:

1. Freedom and voluntariness.

The service or benefit must be free, and the employee commits to it voluntarily, previously expressing his or her consent contractually. The execution of the work will be solely personal.

2. Alienation.

The employee carries out the work "on behalf of others", that is, at the expense and risk of the employer. Therefore, from the beginning of the contractual relationship, the results of their work are attributed to the entrepreneur (unshared results); and it is the employer who subsequently incorporates these fruits of labor into the market. The latter also receives all the benefits that may be produced; and also, assumes any of the risks inherent to the operations. The employee receives in exchange the salary remuneration agreed in the contract.

3. Subordination or dependence.

It assumes that the provided work is subject to the employer's instructions. Therefore, we could affirm that dependency is also a manifestation of alienation, understood as "the alienation in the organization of work" which means that the employee does not organize his work, but rather it is the employer who does it at his discretion and own interest. It must be recognized that currently, after changes in work models, subordination or dependency is immersed in a process of flexibility based on jurisprudence. To determine whether or not there is dependency in a provision of services, it is still valid to check whether certain indications occur -such as the organization of working time, the determination of the workplace and the provision of the means of production- that confirm the existence of this requirement. However, the greater "technical labor independence" that exists today, in certain cases, is not an obstacle to the continued existence of "legal dependence" since the employee will always be under the orders of the employer, although increasingly assuming tasks with greater independence.

4. Salary compensation.

A job with obligations for both parties (employee and employer) is not free either. It is provided in exchange for a remuneration of a salary nature. Article 26 ET is the one that frames all the explanatory aspects regarding the salary, understanding this as the totality of the economic perceptions received by employees for the performance of their professional services on behalf of others (whatever the form of remuneration, whether in money or in-kind), and which come to reward both actual work and rest periods, also considered as work. Through collective bargaining or, failing that, the individual contract, the salary structure will be determined, which must include the base salary (as remuneration set per unit of time or work) and, where appropriate, the salary supplements set in depending on circumstances related to the personal conditions of the employee, the work performed or the situation and results of the company, which will be calculated following the criteria agreed upon for this purpose. In no case, it won´t be considered salary the amounts received by the employee as compensation for expenses incurred because of the work activity, Social Security benefits and compensation corresponding to transfers, suspensions or dismissals.

Regarding the form of the employment contract, the principle of freedom of form is the general rule, which means that it can be done in writing or orally (Article 8.1 ET), although this statement practically carries its exceptions, since employment contracts must be recorded in writing when required by legal provision and, in any case:

- Those for internships, training or learning.
- Part-time, fixed-discontinuous contracts, relief contracts, and contracts for the performance of a specific work or service.
- Those that are formalized for a specific period of time, and whose duration exceeds four weeks.
- Fishermen's employment contracts.
- Those of those employees who work remotely.
- Likewise, those of employees hired in Spain at the service of Spanish companies abroad.
- Home work contracts.
- Those that are formalized for some time to make up for the absence of another person (interim ones), and in general, those carried out by public administrations.
- Those carried out to promote hiring for an indefinite period.
- And by legal provision, almost all of the special employment relationships mentioned in Article 2 ET cannot be left behind.

In addition to being formalized in writing, in some cases an approved contract model must also be used. If the requirement of written form for these contracts is not met, the work will be presumed to have been carried

out for an indefinite period and full time (unless proven otherwise its temporary nature or the part-time nature of the services).

And in any case, any of the parties, employer or employee, may demand that the contract be formalized in writing, even during the course of the employment relationship.

Regarding the information duties in matters of contracting, the employer will be obliged to communicate, on the one hand, to the state public employment office (within ten days following its conclusion), about the content of the contracts of work that are celebrated (or their extensions), and if they are formalized in writing or not. On the other hand, it is obliged to deliver to the legal representation of the employees a basic copy of all contracts that must be concluded in writing, except for special senior management employment relationship contracts.

2. Subjects of the contract: the employee

To configure the legal concept of a salaried employee, we must combine certain articles of the ET:

a) The first possibility of combination expressly raises the definition of an employee (as we saw in the previous section when mentioning Article 1.1 ET, which helps to define an employment contract), perfecting it in turn with the inclusions of Article 2 ET, on special labor relations.

b) In the second option, Article 1.3 ET excludes certain people from the status of salaried employee based on the services they provide.

Therefore, let's analyze these two processes to complete the legal composition of the concept of employee:

a) In this first section, let us remember that Article 1.1 ET defines employees as those people who voluntarily provide their services on behalf of others in exchange for remuneration, and under the power of organization and management of another person (natural or legal), called employer or entrepreneur. The following are added to employees of this condition, with the characteristic of special labor relations (Article 2 ET):

   - Senior management personnel (excluding those who carry out the activity limited by Article 1.3.(c) ET, and which is expressly described in the exclusions).
   - Family home service employees.
   - Condemned people in penitentiary institutions.
   - Professional sportsmen.
   - Artists who carry out their activity in the performing, audiovisual and musical arts, as well as people who carry out technical or auxiliary activities complementary to such activity.
   - Commercial operators who carry out their professional activity on behalf of one or more businessmen without assuming risk and fortune.
   - Employees with disabilities who provide their services in special employment centres.
   - Minors subject to the execution of detention measures for the fulfilment of their criminal responsibility.
   - People hired to train Health Sciences specialists (resident doctors).
   - Lawyers who provide services in law firms, individual or collective.
   - As well as any other job expressly declared as a special employment relationship by Law.
   - Likewise, by application of the provisions of Article 8.1 ET, the activity of persons who provide paid services consisting of the distribution of any consumer product or merchandise is presumed to be included in the scope of this law, by employers who exercise the business powers of organization, direction and control directly, indirectly or implicitly, through the algorithmic management of the service or working conditions, through a digital platform (Additional provision twenty-third refers to the presumption of employment in the field of digital delivery platforms).

b) Article 1.3 ET excludes people who carry out activities or provide services as a non-salaried work condition, based on two criteria: on the one hand, responding to a legislative political decision contemplated in the Spanish Constitution (Articles 35.2 and 103.3 CE), and on the other, understanding that these activities or services do not meet some of the essential notes that define the salaried employee contemplated in Article 1.1 ET. Therefore, based on Article 1.3 ET, the following are excluded:

   - The service relationship of public officials (including temporary services under the administrative regime), regulated by LEBEP. As well as personnel at the service of the State, local

corporations, and autonomous public entities, which will be governed by the corresponding legal and regulatory standards; in addition to the service relationship of personnel at the service of public administrations, and other entities, organizations and entities of the public sector, when under the protection of a law, said relationship is regulated by administrative or statutory regulations. As an example, the statutory personnel at the service of the National Health System (doctors, health employees, etc.), whose employment relationship is regulated in Royal Decree-Law 12/2022, of July 5, which modifies certain aspects of the original Law 55/2003, of December 16, of the Framework Statute of the statutory personnel of the Health Services.

- Mandatory personal benefits. In this case, the exclusion is based on the failure to comply with two essential notes that define the salaried employee: firstly, the absence of voluntariness and freedom, since the benefit is justified based on a requirement imposed by law (Article 31.3 CE); and secondly, the lack of salary compensation as an obvious consequence of the aforementioned lack of voluntariness in the work performed. By way of illustration, mention the services provided in the event of adversity or public catastrophes, and social benefits or military services.
- The limited activity, purely and simply, to the mere performance of the position of director or member of the administrative bodies in companies that have the legal form of a company and provided that their activity in the company only involves the performance of inherent tasks to such position (Article 1.3 (c) ET). Such exclusion is based on the fact that whoever carries out these activities does not do so under a regime of third party, subordination or dependency, since they act on behalf of the management of the company and are only responsible to the owners of the company or its shareholders.
- Work carried out for friendship, benevolence or good neighbourliness, because despite acting under the criteria of the work notes -alienation and dependency- however, they don´t receive a salary compensation since the activities are free and based on altruistic reasons.
- Family work, unless the status of those who carry it out as employees is proven. They will be considered family members if they live with the employer: the spouse, the descendants, ascendants and other relatives by blood or affinity, up to the second degree inclusive and, where appropriate, by adoption (Article 1.3(e) ET). Therefore, this exclusion operates with a double limitation: on the one hand, it only applies to certain family members, those closest to the family nucleus who live with the businessman. Furthermore, there is an "alleged" exclusion that, through contrary evidence, could demonstrate the existence of an employment relationship between these family members with the consequent salary remuneration. The exclusion is justified by the absence of unrelatedness since it is understood that the results of the activity benefit the family unit as a whole (asset and economic unit), of which the person who provides the services is also a part.
- The activity of people who intervene in commercial operations on behalf of one or more businessmen, provided that they are personally obliged to respond for the successful completion of the operation, assuming the risk and fortune of the same (Article 1.3(f) ET, as opposed to than may be established in Article 2.1(f) ET, and Article 1 Law 12/1992, of May 27, on Agency Contracts, where certain employees do not assume the risk and fortune of those operations. Therefore, the exclusion is justified by the absence of alienation and/or dependence, because the people who carry out these activities assume risks in the operations (for example in the cost of failed operations), and/or carry them out with autonomy and not under the subordination of a third party.
- Likewise, the activity of persons providing transportation services, under the protection of administrative authorizations of which they are holders. These activities are carried out with commercial public service vehicles (Article 1.3(g) ET). The exclusion requires two requirements related to the ownership of the carrier: first, that he is the holder of the corresponding administrative authorization (transport card); and second, that the public service commercial vehicle is of his property, or he exercises direct power over it.
- Self-employed employees and economically dependent self-employed employees. These employees are excluded from the status of salaried employees because they work on their own account, and not as employees. LETA, in its Article 1, Section 1 defines self-employed employees as those natural persons who carry out activities on

a regular, personal, direct basis, on their account and outside the scope of management and organization of another person, whether they employ employees or not. This autonomous or self-employed activity may be carried out full-time or part-time.

To clarify the term self-employed, the LETA expressly includes these examples in the scope of application of this standard:

- Industrial partners of regular collective societies and limited partnerships.
- Community members of communities of property and partners of irregular civil societies, unless their activity is limited to the mere administration of the assets put in common.
- Those who exercise the direction and management functions that come with the performance of the position of director or administrator, or provide other services for a capitalist commercial company, for-profit and in a habitual, personal and direct manner, when they have effective, direct or indirect of that.
- Economically dependent self-employed employees (TRADE). They are defined in Article 11.1 LETA as those who "carry out an economic or professional activity for profit and in a habitual, personal, direct and predominant manner for a natural or legal person, called client, on whom they depend economically by receiving at least 75 per cent of their income from work and economic or professional activities". To carry out the economic or professional activity as TRADE, it must simultaneously comply with the following conditions: a) not be in charge of employees, nor hire or subcontract part or all of the activity with third parties; b) not carry out its activity in an undifferentiated manner with employees who provide services under any type of labor contract on behalf of the client; c) have their own productive infrastructure and materials; d) develop its activity with its own organizational criteria, without prejudice to the technical instructions that it may receive from its client; and e) receive an economic consideration based on the result of their activity, following what was agreed with the client, and assuming the risk and fortune of the latter (Article 11.2 LETA).
- And finally, foreign self-employed employees who meet the requirements set out in Organic Law 4/2000, of January 11, on the rights and freedoms of foreigners in Spain and their social integration, as well as any other person who meets the requirements. requirements established in Article 1.1 LETA.

3. Subjects of the contract: the employer

An entrepreneur or employer (Article 1.1 ET), even if their activity is not motivated by profit, is any natural or legal person, private or public, to whom they provide their services with the consideration of employed or similar employees, the people included in any regime that makes up the Social Security System.

The communities of goods that receive the provision of services by the people referred to in Article 1.1 ET (employees), as well as those Temporary Employment Agencies (ETT) that, considered as employers, formalize contracts with employees and transfer them to user companies (Article 1.2 ET). Therefore, entrepreneurs can have different modalities:

a) Natural or legal person: we must distinguish between entrepreneurs as natural persons or as legal entities to contract. In the first case, employers with the capacity to act or full legal capacity, which is acquired upon reaching the age of majority (18 years, according to Article 246 of the Cód.Civ.) may formalize contracts with those employees who are also of legal age, unless they are legally incapacitated. When employees are minors (between 16 and 18 years old), it is required to obtain the permission of their parents or legal guardian, unless the minors are emancipated (Article 247 Cód.Civ.). Secondly, the rules affect the legal capacity and ability to act of corporations, associations, foundations and societies that are determined in accordance with the specific laws that regulate their constitution and operation. In the field of Labor Law, it will always be the representative, with sufficient power and legal capacity, who formalizes labor contracts (as an employer) with the employee, on behalf of the legal entity (company).

b) Private entrepreneur and public entrepreneur (public administration as the employer): in this case, a private entrepreneur can be a natural person or a legal entity that normally takes the form of a commercial company. In addition, the status of the entrepreneur can also be acquired by public administrations (of the State, of the Autonomous Communities, of Local Entities, or of any public autonomous body), as well as by public companies whose majority or total ownership corresponds to a Public body. For this reason, in public administrations there can be both civil servants, statutory personnel, as well as salaried

employees (administration labor personnel). LEBEP, is the one that provides all the information on the different types of employees and public employees and their characteristics.

c) Community of property: there is a community when the ownership of a thing or a right undivided belongs to several people (Article 392 Cód.Civ.), so under these circumstances the condition of the entrepreneur or employer can also be acquired (Article 1.2 ET). By way of illustration, groupings of companies, associations without legal personality or a community of owners could hire a employee. Therefore, since the community of property does not have its legal personality, the hiring of employees is done by the community members themselves (STS of July 23, 2021, rcud 1459/ 2020, 1702/2020 and 1515/2020).

d) Entrepreneur and Temporary Employment Agencies (ETT): a temporary employment agency is an organization that is responsible for hiring employees for a certain period of time to assign them to companies (users) that require their services (Article 1 of Law 14/ 1994, of June 1, which regulates temporary employment agencies). Companies that use this type of contracting, through an ETT, facilitate their personnel search processes, avoid contractual complications and quickly obtain temporary personnel to respond to the coverage of their services. Regarding the operation of the ETT, it is in charge of proposing the job offer to the employee, and it is with the same ETT that the new employee will sign the employment contract. The ETT also registers them with Social Security, and is responsible for paying the employee's wages, as well as managing all aspects of their hiring. The employee will provide his services in the user company, adapting to its schedule and standards, and having a supervisor in this other organization. The user company is also responsible for offering the employee appropriate working conditions in terms of health and safety, and for making available all safety regulations related to work. In addition, the ETT must be kept informed about the employee's performance, so that the ETT can carry out the administrative processes required by the employee (salary payment, vacation bonus, registration in courses, other professional development activities, or social protection). ETTs must be authorized by the public administration to assign employees to user companies. This authorization offers a guarantee of good practices in this field, both to the companies with which they sign service contracts, and to the employees themselves.

3.1. Company and work center

A company constitutes an organizational unit for the production of goods and services, and enjoys a certain decision-making autonomy, mainly when it comes to using the current resources available to it. The company carries out one or more activities in one or more locations and may correspond to a single legal unit or the smallest combination of legal units.

The work center is a productive unit with a specific organization, which is registered, as such, before the labor authority (Article 1.5 ET). The elements that determine the existence of a work center are:

- Production unit: understood as a "technical production unit with a specific organization" that belongs to the company.
- Specific organization: the work center must have individualized organizational and operational autonomy within the business group, without diminishing the business's own power to organize, plan and direct the business.
- Registration with the Labor Authority: it is only necessary for the employer to communicate the opening of the work center prior to or within thirty days following the opening. Therefore, the opening of the center does not require administrative authorization, but rather the administrative communication of registration with the Labor Authority, which presumes the existence of the work center to be certain. This is a "Juris tantum presumption", which may be destroyed (proving the non-concurrence of the constituent requirements) by proof to the contrary from anyone who denies, for any legal purposes, the existence as such of the workplace. Failure to comply with this duty by the employer generates certain administrative responsibilities and sanctions for the employer himself, which will depend on whether we are dealing with a company with more or less than 25 employees, whether we are dealing with the performance of a dangerous or unhealthy activity, among others (Article 11.3 and 12.5 LISOS). Other procedures are necessary in addition to this communication, for example, the affiliation or registration of employees in Social Security, the formalization of the corresponding accident insurance, etc.

Distinguishing between a company and a workplace is important because it affects certain conditions of labor relations contemplated from the individual or collective level, with regard to, for example, the regulation of geographical mobility and the transfer of employees (Article 40 ET); the negotiation of collective agreements at company level or lower in relation to certain Negotiating Units (Article 87.1 ET); or to the organization of unitary representation (Articles 62 and 63 ET) and union representation (Article 8 of Organic Law 11/1985, of August 2, on Freedom of Association) of employees in the company.

Considering a work center as mobile or itinerant does not exempt it from the duty to comply with the general occupational health and safety standards that may affect each specific activity. It has significance in the tax order in terms of subjection or not to taxation by personal income tax of certain remunerations or economic compensations such as bonuses for expenses for travel, maintenance, stays, etc., and that employees may receive as a consequence of their work performance.

Likewise, Law 10/2021, of July 9, on Remote Work, establishes the possibility of carrying out work activity, not only in the workplace that the company has prepared for this purpose, but also at the domicile of the employee or in the place designated by the employee as the work center. The distance work location must be established in an agreement signed between the company and the employee prior to the start of work.

3.2. The group of companies and network companies

a) Group of companies is an association of companies that are interconnected by links of ownership or control, such as through participation in the company's shares, administrative control or influence in decision-making.

   These groups can be formed for various reasons: business diversification, the search for synergies, optimization of resources, access to new markets or obtaining competitive advantages.

b) The network company is a model of division of labor between companies. It is made up of a group of legally independent companies but at the same time linked in an associative way, and linked by the same production cycle. Nowadays, the networked company is an essential reality from a business economic point of view, which is only perceived through the monitoring of the production cycle or the existence of other mechanisms such as the commercial type norm, the rules internal relations between the companies themselves or social ties. In these cases, the main company (which will form a subset of that network of companies) will be in charge of coordinating all tasks, subcontracting those activities of the value chain that are not part of its business, and making that information flows between all companies as if it were a single company. For companies to function in a network, some characteristics must be present, such as: attitude of transversal competition, strategy and joint business model, division of labor so that activities are always carried out in business subsets with better capabilities, leadership and coordination, flexibility, autonomous decentralized organization, technological communication, and learning the new environment.

4. Subcontracting of works and services

From a conceptual point of view, to understand the meaning of "contracts" we can turn to the Spanish legal dictionary, which defines it as "contract or subcontract by which an entrepreneur entrusts another with the execution of works or the provision of services corresponding to the former's own activity. Through the contract, the contractor undertakes to carry out a work or provide a specific service for another party called the principal entrepreneur. By way of illustration, contracts and subcontractors are a very popular form of business organization in the construction sector in Spain. It mainly consists of a construction company deciding not to directly carry out certain of its own activities, opting instead to transfer them to other companies or individuals with whom it establishes a contract, whether civil or commercial.

Article 42 ET delimits the field of application of the responsibility corresponding to the main entrepreneur's activity. Understanding it as all the activities inherent to the production cycle of the main company. For jurisprudence, the administrative concession has been equated to the contract, STS March 3, 1997(rec. 1002/1996):

"An interpretation of the reiterated article 42, in accordance with its spirit and purpose, allows us to extend the concept of "contracts or subcontracts" entered into by the employer and third parties with respect to the performance of works and services of the former, to the notion of "administrative concession." since, on the one hand, the generality of the terms 'contracts or subcontracts' do not allow their exclusive

application to private legal transactions, and, on the other hand, it seems more appropriate for the purposes of the Administration that it, through the figure of the concession, can entrust a third party with the direct management of its own services, without affecting the solidarity guarantees between the public entity, owner of the work or service transferred, and the entity that organizes its own activity and personal and means. materials for the fulfillment of the granted benefit."

Therefore, it is important not to forget that there are numerous rulings where it is clearly seen how, on the one hand, it does not constitute any obstacle to applying Article 42 ET to any contracting carried out by public companies; and on the other hand, how the application of the doctrine depends on whether or not the contracted or outsourced activity is considered, as an essential part or not, of the activity of the main or commissioning company.

There is also an obligation to provide information. When the main company concludes a contract for the provision of works or services with a contractor or subcontractor company, it must inform the legal representatives of its employees about the following matters:

- Name or company name, address and tax identification number of the contractor or subcontractor company.
- Purpose and duration of the contract.
- Place of performance of the contract.
- If applicable, number of employees who will be employed by the contractor or subcontractor in the work center of the main company.
- Measures planned for the coordination of activities from the point of view of occupational risk prevention.

In the same way, about these same points indicated, the contractor or subcontractor company must inform its employees or its legal representatives, before the start of the contract. If the employees of the contractor and subcontractor companies do not have legal representation, they will have the right to ask the legal representatives of the main company themselves questions related to working conditions, during the time that they share a workplace and lack of representation.

Regarding the Collective Agreement applicable to contractor and subcontractor companies, it will be that of the sector of the activity carried out in the contract or subcontractor, regardless of its corporate purpose or legal form, unless there is another applicable sectoral Agreement, or the contractor company or subcontractor has its Collective Agreement.

4.1. Corporate liability in cases of contracts and subcontractors: joint and subsidiary liability

Under the conditions described, employers, both private and public, who contract or subcontract with others the performance of works or services corresponding to their activity, will be jointly and severally liable for the obligations of a salary nature and the obligations referred to Social Security. In the case of obligations related to Social Security the responsibility is maintained up to the three years following the termination of the assignment. For the salary obligations contracted by the contractors and subcontractors with the employees at their service, they will be jointly and severally liable during the year following the completion of the assignment.

In this type of contract, liability in matters of Social Security can be exonerated, at the time that a negative certification for overdrafts related to the affected company is obtained from the General Treasury of Social Security (TGSS). Therefore, faced with this possible joint liability, the main employer must verify that the contractor or subcontractor is up to date with the payment of Social Security contributions, for which he must obtain negative overdraft certifications from the TGSS that the same organization must release within 30 days of your request. If this period passes without receiving certification, or if it is certified negatively, the employer will be exonerated from joint and several liability, with respect to the obligations contracted by the contractor or subcontractor.

The obligations in relation to Social Security cover (STS May 20, 1998 (rec. 3202/1997)):

"(...) the overdraft of fees incurred by the contractor with its employees affected by the contract, as well as the social benefits assigned to them and for the payment of which said contractor has been declared responsible for failure to comply with its obligations regarding affiliation. , ups and downs and quotes".

By way of illustration, if its activity is involved, the main company is jointly and severally liable for a debt for Social Security benefits derived from a work accident (temporary disability, even if it extends beyond the duration of the contract, STS May 17, 1996 (rec. 1902/1995), as well as a non-occupational accident

(permanent disability, STS September 23, 2008 (rec. 1048/2007)).

It will not be possible to speak of joint liability when the contracted activity refers exclusively to the construction or repair that the head of the family may contract concerning his home, as well as when the person who owns the work or industry does not contract its execution by reason for business activity (Article 42.2 ET).

Likewise, the main employer would be responsible for the salary debts claimed from each of the employees, a proportional part of extraordinary payments, vacations not taken, as well as interest for late payment of the amounts owed to the employees for the aforementioned concepts (STSJ Madrid February 11, 2019 (rec. 1286/2018).

In summary, the joint liability of the main employer established in Article 42.2 ET only extends to obligations of a salary nature and those related to Social Security during the period of validity of the contract (with the limit of what would be liable if there had been treated of its permanent staff in the same category or job position). The interest for late payment of the salary established in Article 29.3 ET (ten percent of what is owed) cannot be considered as an obligation of a salary nature, but rather as compensation, the purpose of which is to compensate the employee for the delay suffered in receiving his salary from the date of accrual (STSJ Comunidad Valenciana, May 17, 2012 (rec. 3167/2011).

On the other hand, the *subsidiary* responsibility requires that the principal responsible party has not complied with her obligations and that the payment demand has not been resolved. Only upon the insolvency of the main debtor can the obligation be passed on to the subsidiary liable party. There is no exoneration mechanism and it is enforceable in any case.

Therefore, they are subsidiary responsible for the contracts or subcontracts of works or services corresponding to the activity of the contracting entrepreneur, the owner of the contracted work or industry and for the period of validity of the contract or subcontract, which will be responsible for the obligation of contribute (Article 142.1 LGSS), and, where applicable, for unpaid contributions concerning employed employees (without taking into account the surcharges, by Article 14.2 LGSS), as well as the payment of benefits when the contracting employer has been declared responsible and insolvent (Article 168.1 LGSS). Furthermore, they will be subsidiarily liable along with the recipients who, by action or omission, have contributed to making possible the improper receipt of a Social Security benefit. There will be no place for this subsidiary liability when the contracted work refers exclusively to the repairs contracted by the owner for his home.

5. Illegal transfer of employees

Given the need to hire employees, and to temporarily assign them to another company, Article 43.1 ET clarifies that it can only be done through ETT duly authorized in the terms established in Law 14/ 1994, of June 1, which regulates temporary employment companies (hereinafter, LETT), as well as in Royal Decree 417/2015, of May 29, which approves the Regulations for temporary employment agencies. In this case, and under Article 12.1 LETT, when the provision contract between the ETT and the user company has been formalized for the legally permitted cases, it is up to the ETT to comply with the obligations related to salaries and Social Security for employees hired to be transferred.

The user company must also assume a series of obligations and responsibilities. Article 16 LETT, determines the following:

- Inform the employee, in advance, about the risks derived from their job, and the protection and prevention measures.
- The user company will be responsible for protection in matters of safety and hygiene at work as well as for the surcharge of Social Security benefits referred to in Article 93 LGSS, in the event of a work accident or occupational disease that occurs in the workplace during the validity of the provision contract and caused by the lack of safety measures and hygiene. Surcharges will be increased, depending on the severity of the fault, from 30 to 50 per cent.
- In addition, the user company will be subsidiarily liable for the salary and Social Security obligations contracted with the employee during the validity of the employment contract, as well as for the financial compensation derived from the termination of the employment contract. Said liability will be joint and several if the contract has been made in breach of the provisions of Article 6 LETT (referring to the cases in which provision contracts can be used between an ETT and a user company) and Article 8 LETT (on exclusions for making provision contracts).

Regulations will determine the information that the ETT must provide to the user company, which includes the transfer of documentation accrediting having complied with the salary obligations contracted with employees and in matters of Social Security (Article 18.1(b) LETT).

In cases of infringement, the transferor and transferee will be jointly and severally liable for the obligations contracted with the employees and with Social Security, even if the transfer is on a friendly or non-profit basis. Responsibility for such acts may even be extended to the criminal sphere (Article 43.2 ET, Art. 16.3 LETT, and Art. 168.3 LGSS). Finally, employees have the right to acquire permanent status, at their choice, in the transferring or assigning company. The rights and obligations of the employee in the transferee company will be those that correspond under ordinary conditions to a employee who provides services in the same or equivalent job although seniority will be computed from the beginning of the illegal transfer (Article 43.4 ET).

The Contract of Employment

Shelagh McKenzie

Contents

1. Introduction

The Spanish Workers' Statute does not contain a definition of an employment contract. A contract exists in Spain when 'a person agrees to be bound to give something or provide a service to another' (Article 1254 Cód.Civ.). An employee is defined as someone who: 'voluntarily provides paid services on behalf of others and within the scope of the organization and management of another person, natural or legal, called an employer or entrepreneur' (Article 1.1 ET). The definition of an employment contract can therefore be summarised as a contract under which an individual agrees to provide services on behalf of another, in return for remuneration, within the scope of an organisation and under the management of an employer.

It does not matter how the parties classify a contract, it is for the employment courts in Spain to decide whether or not a contract is a contract of employment, having regard to the obligations and responsibilities contained therein. Spanish law distinguishes between ordinary employment relationships and special employment relationships such as senior executive contracts, as well as other types of contracts such as commercial agent contracts or contracts for the self-employed whose income source mainly comes from one client (the so-called 'economically dependent self-employed'). This chapter will focus on ordinary employment contracts.

The sources of employment law in Spain are summarised in chapter TBC. Employment contracts in Spain are subject to the applicable law in these sources, primarily by the CE, ET, and the terms of any collective bargaining agreement that may be applicable. Collective bargaining agreements may exist for a specific industry negotiated between representatives of trade unions and employers' associations and can apply either throughout the whole of Spain, or to specific autonomous communities within Spain (there are seventeen in total). By way of illustration, when drafting an employment contract for an office employee in Madrid, it may be necessary to have regard to the terms of the current Collective Agreement for Offices in Madrid which is valid until 31 December 2024 (Convenio Colectivo de Sector de Oficinas y Despachos de Madrid (28003005011981)).

Collective bargaining agreements can cover a range of conditions of employment including the maximum length of probationary periods, use of fixed-term contracts, the maximum notice period that employees may be required to give prior to resignation, professional categories, salary structures, expenses, sickness payments, working hours, holidays, rights to paid and unpaid time off, maternity rights, working from home rights and disciplinary procedures. Employers in Spain therefore have less freedom than employers in common law jurisdictions such as England and Wales to individually negotiate the terms and conditions of

employment of each of their employees. Employers must take into consideration the terms of any applicable bargaining agreement because an employee in Spain can always argue that the most beneficial term applicable to their employment should apply in any given set of circumstances (Articles 3.1 and 3.3 ET). For example, if an employee's contract of employment states that an employee's holidays will be 28 working days per year, but the applicable collective agreement provides that employees are entitled to 30 working days per year, this more beneficial term will apply.

Employment contracts do not have to be written in Spanish however it is advisable that they are because in the event of a dispute, a court would require officially translated copies of all the relevant contracts which would add considerable cost to any litigation. In addition, an employee who is provided a copy of a contract in another language such as English, may argue, that they have not fully understood its terms and this could be a relevant factor in a potential litigation. In practice, employers in Spain will often keep the content of individual contracts of employment to a minimum given that many conditions of employment are detailed in the applicable collective bargaining agreement. Employers often will use the standard models of employment contracts issued by the Spanish Public Service of State Employment as a basis for their own contracts (https://www.sepe.es/HomeSepe/empresas/Contratos-de-trabajo/modelos-contrato.html). Businesses will then typically include additional relevant clauses to these contracts for their specific businesses. This chapter will consider whether employment contracts can be verbal or must be provided in writing, as well as outlining some of the most common types of optional clauses in ordinary employment clauses which must be in writing.

2. Form of contract (verbal or written)

General principle of freedom in relation to the form of contracts

In the Spanish legal system, there exists a general principle called the 'principle of freedom in relation to the form of contracts.' This means that the parties to a contract can freely decide how the contract is expressed. As noted previously, the Civil Code provides that: 'a contract exists when one person or more agrees to be bound, with respect to another or others, to give something or to provide some service' (Article 1254 Cód. Civ.). The Civil Code states clearly that 'contracts are concluded by mere consent' and that 'contracts will be binding, regardless of the way in which they have been concluded, provided that the essential conditions for their validity are met' (Articles 1258 and 1278 Cód.Civ.). The essential conditions for validity are that there exists the lawful consent of the contracting parties, clarity in terms of what is being contracted, and the contract must create lawful obligations that are not in breach of any existing laws (Article 1261 Cód.Civ.).

The ET reflects the general principle of freedom in relation to the form of contracts because it states that employment contracts can be verbal or in writing (Article 8.1 ET). Whether or not the contract is formalised verbally or in writing there exists a legal presumption that a contract of employment will be 'presumed to exist between anyone who provides a personal service within the scope of organization and management of another in exchange for a remuneration' (Article 8.1 ET). Given this legal presumption, if it is the intention of the parties that any contract should not be classified as a contract of employment, it is good practice to ensure that these intentions and the conditions of any commercial contract are recorded in writing to reflect the reality of the commercial relationship.

Types of employment contracts that must always be in writing

Notwithstanding the general rule that employment contracts can be verbal or in writing, the ET then goes on to list some specific types of contracts that must always be provided in writing including temporary contracts, part-time contracts and remote working contracts. In addition, various laws covering special employment relationships also require these types of contracts to be writing. Here are some examples in the table below:

Types of contracts that must be in writing	Legal reference
Temporary contract linked to an increase in production	Article 8.2 ET
Substitution contracts	Article 8.2 ET
Internship contracts	Article 8.2 ET
Contracts for professional training and learning	Article 8.2 ET
Part-time contracts	Article 8.2 ET
Substitution contracts for partially retired employees	Article 8.2 ET
Permanent seasonal contracts	Article 8.2 ET

Types of contracts that must be in writing	Legal reference
Contracts for remote employees	Article 8.2 ET
Contracts for employees hired in Spain to provide services for Spanish companies abroad	Article 8.2 ET
Fixed-term contracts generally which exceed four weeks	Article 8.2 ET
Contracts for fishermen	Article 8.2 ET
Contracts between temporary work agencies and temporary employees (whether temporary or permanent)	Article 10 of Law 14/1994*
Lawyers in law firms	Article 7 of Royal Decree 1331/2006*
Senior executive contracts	Article 4.1 of Royal Decree 1382/1985*
Artists (Performing, Audiovisual and Musical Arts)	Article 3.1 of Royal Decree 1435/1985*
Religious teachers	Article 5 of Royal Decree 696/2007
Professional sportsmen and women	Article 3.1 of Royal Decree 1006/1985*
Public sector employees	Article 11.1 of Royal Decree 5/2015
Commercial agents	Article 2.1 of Royal Decree 1438/1985*
People with disabilities working in special employment centres	Article 5 of Royal Decree 1368/1985*
Civilian personnel at military establishments	Article 8 of Royal Decree 2205/1980*
Miners	Article 2.3 of Royal Decree 3255/1983*
*Full citation of legislation is available in the bibliography at the end of the chapter.	

In addition, the applicable collective bargaining agreement to a contract of employment must also always be reviewed because it may contain an express obligation requiring some or all employment contracts to which it applies to be writing. Even if the collective agreement is silent and it appears that there is no express obligation to formalise an employment contract in writing, at any point during the employment relationship, the employer or employee can request that the employment contract is formalised in writing (Article 8.2 ET).

It is important to check whether there are any express legal obligations to provide an employment contract in writing, particularly in relation to temporary or part-time contracts. This is because if there is a legal requirement that an employment contract be in writing and this is not observed, there is a legal presumption that the contract is for an indefinite period and on a full-time basis, unless there is otherwise evidence that proves its temporary nature or the part-time nature of the services (Article 8.2 ET). A written contract reflecting the true nature of the employment relationship signed by the employee is always the best evidence.

An employer risks an administrative sanction from the Spanish labour inspectors of between €751 and €7500 if they fail to formalise in writing the employment contract when required to do so by law, or when this has been requested by the employee, or if they have failed to formalise an agreement to distance working in writing (Articles 7.1 and 40.1(b) LISOS).

General obligation to provide written details of employment

When the employment relationship lasts more than four weeks, the employer must inform the employee in writing within a two-month period of the date of commencement of employment about the essential elements of the contract and the main conditions of employment (Article 8.5 ET). This information includes:

Particulars of employment which must be provided in writing	
a)	The identity of the parties to the contract of employment.
b)	The date of commencement of the employment relationship, and in the event that it is a temporary contract, the likely duration of the same.
c)	The registered address of the business, or the address of the employer, as well as the address of the place of work where the employee will normally carry out their services. If the employee will work from various locations the contract should reflect this.
d)	The professional category of the role that the employee is carrying out or a description of the role.
e)	The remuneration structure, such as the basic salary and salary complements, and the normal date of payment.
f)	The ordinary working hours.

Particulars of employment which must be provided in writing	
g)	Rights in relation to holidays including the number of holidays and any rules about how holidays will be allocated.
h)	Any notice periods that must be given by the employer or the employee in relation to the termination of the contract.
i)	The collective bargaining agreement applicable to the contract.
(As set out in Article 8.5 ET and Article 2 of Royal Decree 1659/1998 of 24 of July which develops Article 8.5 ET regarding information to the employee about the essential elements of the employment contract (hereinafter 'Royal Decree 1659/1988')).	

The information in relation to points (e) to (g) above can be provided by making reference to another document which contains the information such as the applicable collective bargaining agreement (Article 2.3 of Royal Decree 1659/1988).

Changes to terms and conditions

Any contractual changes to the aforementioned conditions of employment must be notified in writing to the employee within a period of one month from the date of the relevant change (Article 6.3 of Royal Decree 1659/1988). However, the employer does not need to notify the employee of any changes if changes to these terms and conditions are as a result of changes to legislation, regulations or collective agreements (Article 4 of Royal Decree 1659/1988).

Employees working abroad

If an employee goes to work abroad, the employer should confirm in writing, before the employee departs, the length of time abroad, the currency that the employee will be paid in, how the employee will be remunerated (including in relation to compensation for travel or travel expenses), as well as the conditions in relation to repatriation (Article 3 of Royal Decree 1659/1988).

Provision of basic copies of employment contracts/ information about employment contracts

Employers must provide to the employees' representatives a basic copy of all the contracts that must be concluded in writing (Article 8.4 ET). The basic copy must be delivered by the employer, within a period of no more than ten days from the formalization of the contract to the employees' representatives. The employees' representatives must sign the copy in order to confirm receipt. The purpose of providing a copy is to ensure that employees' representatives are able to verify that the basic terms of the contracts meet the requirements of existing employment legislation. However, the information provided does not need to include personal details such as the national identity card or identity number as a foreigner, domicile, marital status in order not to breach the privacy or data protection rights of any employees (Article 8.4 ET). This obligation to provide a basic copy of the contract in writing to employee representatives does not apply to the contracts of senior executives who have a 'special employment relationship.' In the case of senior executive contracts, there exists simply the requirement to inform employees' representatives of their existence (Article 8.4 ET).

Employers are also obliged to provide basic copies of the signed contracts in writing to the Public Office of Employment (those that have been signed by the employees' representatives). This obligation exists even if there are no employee representatives, basic copies must be provided to the Public Office of Employment in any event (Article 8.4 ET).

Finally, even if an employment contract has not been formalised in writing, employers must inform the Public Office of Employment within a period of ten days of hiring an employee about the content of the employment contract as well as any extensions of the employment contract (Article 8.3 ET).

3. Contracts that may be totally or partially void

Spanish law distinguishes between circumstances in which an employment contract may be held to be totally void, and circumstances in which a contract may be held to be partially void.

Contracts that may be totally void

Employment contracts may be held to be totally void if the contract lacks one of the essential elements of a contract. As we have already seen, in order for there to be a valid contract in Spain there must exist the lawful consent of the contracting parties, clarity in terms of what is being contracted, and the contract must create lawful obligations that are not in breach of any existing laws (Article 1261 Cód.Civ.). If any of these requirements is lacking the contract would be declared null and void (Article 1300 Cód.Civ.). By way of illustration, an employment contract would be held to be null and void

if the employee was contracted to carry out any activities which were in breach of Spanish criminal law.

An employment contract could be held to be null and void, if no lawful consent has been given due to consent being given by mistake, under threat of violence, intimidation or as a consequence of a fraud (Article 1265 Cód.Civ.). There exists violence when 'irresistible force is used to extract consent' (Article 1267 Cód.Civ.). There exists intimidation when one of the contracting parties has a 'rational and well-founded fear of suffering an imminent and serious harm to his person or property, or to the person or property of his spouse, descendants or ascendants' (Article 1267 Cód.Civ.). Fraud may exist, for example, if it turned out that an employee did not hold a relevant professional qualification that was necessary for the performance of the contract. Furthermore, the employee could face criminal prosecution (Article 403 CP).

If a party enters into a contract on behalf of someone else without proper authorisation, the contract will be null and void unless it is ratified by the person in whose name the contract was entered into (Article 1259 Cód. Civ.). It is generally unlawful to offer employment to young people who are under 16 years old, and so contracts entered into with minors would be null and void (Articles 6.1 and 6.4 ET). The only exception to this general rule is if the work is in relation to public shows and written authorisation has been sought from the labour authorities (Article 6.4 ET). The consent of legal guardians such as parents or legal tutors must be obtained before hiring employees aged between 16 and 18 years old who continue to live with their legal guardians (Article 7(b) ET). It is considered a serious breach of Spanish labour law to hire under 16s, and so the labour inspectors can pose potential administrative fines of between €7501 and €255,018 (Articles 8.4 and 40.1.(c) LISOS).

Contracts that may be partially void

Contracts may be partially void because they contain clauses which have not been correctly drafted conform to Spanish law. By way of illustration, a probationary period clause of a year in an ordinary employment contract for a professional employee, would be held to be null and void because it is not compliant with the lawful maximum probationary period for this category of employee of six months (please see the section on probationary periods for more information).

Similarly, a clause in a contract may be held to be null and void if it breaches Spanish equality laws. Law 15/2022, of 12 July, the Comprehensive Law for Equality of Treatment and No Discrimination expressly states that clauses in contracts which breach Spanish equality laws are null and void (Article 26 of Law 15/2022). The characteristics that are protected by Spanish law include 'birth, racial or ethnic origin, sex, religion, conviction or opinion, age, disability, sexual orientation or identity, gender expression, disease or health condition, serological status and/or genetic predisposition to suffer pathologies and disorders, language, socioeconomic situation, or any other personal or social condition or circumstance' (Article 2 of Law 15/2022). Similarly, the Employees' Statue provides that individual agreements or unilateral decisions by the employer that give rise in employment to situations of direct or indirect discrimination on the grounds of 'age disability sex, origin, including racial or ethnic origin, marital status, social status, religion or beliefs, political ideas, sexual orientation and identity, gender expression, sexual characteristics, membership or non-membership of trade unions, links of kinship with people belonging to or related to the employer, and language within the Spanish State' will be null and void' (Article 17.1 ET). Care must be taken when drafting the terms and conditions of an employment contract to try to ensure that none of the terms and conditions are directly or indirectly discriminatory.

Consequences of totally or partially void contracts in labour law

The Civil Code also states clearly that: 'unlawful acts are null and void, unless the law itself provides that the consequences of such acts are otherwise' (Article 6.3 Cód.Civ.). In the context of employment law, the ET states that in the event that an employment contract is held to be null and void, the employee can still demand payment for the work that has been undertaken in terms of the remuneration that would have been due had the contract been held to be valid (Article 9.2 ET). This law exists to avoid the unjustified enrichment of the employer. By way of illustration, if an employer has contracted a sixteen- year- old without obtaining the necessary consent of their parents, the employer would still need to pay the individual for the work undertaken (assuming the work itself was a lawful activity).

As a general rule, if only part of the contract is void, for example, one particular clause, the general legal principle of the 'preservation of legal bargains' will apply. This means that the lawful parts of the contract

will remain enforceable, and only the unlawful clause or clauses will be unenforceable. The ET expressly states that if only part of the employment contract is void, the rest of the contract will remain valid, and it will be understood that it will be carried out in accordance with all applicable laws (Article 9.1 ET). To offer an example, if a non-compete period of three years is agreed, this can only be potentially valid for the maximum period of two years permitted under Spanish law (Article 21.1 ET).

If the employee was assigned special conditions or remuneration in terms of remuneration for the invalid part of the contract, the courts will decide whether these special conditions or remuneration will remain or cease (Article 9.1 ET). In the event of a challenge to the validity of a contract based on salary discrimination due to sex, the employee will have the right to receive the remuneration corresponding to equal work or work of equal value (Article 9.3 ET). In other words, the employee will have the right to receive the pay that they would have received had they been the opposite gender.

4. Probationary periods

Probationary period clauses can establish a trial period for the employee to try out the role that they are being hired to do. The inclusion of probationary period clauses in contracts of employment in Spain is generally optional. The only exception to this general rule is that probationary clauses are not permitted in temporary contracts that combine paid work with vocational training/university studies or other types of training approved by the National Employment System (Article 11.2(l) ET). Probationary periods are also generally considered null and void for employees who have previously carried out the same duties in the same business (regardless of the type of contract under which the duties were performed) (Article 14.1 ET). This includes for employees who have previously provided services to the business through a temporary employment agency and who have then continued directly with the business (STSJ Cataluña (Social), sec. 1ª, 20-09-2004, nº 6334/2004, rec. 1696/2004).

If a probationary period is included in a contract of employment, it must be formalised in writing prior to the commencement of employment (Article 14.1 ET). If an employment contract is initially verbal, and a probationary period is only agreed in writing once the employment relationship has commenced and a period of time such as a month and a half has elapsed, then the probationary clause may be held to be null and void (STSJ Madrid (Social), 03-04-2002, nº 225/2002, rec. 145/2002).

The precise length of the probationary period must be included in the contract. Employers are not free to set the periods of probationary periods because these are strictly regulated. They are limited in duration to the periods of time set out in the applicable collective bargaining agreements. If the applicable collective bargaining agreement is silent, the ET states that probationary periods are limited to six months for professional roles and two months for all other roles (Article 14.1 ET). However, in businesses with less than twenty-five employees, the probationary period can be up to three months for non-professional roles (Article 14.1 ET). In temporary contracts for six months or less, the probationary period cannot exceed a month unless the applicable collective bargaining agreement provides otherwise (Article 14.1 ET). If the temporary contract is a training contract relating to obtaining professional experience linked to studies, the maximum probationary period is one month unless the applicable collective agreement provides otherwise (Article 11.3.(e) ET). Different rules also apply to senior executives who may be subject to a probationary period of 9 months if the appointment is on a permanent basis (Article 5 of Royal Decree 1382/1985).

As a general rule any suspension of the employment contract, interrupts the probationary period. However, the ET expressly provides that absence during the probationary period due to temporary illness, childbirth, adoption, preparations for adoption, foster care, risk during pregnancy, risk during breastfeeding, or gender violence will count towards the calculation of the probationary period unless the parties agree otherwise (Article 14.3 ET). Thus, in principle, if there is no such agreement, time off for these reasons will continue to count towards the probationary period. Notwithstanding this, care must be taken prior to terminating the contract of an employee who is ill during the probationary period because Spanish non-discrimination law prohibits discrimination not just on the grounds of disability but also on the grounds of any illness or a health condition (Articles 2.1 and 26 of Law 15/2022, of 12 July, the Comprehensive Law on Equality of Treatment and No-Discrimination). In these circumstances, the employer must prove that the decision to terminate the employment has no relationship to the illness or health condition of the employee. It is therefore always best practice, although not legally required, to explain the reason for the termination in writing.

During the probationary period, the employee has the same rights and obligations in relation to the role as any other permanent employee (other than in relation to the termination of employment), and the employer is obliged to provide the work experiences that are the purpose of the test of the probationary period (Article 14.2 ET). During this period, the employer can assess the suitability of the employee for the role, and the employee can experience the conditions of employment.

In theory, during the probationary period, the employer or employee can terminate the relationship without having to provide any reason, and without providing any period of notice (unless this has been otherwise agreed), and without following any formal procedure. If a notice period applicable during the probationary period has been contractually agreed, this must be respected or the employer must pay damages amounting to the financial compensation corresponding to the loss of the notice period (STSJ Canarias (Las Palmas) (Social), sec. 1ª, 31-07-2006, nº 983/2006, rec. 336/2006).

Employees are not generally entitled to receive any additional compensation unless they can prove that the employer has acted fraudulently, or in breach of any fundamental rights such as for a discriminatory reason in which case any termination would be declared null and void. For this reason, in practice, it is always best to set out the reasons for the failure of the probationary period in writing as proof that they are not for any discriminatory reasons. Any termination of employment during the probationary period due to pregnancy (from the commencement of pregnancy until the commencement of maternity leave) is, of course, unlawful. However, a contract can always be terminated during pregnancy for reasons not related to pregnancy or maternity leave (Article 14.2 ET).

If, after the expiration of the probationary period, the contract is terminated for failing to pass the probationary period, the termination will be classified as an unfair dismissal. In addition, the ET expressly states that a employees' unsuitability which is known about prior to the completion of the probationary period may not be relied upon as a reason for fair dismissal by the employer after the probationary period is completed (Article 52(a) ET). Once the probationary period is complete, if the contract has not been terminated, the contract continues, and the period of time spent on the probationary period is counted towards the total length of service of the employee (Article 14.3 ET).

5. Other agreements that accompany the contract: minimum period of service, exclusive dedication and post-contractual non-competition agreements and bonus clauses.

Minimum period of service agreements

In circumstances where an employee receives specific, specialised, professional training at the expense of the employer to launch specific projects or to carry out a specific task, it is possible for the employer and the employee to agree, in writing, that the employee will remain in the business for a period not exceeding two years (Article 21.4 ET). If the employee leaves before the expiration of the agreed period, the employer will be entitled to compensation for damages (Article 21.4 ET).

Exclusive dedication agreements

In general, employees in the private sector are entitled to work for one or more employers. However, employers may expressly contract with employees that the employees will work exclusively for them. Employers must offer specific financial compensation in return for the employee agreeing to work exclusively for them, and this should be reflected in the employees' wage slips (Article 21.3 ET). However, even if this is agreed, employees may change their minds by providing thirty days prior notice to the employer of the termination of this agreement (Article 21.3 ET). Consequently, employees will no longer be entitled to receive compensation for exclusive dedication, however they will remain subject to the obligation not to compete unfairly with their employer (Article 21.1 ET). Employers may also change their minds in relation to this agreement and decide that they no longer wish to pay expressly for exclusive dedication, however in such cases, employers must consider whether or not they will need to follow the substantial changes to terms and conditions procedure set out in Article 41 ET.

Non-competition agreements

Non-competition whilst employed

As previously outlined, as a general rule employees may work for two or more employers. However, employees are not allowed to participate in disloyal competition during an employment relationship (Article 21.1 ET). Disloyal competition means 'performing work tasks of the same nature or branch of production as those he is performing under the employment contract, without the consent of his employer and provided that actual or potential damage is caused to the employee'(STS de 12

de diciembre de 2021, Rcud. 1090/2019). This includes 'founding or constituting competitive companies [...] without it even being necessary that the start-up and operation of the new company has materialized [...]' (STS de 12 de diciembre de 2021, Rcud. 1090/2019). The work must be in the same commercial or industrial sector. The work has to be of a similar nature (for example, producing similar products or finding similar clients or colleagues). Courts will take into consideration the extent of the overlap between products and services offered by the employer and the employee. If there is little overlap, the courts may hold that there is no unlawful disloyal competition.

Employers may bring claims for damages against employees engaging in such activities as well as the entities who they work for. Employers must demonstrate that they have a real industrial or commercial interest in no disloyal competition. Employers do not have to prove actual loss, potential loss is sufficient. Employees engaging in such activities may also be dismissed for breaching the contractual obligation of good faith which exists in all employment contracts (Articles 5(a) and 54(d) ET).

Post-contractual non-competition agreement

Article 21.2 ET governs post-contractual non-competition agreements. These prohibit employees working for a competitor for a set period of time once their employment has terminated. Non-competition agreements are valid if the employer can show that they comply with three key requirements. The first requirement is that the employer has an effective industrial or commercial interest to protect. The second requirement is that the employee must receive adequate financial compensation. The compensation is to cover the period when the employee may be unable to work for a competitor. It must be separately identified and accounted for on the employee's wage slip. If the compensation offered is too little, the clause will be null and void. Thirdly, the length of period of the non-competition agreement cannot exceed two years for professionals, or six months for other types of employees.

If the employee breaches the post contractual non-competition agreement, the employer can sue for the return of the monies paid to the employee for not competing (STS, 03-02-1991).

It is also possible for employers to agree, in advance, with the employee a penalty clause for breach of the post-contractual non-competition agreement which includes compensation for damages and losses. This will be valid providing the amount sought is proportionate. The Spanish courts have held that a clause requiring the employee to return double the amount received to be disproportionate and abusive and therefore null and void (STS), sec. 1ª, S 01-12-2021, nº 1178/2021, rec. 894/2019).

Bonus clauses

The Civil Code provides that 'contracting parties may establish the agreements, clauses and conditions that they deem appropriate, as long as they are not contrary to the laws, morality or public order' (Article 1255 Cód. Civ.). Whereas in common law countries such as England and Wales it is common for employers to draft bonus clauses which leave the final decisions as to whether an employee has met the criteria for a bonus, as well as the sum of the bonus, to the discretion of the employer, it is important to note that such drafting may not be valid in Spain. This is because the Civil Code states clearly that 'the validity and compliance of contracts cannot be left to the discretion of one of the contracting parties' (Article 1256 Cód.Civ.). Bonus clauses should therefore clearly set out the conditions that may entitle the employee to a bonus and that will determine the amount of any bonus. Bonus payments may be taken into account when calculating the value of severance pay. It is always best practise to seek advice from a Spanish lawyer before adapting or drafting a bonus clause for employees based in Spain.

Typology and Modalities of the Employment Contract

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Contents

1. Introduction

This topic describes the classification criteria and modalities of employment contracts regulated in current Spanish labor legislation, especially since the entry into force of *Royal Decree-Law 32/2021, of 28 December, on urgent measures for labor reform, the guarantee of employment stability and the transformation of the labor market*, which entailed a complete and profound restructuring with respect to the duration and modalities of employment contracts in the country.

The four basic blocks of the employment contract (indefinite, temporary or fixed-term, training and indefinite-discontinuous) are addressed. At the outset, it should be made clear that this grouping does not mean that these are the generic types of employment contracts within the Spanish legal system, but rather that it is an approach that follows the systematic approach of the ET in this respect, in its *Section 4.ª Modalities of the employment contract*, without strictly adhering to the order in which they are presented.

In line with this idea, other forms of provision of paid work are also presented here, essentially characterized by the length of the contracted working day, the place where the work is performed or the way it is organized; these affect the configuration of the contract and are combined with the aforementioned modalities. Therefore, it is necessary to start from a presupposition of analysis: the classification of employment contracts depends on the criterion being analyzed.

Within this diverse framework, there is also a "fifth" block of contracts relating to so-called "special employment relationships" (e.g. lawyers, senior management, artists, religious teachers, professional sportsmen and women, public employees, resident specialists in health sciences, people with disabilities working in special employment centers, trade representatives...), or other very specific contractual figures (such as employees contracted in Spain at the service of Spanish companies abroad, cooperants, associated aid contracts and fishermen), which for reasons of space and in order not to make the understanding of the national reality so complex in this respect, we will limit it only to their recognition or identification and not to a more exhaustive explanation and analysis, which undoubtedly merits a separate study.

It is said that there are so many different types of employment contracts that it is natural to speak of "à la carte hiring", and that the different reasons that could justify this plurality can be summarized in two groups: those inherent to the company (due to production and/or organizational needs) and those related to employment policy.

The temporary factor or possible duration of the employment contract is undoubtedly the distinguishing criterion of greatest social and legal transcendence in employment contracts in Spain. This is true in two ways: depending on the duration of the contract (indefinite contracts and temporary contracts), on the one hand; and depending on the length of the working day (full-time and part-time contracts), on the other hand. Certainly, the place where the services are provided (when this is the employee's own home - or outside the workplace) also acquires relevance, which determines the existence of peculiarities with respect to the configuration of the common or ordinary employment contract, as set out in Article 13 ET, which regulates the remote work contract, with a renewed prominence by virtue of the development of different forms of teleworking. It is also possible to jointly hire a group of employees.

Different types and modalities of employment contracts may arise from what the parties agree for the provision of services, which generally require special regulation for their characterization and the determination of their legal regime, due to their differences from the normal or ordinary contract. Many of these types of contract may, moreover, be juxtaposed (e.g. temporary contract with part-time work).

As a general rule, and unless otherwise agreed, the employment contract is presumed to be concluded for an indefinite period of time (Article 15.1 ET), on a full-time basis and without any particularities affecting its purpose, place or form of work. This implies that there is no "works and services contract" and that the temporary nature of the contract must be fully justified, i.e. the contract must specify precisely the reason for the temporary contract, the specific circumstances that justify it and its connection with the planned duration.

In view of the above, the current system of employment contracts in Spain is essentially based on four classification criteria, as follows:

1. Types of employment contract according to the duration of the contractual relationship:

   a) indefinite-term contracts (which include the so-called ordinary indefinite-term contract or ordinary employment contract, as well as some special forms of this which are configured according to specific clauses, as will be seen below, including the indefinite-discontinuous contract).

   b) temporary contracts. These can be grouped into two broad categories or different types:

      - structural temporary contracts (Article 15 ET, comprising two types: fixed-term employment contracts due to production circumstances and fixed-term employment contracts for the substitution of a employee)
      - training contracts (Article 11 ET, which also includes two types: training in alternation contracts and training contracts to obtain professional practice appropriate to the level of studies).

2. Modalities according to the length of the working day:

   a) full-time contracts (those in which the employee completes the ordinary working day, the maximum duration of which is set by the ET at 40 hours per week).

   b) part-time contracts (Article 12 ET, includes the following types: ordinary or common, partial retirement and relief contracts, and contracts for regular indefinite-discontinuous employees, either by legal determination or by collective agreement).

3. Types based on the place where the work is performed:

   a) on-site contract or at the workplace.

   b) Remote work contract / teleworking (Article 13 ET, with reference to *Law 10/2021 of 9 July on remote work*).

4. Modalities according to the number of employees involved:

   a) individual employment contract

   b) group contract.

The fundamental aspects of each of these identified typologies are detailed below.

2. Indefinite-term contracts

Indefinite-term contracts are those that lack an initial forecast as to their possible duration and which normally entail the condition of fixity or stability in employment (with certain exceptions in some sectors of

activity, such as public employment). They respond to a classic conception of labor law, according to which they are considered to be the typical ordinary or common contract, normally intended to regulate the professional career of a employee, who will not practically change workplace, profession or activity. In this sense, it constitutes the model for the regulation of employment contracts in Title I of the ET and, therefore, becomes the point of reference for typifying the rest of the contractual modalities by default, taking into account that what is not expressly regulated in each specific type of contract will be regulated by the general provisions of the ET.

This contract may be concluded on a full-time or part-time basis. It should be borne in mind that when the contract is indefinite and part-time -in its two forms: ordinary or ordinary indefinite part-time contract and indefinite-discontinuous contract- it will have a specific regulation.

From a formal point of view, the ordinary, full-time indefinite employment contract may be concluded verbally or in writing, although either party may require that the contract be formalized in writing during the course of the employment relationship.

The indefinite contract has become the preferred formula for the legislator and a priority option for the employer after the 2022 labor reform, since one of the objectives of this reform was precisely to reduce the temporary nature of employment, or rather, to avoid the abusive use of the temporary contract and excessive turnover of employees, trying to limit non-indefinite-term contracts to specific cases in which they are truly justified.

As noted above, within the general category there are different specific modalities whose rules differ in some respects from those that apply as a general rule. The main "special" cases are three:

- indefinite-discontinuous contract
- indefinite contract assigned to a construction site
- indefinite contract for senior management.

Moreover, in some cases, indefinite contracts may be eligible for hiring bonuses, when the requirements of the applicable regulations are met in each case, depending on the characteristics of the company, the employee and, where applicable, the working day. Opting for these modalities is a good formula for counteracting the economic impact for the employer of increasing the number of permanent employees. This is the case for:

- people with disabilities
- long-term unemployed people
- employees in a situation of social exclusion
- employees who have accredited status as victims of gender-based violence, domestic violence, terrorism or human trafficking
- family members of self-employed employees
- employees over 52 years of age receiving unemployment benefits
- employees in the family home service.

In all these cases, the requirements of the State Public Employment Service (SPES) must be taken into account in order to apply the benefits in question, both on the company's and the employee's side.

2.1. Indefinite-discontinuous contract

The indefinite-discontinuous contract is included in the category of indefinite contract. In fact, the Explanatory Memorandum to the 2022 labor reform law emphasizes that "the artificial distinction in the legal regime between indefinite periodic and indefinite discontinuous contracts finally disappears". It is regulated in Article 16 ET and its characteristic features are as follows:

1) Purpose and scope of use: it is used for work that is seasonal in nature or linked to seasonal productive activities; and for the performance of work that is not seasonal in nature but which, being intermittent, has certain, determined or indeterminate periods of performance (Article 16.1 ET).

It may also be used to carry out work within the framework of the execution of commercial or administrative contracts which, being foreseeable, form part of the ordinary activity of the company, in which cases the periods of inactivity may only occur as waiting periods between relocations between subcontracting. The maximum period of inactivity shall be three months, unless collective bargaining provides otherwise. Once this period has expired, the company must adopt the appropriate temporary or definitive measures.

Likewise, it may be arranged in relations between a Temporary Employment Agency (ETT) and a person hired to be seconded, in which case the periods of inactivity coincide with the waiting period between contracts.

Some examples of this figure could be: a contract as a teacher in a ski resort, a employee in a hotel that is

only open in high season, or a firefighter in the forest fire-fighting service.

2) Formalities: it is required in writing in accordance with the provisions of Article 8.2 ET and must reflect the essential elements of the work activity (among others, the duration of the period of activity, the working day and its timetable distribution, although the latter may be stated as an estimate, to be specified at the time of the call).

The question of the call-up is referred (Article 16.3 ET) to collective agreements or, failing that, to company agreements. Specifically, they are called upon to establish "the objective and formal criteria by which the call-up of indefinite-discontinuous employees must be governed. In any case, the call must be made in writing or by any other means that allows the person concerned to be duly notified with precise indications of the conditions of their incorporation and with adequate advance notice".

Indefinite-discontinuous employees may take the appropriate action in the event of non-compliance in relation to the call, starting from the moment of non-compliance or from the moment they become aware of it".

Indefinite-discontinuous employees are entitled to have their seniority calculated taking into account the entire duration of the employment relationship (and not only the time actually worked), except for those conditions that require other treatment due to their nature. Companies must inform indefinite-discontinuous employees and employees' representatives of the existence of vacancies of an indefinite nature; and it should be added that these indefinite-discontinuous employees will be considered as a priority group for access to training initiatives during periods of inactivity.

Indefinite contract assigned to a construction site

In this case, the contract is determined for services or tasks whose purpose is linked to construction. Among other things, at the end of the construction work, the employer is obliged to make a proposal to the employee for relocation. This proposal must be made within 5 days and in writing.

Once the relocation proposal has been made, the indefinite-term contract assigned to the work may be terminated for reasons inherent to the employee when any of these circumstances arise:

- The employee concerned refuses the relocation.
- The qualification of the person concerned, even after a process of training or requalification, is not suitable for the new works that the company has in the same province, or does not allow their integration in them, because there are too many people with the necessary qualifications to carry out the same functions.
- There is no work in the province in which the employee is hired in the company that is in line with their professional qualification, level, function and professional group, once their qualification or possible requalification has been analyzed.

Indefinite contract for senior management

In this case, senior management personnel are considered to be those employees who exercise powers inherent to the legal ownership of the company, as well as those relating to its general objectives. This work is carried out with autonomy and full responsibility, only limited by the criteria and direct instructions emanating from the person or the higher governing and administrative bodies of the entity.

This type of contract must be formalized in writing. In the absence of a written agreement, it will be understood that the employee is senior management personnel when the circumstances of Article 8.1 ET are met and the professional performance corresponds to that defined in Article 1.2 of *Royal Decree 1382/1985, of 1 August, which regulates the special employment relationship of senior management personnel*.

A probationary period, which in no case may exceed 9 months, may be agreed upon if its duration is indefinite. Once the trial period has elapsed without withdrawal, the contract shall become fully effective, with the time of services rendered being counted as part of the employee's seniority in the company.

3. Structural temporary contracts

Temporary contracts are those that have a fixed duration and which, from the moment they are concluded, include some reference to their cause (substitution, temporary coverage of a job) or to their termination date (through the setting of a deadline or a final term). In other words, the employee knows when his or her employment relationship with the company begins and when it ends.

Although there are other cases of temporary contracts, the fixed-term contracts par excellence are those mentioned in Article 15.1 ET, which contemplates the modalities we have already mentioned: a) fixed-term employment contracts due to production circumstances; and b) fixed-term employment contracts to replace a employee with the right to reserve the job (or to provisionally fill positions pending definitive coverage). Thus, terms such as: contract for works and services, interim or temporary contract have disappeared from the legal-normative language after the labor reform of 2022.

These two are the classic or structural forms of temporary contracting, as their *raison d'être* lies in the temporary nature of the work or in temporary labor needs, given the very nature of business activity, and there is therefore a correspondence between the temporary nature of the contract and the temporary nature of the work.

They can be used both in private companies and in the public administration, a sector in which they are subject to certain modulations or nuances. They can also be made through direct hiring (by the same employer who provides the work) or through indirect hiring, for example, through ETT´s. Article 15.1 ET itself is valid for identifying the main cases in which "contracts for the provision of services" can be concluded between these ETT´s and user companies, by reference to Article 6.2 of *Law 14/1994 of 1 June 1994, which regulates temporary employment agencies*.

The principles of causality and typicality apply to temporary employment. Therefore, in certain situations of irregularity in hiring, the legal system establishes a series of conditions under which a temporary contract acquires the status of a permanent contract, namely: a) fraud by breach of law due to non-compliance with the provisions of Article 15.4 ET ("Persons hired in breach of the provisions of this article shall acquire the status of permanent employees"); b) failure to register with the Social Security once a period equal to that which could have been legally established for the trial period has elapsed; and c) in the event of a chain of temporary contracts under the new conditions defined. With regard to the latter case, the current regulation has set the maximum period for chaining contracts in order to acquire the status of permanent employee at 18 months within a period of 24 months (Article 15.5 ET), which prior to the 2022 reform was 24 months in 30 months.

Fixed-term contract due to production circumstances

As its *nomen iuris* itself suggests, this is a contract limited in time and linked to temporary situations - foreseeable or not - in the level of business activity. Therefore, it is a matter of temporary circumstances and not with a lasting holiday, which is why this contract cannot correspond to situations of indefinite-discontinuous employment as defined in Article 16.1 ET.

Under Article 15.2 ET, a distinction is made between two types of production circumstances:

1. *the occasional and unforeseeable increase in activity and fluctuations which, although they are part of the company's normal activity, generate a temporary mismatch between the stable employment available and that which is required*, provided that they do not correspond to the performance of seasonal work or work linked to seasonal productive activities, or to the performance of work which is not of this nature but which, being intermittent, has certain, determined or indeterminate periods of performance (Article 16.1 ET). The aforementioned fluctuations also include those arising from annual leave.

   Article 15.2, third paragraph ET stipulates that when the fixed-term contract is due to these circumstances of production, its duration may not exceed six months (extendable to twelve months by sectoral collective agreement) and that a single extension may be agreed, provided that the maximum limit is not exceeded.

2. To deal with *occasional, foreseeable situations of limited and delimited duration*, the following being considered in these cases:

   a) The maximum duration of this contract shall be ninety days per calendar year, regardless of the number of employees necessary to attend to specific situations on each of these days, which must be duly identified in the contract.

   b) These ninety days may not be used continuously.

   c) The company must inform the employees' legal representatives of the annual forecast for the use of these contracts.

   The performance of work within the framework of contracts, subcontracts or administrative concessions that constitute the normal/ordinary activity of the company may not be identified as a cause of this contract.

Fixed-term contract for the replacement of a employee

It uses the same criteria as the former interim contract. According to Article 15.3 ET, there are three types of causes or cases for this type of contract:

1. Replacement of a employee with the right to reserve the job, provided that the contract specifies the name of the person being replaced and the reason for the replacement.

2. Completion of the reduced working day by another employee, when this reduction is based on legally established causes or regulated in the collective agreement. The name of the person partially substituted and the reason for the substitution must be identified.

3. Temporary coverage of a post during a selection or promotion process for its definitive coverage by means of a permanent contract (in this case never for a period of more than three months).

Specifically, it may be carried out in cases of substitution due to holidays, maternity, risk during pregnancy, adoption or pre-adoptive or permanent fostering of self-employed employees and members of cooperative societies; and its duration shall coincide with the duration of the underlying cause.

The employment contract must be in writing. The working day must be full-time unless the person being replaced has a part-time contract or a reduced working day. In addition, the duration of the probationary period for temporary contracts is limited to a maximum of one month for employment contracts lasting no more than six months. However, with the 2022 labor reform, an important change was incorporated, since the substitute person may begin to provide services before the absence of the person being replaced occurs, coinciding with the time necessary to guarantee the adequate performance of the position and, at the most, for a maximum of fifteen days.

4. Training contract: training in alternation and practical training

The purpose of the training contract is training in alternation with paid employment (Article 11.2 ET) or the performance of a work activity aimed at acquiring professional practice appropriate to the corresponding levels of studies (Article 11.3 ET). The main features of each of these forms, as well as the rules shared by both modalities, are described below.

Training in alternation contract

- Its purpose is to make paid work activity compatible with the corresponding training processes in the field of vocational training, university studies or the *Catalogue of training specialities of the National Employment System*. This is why it was formerly known as a dual training contract or alternating work-training contract.
- It must be in writing and cannot be concluded on a part-time basis. It shall be made in accordance with the following rules:
- It may be concluded with persons who lack professional qualifications. Within the framework of level 1 and 2 certificates of professionalism, and public or private programmes of work-training alternation training, which form part of the *Catalogue of training specialties of the National Employment System*, the contract may only be entered into with persons up to the age of thirty.
- The activity carried out by the employee must be directly related to the training activities, being coordinated and integrated in a common training programme.
- The figure of the tutor is regulated, both in the training entity and in the company, and the drawing up of individual training plans.
- Both theoretical and practical training are considered substantial.
- The minimum duration shall be three months and the maximum two years and may be carried out on a non-continuous basis.
- If the duration of the contract is less than the legal maximum and the qualification, certificate, accreditation or diploma has not been obtained, it may be extended by agreement until the qualification is obtained, without ever exceeding the maximum duration of two years.
- As a general rule, only one contract may be concluded for each training cycle. However, contracts with several companies on the basis of the same cycle, certificate of professionalism or itinerary are also allowed, provided that they respond to different activities linked to the cycle, plan or training programme and the maximum duration of all of them may not exceed two years.

- The effective working time (compatible with the training) is subject to limits: 65% in the first year and 85% in the second year.
- It may not be held when the activity or post has been previously carried out by the employee in the same company under any modality for a period of more than six months.
- As a general rule, no overtime, shift work or night work may be performed, with some exceptions. No probationary period may be established.
- Remuneration shall be that set by the collective agreement. Failing this, it may not be less than 60% (first year) or 75% (second year) of that fixed for the corresponding professional group or level, and may not be less than the minimum interprofessional wage (MIW) in proportion to the effective working time.

Training contract for obtaining professional practice appropriate to the level of studies

Its name is self-explanatory, and its conclusion is governed by the following rules:

- It is intended for those in possession of a university degree or an intermediate or higher degree, specialist, professional master's degree or certificate from the vocational training system, in accordance with the provisions of *Organic Law 5/2002, of 19 June, on Qualifications and Vocational Training* (provision repealed by *Organic Law 3/2022, of 31 March, on the organization and integration of Vocational Training*), as well as with those in possession of an equivalent degree in artistic or sports education from the education system, which enables or qualifies them for the exercise of work activity.
- It must be concluded within three years following the completion of the corresponding studies (extendable to five years in the case of disability). It may not be signed with anyone who has already obtained professional experience or carried out training activity in the same activity within the company for a period of more than three months.
- The minimum duration is six months and the maximum is one year.
- A person may not be hired for the same qualification in the same or a different company for longer than the above limits. Nor may a person be hired for the same job for a longer period than the maximum, even if it involves a different qualification or a different certificate.
- A probationary period of up to one month may be established (except as provided for by collective agreement).
- The job must allow for work experience appropriate to the level of education or training covered by the contract. An individual training plan shall be drawn up.
- At the end of the contract, the employee shall be entitled to obtain certification of the content of the work experience.
- No overtime may be worked.
- The remuneration for the effective working time shall be that established in the agreement applicable in the company for these contracts or, failing that, that of the professional group and remuneration level. In no case may the remuneration be less than the minimum remuneration established for the contract for training in alternation or the MIW.

Common rules for both training contracts

- Social Security protection will cover all protectable contingencies and benefits, including unemployment and coverage by the Wage Guarantee Fund.
- Certain situations interrupt the duration of the contract (temporary incapacity, birth, risk during pregnancy, risk during breastfeeding and gender violence).
- The contract shall be formalized in writing and shall include the training plan and mentoring activities.
- Age and duration limits do not apply to persons with disabilities or at risk of social exclusion.
- Collective bargaining may determine which positions, groups or levels may be filled through training contracts.
- During the implementation of internal flexibility measures (such as Temporary Employment Regulation Files or RED Mechanisms), training contracts cannot be signed to replace affected employees.
- If at the end of the training contract the employee is hired in the company, a probationary period cannot be established in the new contract and seniority will be taken into account.
- Contracts in violation of the law or in which the company fails to comply with its training obligations will be understood as ordinary permanent contracts.

- The company must inform the employees' legal representatives of the educational or training cooperation agreements.

5. Part-time contracts. Relief contract and partial retirement

The part-time contract as a generic form and the relief contract as a specialty are regulated in Article 12 ET. This generic form is known as the common or ordinary part-time contract, which becomes the reference for the rest of the variants analyzed in this section.

Ordinary part-time contract

- Concept: A part-time employment contract shall be deemed to have been concluded when it has been agreed to provide services for a number of hours per day, per week, per month or per year that is less than the working hours of a "comparable full-time employee". A comparable full-time employee means a full-time employee in the same undertaking and establishment, with the same type of employment contract and performing the same or similar work. In any case, the sum of ordinary and supplementary hours, including previously agreed and voluntary hours, may not exceed the legal limit for part-time work, if there is no comparable full-time employee in the company.
- Characteristics: it may be agreed for an indefinite period of time or for a fixed term in those cases in which such a possibility is provided for in the corresponding regulation.
- Working day:
  - Distribution of the working day: The daily working day in part-time work may be continuous or split. When the part-time contract entails a shorter working day than that of full-time employees and this is carried out on a split basis, it will only be possible to make a single interruption in the working day, unless otherwise provided for in the collective agreement.
  - Overtime: part-time employees may not work overtime, except in the cases referred to in Article 35.3 ET.
  - Additional hours: part-time employees may work additional hours, which are those that are added to the part-time employee's ordinary working hours, and a distinction must be made between agreed additional hours, which are mandatory for the employee when he/she has signed the mandatory agreement, and voluntary additional hours, which can only be offered by the company in indefinite contracts and are voluntary for the employee. The two types of supplementary hours can only be carried out in the case of part-time contracts with a working week of no less than 10 hours per week, on an annual basis, and they can coexist.
- Formalization: requires the written form and the official model established, which must include the number of ordinary working hours per day, per week, per month or per year contracted, as well as the method of their distribution, as provided for in the collective bargaining agreement.
- Conversion from full-time to part-time work and vice versa: this change shall always be voluntary for the employee and may not be imposed unilaterally or as a consequence of a substantial modification of working conditions, and the employee may not be dismissed or suffer any other type of penalty or detrimental effect for refusing this conversion.

Relief contract and partial retirement

The relief contract is a singular type of part-time contract that is inextricably linked to the figure of partial retirement and whose regulation is established in Article 12.6 ET. It is an employment contract with an employee who is unemployed or who has a fixed-term contract with the company to partially replace an employee of that company who is partially entitled to a retirement pension, as he or she receives it at the same time as doing part-time work.

In other words, a "relief employee" fills the time left vacant by another employee in the company who, although not yet of normal retirement age, meets the necessary age and social security contribution requirements to qualify for partial retirement, and who therefore continues to work in the company with a reduced working day and at the same time receives a partial contributory social security pension.

However, the sixth paragraph of Article 12 ET states that the relief contract may also be entered into to replace the work time left vacant by employees who partially retire after having reached the corresponding ordinary retirement age in accordance with the provisions of the LGSS.

Therefore, in this contract, the company must carry out two operations: one with the employee who partially retires -partially retired- and another with the employee to whom the relief contract is made -released-. The employee who partially retires must have his full-time contract converted into a part-time contract by reducing his working hours. A relief contract must be concluded with the relief employee at the same time as the reduction in working hours of the partially retired employee. This contract may be indefinite or temporary, but in the latter case it must have a duration equal to the period of time remaining for the employee being replaced to reach the corresponding ordinary retirement age according to the LGSS.

Likewise, it may be full-time or part-time, but in any case, the duration of the working day must be at least equal to the reduction in the working day agreed by the "partially relieved" employee, and will therefore range between 25% and 50%; and full-time when the reduction in the working day is 75%. When the reduction of the "partially relieved" employee's working hours is 75%, the relief contract must be full-time and of indefinite duration. The relief employee's working hours may supplement those of the relieved employee or be combined with them.

The relief contract will terminate upon the total retirement of the "partially relieved" employee, unless the employer converts it into an indefinite contract. It may happen that on reaching the ordinary retirement age the "partially relieved" employee continues in the company, in which case, if the relief contract has been concluded for a fixed term, it may be extended by agreement of the parties for annual periods, terminating when the partially retired employee fully retires.

6. Other types of contracting. Remote working contract

This final section deals with other forms of employment contracts regulated in the ET that do not respond to the classic classification criteria based on the duration of the employment relationship or the working day, as mentioned in the introduction to the subject. We are referring to group contracts and remote work.

Group contract

Regulated by Article 10.2 ET, this is a contract between the employer and the head of a group of employees considered as a whole, and the employer does not have the rights and duties that correspond to each of the members of the group, but can only exercise these with the head of the group, who will represent the members of the group and will be responsible for the obligations inherent to that representation.

The employment relationship is established between the employer and the group, and there is no employment relationship between the employer and each of the employees in the group independently, nor between the head of the group and each of its members. Therefore, this is the guideline to follow in order to differentiate this contractual situation from that in which the employer gives a common job to a group of his employees, while retaining their individual rights and duties with respect to each one.

If this modality is crossed with the rest of the classification criteria that have been analyzed, all possible forms are possible, i.e. the form of the contract can be verbal or written, indefinite or fixed-term, full-time or part-time. Bearing in mind that the law does not specify any limitations in this respect.

Remote working contract

As noted above, the ET does not directly regulate this type of contract, but refers to a regulation implementing Article 13, i.e. *Law 10/2021, of 9 July, on remote work*. Under the terms of that law, remote work shall be considered to be that in which the work activity is carried out mainly at the employee's home or at a remote place freely chosen by the employee, as an alternative to being carried out in person at the company's workplace.

Remote work is voluntary and requires the signing of an agreement in accordance with Articles 6 and 7 of the referred Law. The decision to work remotely from a face-to-face mode of work shall be reversible for the company and the employee; and the exercise of this reversibility may be exercised under the terms established in collective bargaining or, failing this, under the terms established in the remote work agreement. Consequently, the employee's refusal to work remotely, the exercise of the reversibility to face-to-face work and difficulties for the proper development of the remote work activity that are exclusively related to the change from a face-to-face service to another that includes remote work, will not be causes justifying the termination of the employment relationship or the substantial modification of the working conditions.

The contract may be concluded for an indefinite period of time or for a fixed term, and the employees under

this type of contract must be assigned to a specific work center of the company, in order to be able to exercise the collective representation rights that correspond to them on the same terms as the rest of the company's workforce.

In terms of employment rights, remote employees enjoy the same rights as those who provide their services in person, except for those that are inherent to the provision of services. Thus, they shall be entitled to the provision and adequate maintenance by the company of all the means, equipment and tools necessary for the development of the activity, in accordance with the inventory included in the agreement and in the terms established, if applicable, in the collective bargaining agreement or collective agreement of application; and the necessary attention shall be guaranteed in the event of technical difficulties, especially in the case of teleworking. The salary must be at least equal to that of a employee of the same professional group and functions. They may also enjoy other rights such as: flexibility, access to training, adequate occupational health and safety protection, as well as the right to privacy, personal data protection and digital disconnection.

Mode of labor provision

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Contents

1. The determination of the work provision. Professional classification: the professional group

In all companies there are different jobs with different needs, conditions, and access requirements. The so-called professional categories came to define these positions explicitly so that every employee knows his working conditions.

Currently, there are no professional categories; since the labor reform of 2012, the concept of professional category ceased to be the way to organize employees and was substituted by the expression professional group.

The so-called professional "groups" are defined according to the ET, as the set of "professional skills, qualifications and content general of the benefit, and may include different tasks, functions, professional specialties or responsibilities assigned to the employee".

In Spain, there are 11 contribution groups which may be classified as follows:

Group 1: Positions of responsibility. This would include management and high-ranking positions. Normally, they will be employees with higher degrees.

Group 2: Intermediate positions. Two types of employees can be distinguished: those with a higher degree and those with extensive professional experience. Team leaders, managers, supervisors are usually included in this category.

Group 3: Positions without responsibility. Employees without a specific qualification or vocational training qualification.

Within these 3 groups, we will find the 11 specific contribution groups in which to gather, more correctly, each employee, which would be the following:

- Engineers and graduates.
- Technical engineers, experts, and qualified assistants.
- Administrative and workshop heads.
- Unqualified helpers.
- Administrative officers.
- Subordinates.
- Administrative assistants.
- First and second officers.

- Third-class officers and specialists.
- Pawns
- Employees under the age of 18, regardless of the professional category to which they belong.

The professional group usually coincides with the level of education. To determine which professional group each employee belongs to, we must look at the table of professional groups previously described and, depending on the functions performed by said employee, he or she will be assigned one contribution group or another. In the event that the employee performs tasks from different contribution groups, the one who dedicates the most hours of their working day will weigh.

2. Professional promotion

Professional and economic promotion in an organization refers to the opportunities and mechanisms available for employees to advance both in their careers (promotions) and their remuneration (economic promotion). Below, both concepts are explained:

A-Professional Promotion: Promotions

The so-called promotion is the process by which an employee is elevated to a position of greater responsibility within the organization. The purpose of this award is to provide motivation to employees who have demonstrated exceptional skills and performance. With promotion in the job, the employer takes advantage of and develops the internal capabilities of employees to fill key positions. Regarding the benefits that a promotion causes for the employer, it stands out that employees are more likely to remain in a company that offers clear development opportunities, as well as achieving an environment where effort is valued and recognized generates greater satisfaction and productivity.

In order to grant a promotion in the business world, it is necessary to evaluate the employee's performance and achievements in the current position, as well as a test of his knowledge, ability to assume and adapt to new responsibilities, skills, and necessary attitudes for the new position.

Another requirement that favors promotions is given by the length of service in the organization, although it should not be the only criterion.

B- The process to qualify for promotion in employment is divided into three phases:

1st Performance Evaluation: Periodic and structured review of the employee's performance.

2nd Interviews and Evaluations: Additional processes to identify the most suitable candidates.

3rd Decision and Communication: Selection of the candidate and official notification of the promotion.

The necessary requirements to be able to achieve this improvement in working conditions are summarized in three basic points:

A- That it is in accordance with what the agreement establishes.

B- That training, merits, seniority, etc. be taken into account.

C- There is an absence of discrimination.

Among the benefits that come with a job promotion, the increase in an employee's remuneration stands out, for example, an increase in the base salary, bonuses or additional payments for outstanding performance, commissions or incentives based on performance, common in sales roles.

Both professional and economic promotion are essential for effective talent management in an organization. Implementing clear and fair policies for both types of promotion can result in a more motivating, equitable and productive work environment.

3. Rights and duties of the employer in the employment relationship

3.1. Power of direction and control: content and limits

The power of management could be defined as the employer's power to unilaterally alter the limits of the work provision, as long as they do not involve substantial modifications to the working conditions. The power of direction and control is a prelude to the disciplinary and sanctioning power, being a power that allows sanctioning those employees who do not comply with their duties at work.

The CE and the ET regulate several precepts from which the power of business management is directly derived:

The freedom of enterprise is recognized within the framework of the market economy. This aspect is recognized in Article 38 CE "within the framework of the market economy". "Public powers guarantee and protect their exercise and the defense of productivity, in accordance with the demands of the general economy and, where appropriate, planning."

Since before the origins of capitalism, the entitlement of management power has corresponded to the businessman. This power as such is usually delegated, since its extension and intensity cannot be identical for the different types of existing labor relations, and even more so, when we take into account labor relations under the protection of new technologies where options such as teleworking end up blurring the interactions between the parts.

The management power of the businessman finds protection in Spanish legislation not only through the CE but also through the ET expressly states in its Article 1.1 that employees provide their services "within the scope of organization and management" of an employer. At this point, the employee must "comply with the orders and instructions of the employer in the regular exercise of his managerial functions" (Article 5(c) ET) and will be obliged to carry out the agreed work under the direction of the employer or person to whom he delegates (Article 20.2 ET). The employment contract may be terminated by decision of the employer, through dismissal based on a serious and culpable breach by the employee (Article 54 ET).

For the sake of good faith, the employee who has been obliged to perform a labor service through a contract will be obliged to carry out the agreed work under the direction of the employer or person to whom he delegates, since in compliance with the obligation to work assumed in the contract, the employee must show diligence and collaboration in the work established by the legal provisions, collective agreements and the orders or instructions adopted by him in the regular exercise of his management powers and, failing that, by the customs and habits.

In short, the ordinance recognizes in Article 20.3 ET, that the employer may adopt the generic surveillance and control measures that he deems most appropriate to verify the employee's compliance with his or her work obligations and duties and is empowered to issue certain types of standards such as codes of conduct according to Article 5(c) ET and Articles 20.1 and 20.2 ET.

The content of these measures finds its limit in the fundamental and unavailable rights of employees recognized in legislation, such as those established by the applicable collective agreement.

The employer may also give specific orders, guidelines, or instructions to perform certain jobs, or rules related to the prevention of occupational risks, protocols to prevent harassment or promote equality, all of this with the purpose of carrying out the correct development of the work activity.

3.1.1. Ius variandi

The Latin expression "ius variandi" refers to the manifestation of the power of business management to organize and order labor benefits, associated with the disciplinary power to repress the illicit conduct of employees, always subject to the respect of the Fundamental rights.

The regulations of our labor law offer a certain inflexibility regarding any modification of working conditions, but allow that in application of the *ius variandi*, the employer can change conditions of the labor provision unilaterally as long as it is not a substantial modification of the working conditions (Articles 41 and 83.2 ET), in which it would be necessary to follow the established legal channels.

STS No. 271/2022, of March 29 (ECLI:ES:TS:2022:1375), compiles the doctrine on this matter to mean that "(...) by substantial modification of the working conditions must be understood as those of such a nature that they alter and transform the fundamental aspects of the employment relationship, among them, those provided for in the ad exemplum list of Article 41.2 becoming different ones, in a noticeable way, while when it comes to simple accidental modifications, these do not have this condition, being manifestations of the power of management and the corporate ius variandi".

3.1.2. Limits on management power

The management power of the employer is not absolute or unlimited, for Spanish jurisprudence it is subject to material limits, including (STSJ del Madrid no. 1095/2018, of December 7, 2018, ECLI:ES:TSJM:2018:12557)

- That the offense is classified in the legal or conventional standard applicable to the company, so that it does not penalize conduct that is not described in such standards.

- That the grading of the offense has been carried out taking into account the principles of individualization and proportionality, it is up to the Social Judge to examine whether the sanction imposed is in accordance with the seriousness of the employee's conduct, taking into account the professional career, seniority, contemporary and subsequent events, greater or lesser responsibility.
- That employees are not discriminated against in the imposition of sanctions when the same facts occur, except in circumstances that justify the imposition of different sanctions.
- That it has not been previously sanctioned for the same facts or principle of non bis in idem.
- That the sanction imposed is not legally prohibited, such as the reduction of vacations or breaks.

The exercise of disciplinary power by employers is also subject to formal limits, such as written communication to the employee for serious and serious offenses, stating the date and the facts that motivate it (Article 58.2 ET) with due detail to avoid accusations vague or generic that prevent guaranteeing the right of defense of the employee in the act of trial, and the provision of contradictory file when it comes to sanctions to the legal and union representatives, as well as hearing to the union delegates when the sanctioned employee is affiliated with a Union (Articles 114 and 115 LRJS)".

In this sense, the Plenary Session of the Constitutional Court, in STC No. 39/2016, of March 3, has established a series of guidelines to consider correct and constitutional any restrictive measure of fundamental rights and the power of management on the part of the employer, such as:

- Judgment of suitability. Whether such a measure is likely to achieve the proposed objective.
- Judgment of necessity. If this measure is also necessary, in the sense that there is no other more moderate measure to achieve such purpose with equal effectiveness.
- Judgment of proportionality. If the measure is weighted or balanced because it results in more benefits or advantages for the general interest than harm to other goods or values in conflict.

Within the limits of management power, the analysis of new technologies is essential to the extent that the emergence of new ways to control activity can clash head-on with fundamental rights of employees such as privacy, image, or the right to digital disconnection, based on the new regulatory environment brought about by the publication of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, 2016, (General Regulation of data protection) and Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (LOPDGDD) and Law 10/2021, of July 9, on remote work.

A relevant judicial resolution is SAN no. 251/2021, of November 30, (ECLI:ES:AN:2021:4743). In this sense, the National Court considers that "(...) within the framework of the limits imposed on the power of direction and control of the employer in the development of the employment relationship, it is worth mentioning the doctrine upheld by the Constitutional Court refers to the need to maintain an adequate balance between the employee's obligations and the power of business control, but always keeping in mind that the employees´fundamental rights prevail over the employer's right of control (STC 6/1998, of January 21), therefore Those constitute negative limits for the power of corporate control and operate as defense rights against an illegitimate exercise of the same by the employer. And it is precisely in this sense that the Arts. 20.3 and 18 ET refer to respect for the dignity of the employee as the basis of all fundamental rights, so that the projection of the dignity of the person in general and fundamental rights in particular in the control by the employer will not only will allow us to overcome a patrimonial vision of the employment relationship, but will place the business control activity on its fair terms, establishing the fundamental rights of the employee within limits to the discretion of the exercise of the employer's power of control".

3.2. Disciplinary power

The employer's disciplinary power derives directly from several precepts contemplated in the CE and ET:

Freedom of enterprise within the framework of the market economy, where public powers guarantee and protect its exercise and the defense of productivity. In this regard, paragraph 1 of Article 1 ET states that employees provide their services "within the scope of organization and management" of an employer.

Section c) of Article 5 ET establishes as a basic duty of the employee "to comply with the orders and instructions of the employer in the regular exercise of his managerial functions." And adds in section 1 of Article 20 that in addition "he is obliged to carry out the agreed work

under the direction of the employer or person to whom he delegates".

The power of management is defined as the employer's power to alter the limits of labor provision unilaterally, as long as they do not entail substantial modifications to the working conditions or violate the fundamental rights of employees or undermine their dignity.

After the above, the disciplinary and sanctioning power of the employer is what allows him to sanction those employees who do not comply with their job duties without the need to resort to judicial means, since it has immediate effectiveness, but with the correlative right of the employee to urge and obtain through labor judicial means a review of the conformity with the Law of the decision and measure taken by the employer.

3.3. Duties regarding occupational health and safety

Among the employer's main preventive obligations and rights are those defined in LPRL. At this point, the employer, complying with the law, must protect the safety and health of his employees, with all the means at his disposal and in all aspects related to work and, specifically, comply with the obligations expressly included in the prevention regulations. These obligations are aimed at knowing the risks of the company, knowing how these can affect employees and, consequently, planning and establishing measures to avoid or minimize the risks, providing employees with information, training, the appropriate means and encouraging their participation.

All employers have the obligation to establish effective protection in terms of occupational health and safety in their workplace. In addition to carrying out permanent action to monitor preventive action.

To comply with the duty of protection, the employer or the person assigned by him and the employees must comply with preventive action measures that not only help avoid accidents and occupational diseases but also promote a safer, healthier and more productive work environment.

What are measures that the entrepreneur must implement? There are numerous measures such as combating risks at their source, adapting work to the person, taking into account the evolution of technology, replacing what is dangerous with what entails little or no risk, planning prevention, putting collective protection before individually, giving proper instructions to employees.

However, two of relevant importance are incorporated into this group of measures:

A-Avoid risks.

To avoid occupational risks and ensure the safety and health of employees, employers must take a proactive and systematic approach. Below are some key measures to avoid occupational risks.

1º. Risk Identification and Assessment, that is, conducting a thorough assessment of all risks associated with each task and workplace. Identify potential hazards and assess their severity and likelihood, conduct periodic inspections to identify new risks that may arise due to changes in processes, equipment, or work environment.

2º. Elimination and Control of Risks.

Whenever possible, eliminate risks at their source. For example, substituting hazardous substances with less hazardous ones, implementing technical control measures, such as adequate ventilation, machinery protection, dust extraction systems, also establishing safe work procedures, limiting the time of exposure to certain risks and providing adequate breaks, and the most expensive requirement for the employer, that is, providing adequate protective equipment and ensuring its correct and constant use.

3º. Design and Organization of Work.

It is the employer's responsibility to design jobs ergonomically to minimize physical effort and prevent musculoskeletal injuries, and organize tasks and schedules in a way that minimizes risks, avoiding work overload and stress.

4º. Training.

In this regard, the employer must provide continuous training to employees on safety and health at work, including the correct use of equipment and safe practices, as well as inform them about the specific risks of their job and the preventive measures they must adopt.

5º. Participation and Consultation of Employees.

The employer must involve employees in identifying risks and adopting preventive measures. Create health

and safety committees, when necessary, as well as encourage open and effective communication between employees and management on any aspect related to occupational health and safety.

6º. Maintenance and Review of Preventive Measures.

It is necessary to ensure regular and adequate maintenance of all facilities, equipment, and tools, continually review and update preventive measures based on changes in processes, technologies, or regulations.

7º. Emergency Management.

To protect employees from potential dangers, the employer must develop and maintain clear and effective emergency plans for situations such as fires, chemical spills, evacuations, and carry out periodic drills to ensure that all employees know the emergency procedures and act in a coordinated manner.

8º. Monitoring of Employees' Health.

It is also the employer's obligation to implement health surveillance programs to early detect any adverse effects related to work and take immediate corrective measures if health problems related to occupational risks are detected.

B-Evaluate the risks that cannot be avoided.

Assessing risks that cannot be avoided is a crucial part of managing occupational health and safety. To carry out an effective assessment of these risks, it is important to follow a structured and systematic process.

What measures should the employer take to evaluate occupational risks that cannot be avoided?

1º. Hazard Identification.

- Identify all hazards present in the work environment, including chemical, physical, biological, ergonomic, and psychosocial.
- Analyze each task and activity carried out by employees to identify possible dangers.

2º. Determination of Risks and analysis of Severity and Probability.

- Determine the frequency and duration of employees' exposure to each hazard.
- Assess specific workplace conditions, such as the physical environment, equipment used, and work practices, as well as the potential severity of harm that may result from exposure to each risk. This includes considering the nature of possible injuries or illnesses, as well as evaluating the probability of an adverse event occurring, taking into account the frequency of exposure and the effectiveness of existing control measures.

3º. Risk Assessment.

- Use a risk matrix to classify each risk according to its severity and probability. This helps prioritize the most critical risks that require immediate attention, as well as classify risks into categories such as low, medium, high, or extreme, depending on the determined risk level.

4º. Control, monitoring and review measures.

- Apply the control hierarchy to manage risks, including elimination, substitution, engineering controls, administrative controls, and personal protective equipment (PPE), and implement specific measures for each identified risk. For example, for ergonomic risks, adjust the height of workstations; for chemical hazards, improve ventilation and provide appropriate protective equipment.
- Continuously monitor the effectiveness of the control measures implemented and make adjustments as necessary and periodically review and update the risk assessment, especially when there are changes in the work environment, processes, or applicable regulations.

5º. Documentation and Communication.

- Maintain detailed records of all risk assessments, control measures implemented, and reviews carried out, and inform all employees of the risks identified and control measures taken. Ensure they understand their role in risk management.

In short, when risks cannot be avoided or cannot be sufficiently reduced by different means, the employer must provide its employees with personal protective equipment, as well as guarantee that each employee receives sufficient and appropriate theoretical and practical training. in preventive matters, both at the time of hiring and whenever changes occur in tasks, innovative technologies are introduced, etc.

On the other hand, the risk assessment carried out by the employer must take into account the exposure of employees who are pregnant or recently giving birth to agents, procedures or working conditions that may negatively influence the health of the employees or the fetus.

Regarding minors, an evaluation must be carried out of the positions to be performed by minors under 18 years of age, which may endanger the health of these employees.

Employees with temporary employment contracts (specific work and service, temporary due to production circumstances, interim employment and so on) must enjoy the same level of protection in terms of safety and health as the rest of the company's employees.

In addition, the stated obligations in preventive matters, which the employer assumes in order to guarantee health and safety in his or her workplace. The employer has rights against employees in preventive matters, such as demanding from his employees:

A- Compliance with the established prevention measures.

B- The correct use of protective means and equipment, machines, tools and materials, devices, and safety elements.

C- The transmission of immediate information about risk situations as well as their cooperation to guarantee safe working conditions, such as, for example, receiving information and training on preventive matters provided by the employer, collaborating in the verification of their health status in cases where the law establishes them as obligatory for employees, etc.

4. Rights and duties of the employee in the employment relationship

When talking about employees' rights and obligations in terms of occupational risk prevention, we refer to Article 40.2 CE, which entrusts public powers, as one of the guiding principles of social and economic policy, to ensure safety and hygiene at work. Based on this fundamental principle, the presentation of employees' rights in terms of occupational risk prevention can be done by listing the obligations of employers, since there is a correlation between the obligations of companies and the rights of employees in this regard.

Decree 315/1964, of February 7, which approves the Articulated Text of the Law of Civil Servants of the State, states that the State will promote all actions that contribute to the improvement of the working conditions of its civil servants.

The ET determines that employees have the right to their physical integrity and to an adequate safety and hygiene policy, adding that the employee, in the provision of their services, will have the right to effective protection in terms of safety and hygiene.

In addition to the basic right of employees, the LPRL reiterates in its Article 14 that employees have the right to effective protection in terms of safety and health at work. The Law also includes, directly or indirectly (as a consequence of the obligations imposed on companies), the following rights:

- Right to have personal protective equipment.
- Right to information, consultation, and participation.
- Right to receive training, theoretical and practical, in preventive matters.
- Right to periodic monitoring of your health status.
- Right to protect employees who are especially sensitive to certain risks.
- Right to maternity protection.

On the other hand, Article 19.2 ET determines that the employee is obliged to observe legal and regulatory safety and hygiene measures in their work.

In this sense, Article 29 LPRL includes the obligations of employees in preventive matters, establishing first of all the obligation of each employee to ensure their own safety and health at work and for that of other people who may be affected by their professional activity, due to their acts and omissions at work, in accordance with their training and the employer's instructions.

This generic obligation is specified in a series of particular obligations of employees, among which the following stand out:

1º Safely use the machines, devices, tools, dangerous substances, transport equipment and, in general, any other means with which they carry out their activity, as well as the protective means and equipment provided by the employer, in accordance with the instructions received of this one.

2º Do not put out of operation and correctly use the existing safety devices in the media related to your activity or in the workplaces where it takes place.

3º Immediately inform your direct superior and the Prevention Service about any situation that, in your opinion, entails, for reasonable reasons, a risk to the safety and health of employees.

4º Contribute to the fulfillment of the obligations established by the competent authority in order to protect the safety and health of employees at work.

5º Cooperate with the employer so that he can guarantee safe working conditions.

In accordance with the Law, failure by employees to comply with their obligations regarding risk prevention will be considered non-compliance for the purposes provided for in the ET or a fault, where applicable, in accordance with the provisions of the Law corresponding regulations on the disciplinary regime of public officials or statutory personnel at the service of Public Administrations.

Working Time

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Contents

1. Introduction and regulatory sources

The employment relationship as a synallagmatic legal relationship implies that the employee must be available to the employer for a specified period. The regulation of working time aims to control a potential disproportion in this availability by the employer, mainly from two perspectives: rest and occupational safety and health. In this regard, this chapter addresses legal impositions that modulate working time and prevent it from being excessively extended by establishing mandatory breaks, possible interruptions of service, or even reductions or distributions of working hours, motivated by both safety and health reasons, and considerations such as respect for private life, leisure, and family reconciliation.

This issue has been one of the main historical demands of the working class, leading to the recognition of the limitation of the working day to 8 hours (Royal Decree of April 3, 1919). Over time, further progress has been made in securing more guaranteed systems from a reconciliation, safety, and health perspective, although this has also made its study and understanding more complex.

Regarding the regulatory sources of working time, it is necessary to start with the Spanish Constitution, which mandates public authorities in Article 40.2 to guarantee "necessary rest through the limitation of the working day" and "paid periodic holidays," while also ensuring "work safety and hygiene". Equally significant is European Union law, which has also addressed working time to ensure uniform application and interpretation of key concepts (working time, presence time, rest, etc.), primarily through Directive 2003/88/EC of the

European Parliament and Council of November 4, 2003, on certain aspects of the organization of working time. This directive has been recently interpreted by the European Commission's Interpretative Communication on Directive 2003/88/EC of the European Parliament and Council concerning certain aspects of the organization of working time (2023/C 109/01). Additionally, at the international level, working time has gained importance, with numerous ILO conventions referring to this institution, such as Convention No. 1 on Working Hours (Industry) of 1919 and Convention No. 132 on Paid Annual Leave of 1932.

In terms of domestic legislation, the legal framework for working time is concentrated in Articles 34 to 38 ET (Title I, Chapter II, Section 5), although there are other dispersed norms on this issue within the Statute (e.g., Article 20 bis ET) and other legal and regulatory provisions (e.g., Royal Decree 1561/1995 of September 21 on special working days), which will be reviewed throughout this chapter. The importance of collective bargaining agreements cannot be overlooked either. The first article of the section of the Statute dedicated to working time establishes that "the duration of the working day will be as agreed in collective agreements or employment contracts." However, the possibilities of collective bargaining agreements go much further. Working time has been a classic subject of regulation in these legal norms, commonly restricting the minimum limits of the ET or adding new rules on the subject (e.g., annual maximum working hours or minimum hours for part-time employees). From a sanctioning perspective, Article 7.5 LISOS classifies as a serious infraction "the transgression of legal or agreed norms and limits regarding working hours, night work, overtime, complementary hours, breaks, vacations, permits, working time records, and, in general, the working time referred to in Articles 12, 23, and 34 to 38 ET".

2. Maximum working hours

Working hours refer to the time during which the employee makes their labor activity available to the employer. In other words, it refers to the time (usually measured in hours) that the employee dedicates to performing their work services. This time is typically calculated on a daily, weekly, or yearly basis (daily, weekly, or annual working hours).

2.1. Ordinary Working Hours

Ordinary working hours refer to the time that the employee dedicates each day, week, or year to performing their work. As previously mentioned, Article 34.1 ET entrusts the establishment of working hours to collective and individual autonomy. The duration of the working day will be contained in the collective agreement or employment contract, as long as the mandatory rules set forth in legal provisions or, where applicable, in the relevant collective agreement are not violated.

In the absence of an agreement, the ET is applied. It sets limits on working hours in two aspects: the maximum annual working hours and the maximum daily working hours. These rules must be complemented by others that contemplate mandatory breaks and rests, which are described later.

Regarding the legal ordinary working hours, Article 34.1 ET, in its second paragraph, establishes that the maximum duration is 40 effective working hours per week on average over the year. Two clarifications can be made about this rule. First, it is an annual cap that can also be reduced in a collective agreement. Historically, it has been understood that the legal limit is equivalent to 1,826 hours and 27 minutes of work, although it is common for collective agreements to establish lower limits. Second, only effective working hours count towards this maximum, excluding entry or exit times to work, and among others, the time spent preventing and repairing extraordinary and urgent damage.

2.2. Distribution of Working Hours: Possible Irregular Distribution

Regarding the distribution of working hours throughout the year, the freedom of the parties prevails, although this rule is nuanced by other provisions of labor law. In the same provision that concerns us, in its second paragraph (Article 34.2 ET), it stipulates the possibility of irregularly distributing the working hours by collective agreement or agreement between the employer and the legal representatives of the employees. In the absence of an agreement, the employer may unilaterally distribute working hours irregularly throughout the year up to a maximum of ten per cent of the same. This irregular distribution means that the provision of services is not uniform in time during the year, varying throughout its course while respecting the daily and weekly working hour limits, which we will discuss next. In case of irregular distribution, the employee must be informed at least five days in advance of the day and time of the provision.

2.3. Daily Working Hour Limits

The daily and between shifts limits are set in the next section (Article 34.3 ET). The first mentioned has a clearly dispositive nature. Unless the collective agreement or an agreement between the company and employees' representatives establishes another distribution, the daily working hours cannot exceed 9 hours. However, employees under 18 years of age are subject to an absolute and unbreakable limit: 8 hours of effective work per day. Moreover, with the same imperative nature, it is established that a minimum rest period of 12 hours must be respected between the end of one working day and the beginning of the next. However, regarding this issue, although located in the provision regulating the weekly rest (Article 37.1 ET), a weekly limit also applies an uninterrupted rest period of one and a half days per week, which generally includes Saturday afternoon or, where applicable, Monday morning, and the whole Sunday. However, this rest period can be accumulated in two-week periods so that 11 consecutive days are worked (while respecting the other absolute limits) and 3 uninterrupted days are rested. On the other hand, employees under 18 years of age must enjoy an uninterrupted rest period of 2 days per week without any possibility of accumulation.

2.4. Adaptation of Working Hours for Reconciliation Purposes

With special incidence on what concerns us, it is worth mentioning the right of employees to request adaptations of their working hours to make effective their right to family and work-life balance. This is a right to request that operates on the duration, distribution, organization, and form of provision, including teleworking. In this regard, as indicated in Article 34.8 ET, the reasonableness and proportionality of the measure must be considered, taking into account and assessing both the conciliatory needs of the applicant and the organizational and productive needs of the company. These rules must be related to the right to a reduction in working hours for similar reasons, which we will discuss later.

The right to request adaptation applies to parents with children under 12 years old or those who need to care for older children, relatives up to the second degree by consanguinity, or other dependent persons who, in this case, live with the employee. All this requires justification of the circumstances that support the request.

Regarding the procedure for recognizing its exercise, the ET refers to the collective agreement, and in the absence of an agreement, it sets a negotiation process of a maximum of 15 days, after which the adaptation will be considered granted (positive silence) if there has been no express and reasoned denial. After the negotiation period, the company must accept the request, deny it, or present an alternative in writing. In the latter two options, the company must justify the decision, which can be challenged by the applicant before the jurisdiction. The applicant can return to their previous situation once the agreed or foreseen period has ended or when the reasons that motivated the request have ceased.

2.5. Guarantees for Compliance with Working Time Regulations

Article 34 ET also provides guarantees to ensure compliance with the regulations we have been mentioning regarding working hour limits and mandatory rests. On the one hand, paragraph 6 contemplates the preparation of an annual work calendar (which must include working days in the year, festive breaks, shifts, if applicable, etc.) that must be placed in a visible location at each workplace. More importantly, paragraph 9 includes the obligation to keep a daily record of the working hours.

The company must ensure a daily record of working hours, including the specific start and end times of each working day. The company must keep the working hour records for four years, during which time they will be available to the employees, their legal representatives, and the Labor and Social Security Inspectorate. Failure to comply with this obligation is classified as a very serious offence in Article 7.5 LISOS.

3. Special Working Days

Special working days are those that differ in one aspect or another from the common labor regulations that have been analyzed concerning working hours because they are carried out in a context with particularities that justify such distinctions. These particularities derive from the need to adapt general rules to the specific characteristics and needs of certain sectors and jobs, either to allow for an extension or more flexible use of these rules based on the organizational demands of such activities or the peculiarities of the type of work or the location where it is performed, or to establish additional limitations aimed at strengthening the protection of the health and safety of employees when the extension of time beyond

certain limits of certain working conditions could pose a risk to them. This is expressed in the preamble of the regulation that accommodates them, Royal Decree 1561/1995 of September 21 on special working days, which has the power to do so in accordance with Article 34.7 ET.

The activities to which the aforementioned regulation applies are numerous. Notable among others are work on urban properties, hospitality, transportation, maritime work, etc. In general terms, the regulation allows for more flexible organization of working hours in these sectors, with the possibility of accumulating rests, regulating presence time, breaks, etc.

4. Work Schedule

4.1. Concept, Types of Schedules, and "Snack Time"

The work schedule refers to the temporal moment in which the provision of work is specified, indicating the start and end of the daily working day. Traditionally, a distinction has been made between a rigid schedule with an invariable start and end time for the employee; a flexible schedule in which the employee is given the possibility to start and/or finish the working day within certain time margins; or with split, continuous, or shift work.

The company will establish the activity schedules, and from there, the regulation of working time in the company will be derived, subject to the provisions contained in collective agreements or individual agreements. For subsequent substantial schedule modifications, the employer must follow the procedure of Article 41 ET.

At this point, it is worth mentioning a break provided for continuous working days exceeding 6 hours, as stipulated in Article 34.4 ET, known as "snack time" which includes 15 minutes of break that, however, will not be considered effective working time unless expressly provided in the collective agreement. Employees under 18 years of age will have a 30-minute break when the working day exceeds 4 and a half hours.

4.2. Night Work

When work is performed between 10 p.m. and 6 a.m., it is considered night work. Due to the implications of this particular working time, a series of measures are provided in our regulations, primarily set in Articles 36.1, 2, and 4 ET:

- The employer who regularly resorts to night work must inform the labor authority.
- The hours worked during the night period will have specific remuneration determined in collective agreements unless already considered in salary determination.
- Those who normally perform at least 3 hours of their ordinary working day at night and those expected to perform at least one-third of their ordinary working day at night will be considered night employees.
- These employees are subject to a series of limits, such as a maximum of 8 hours on average over a 15-day period, the prohibition of overtime except for force majeure, and the prohibition of night work for employees under 18 years of age. Additionally, there is an obligation to medically evaluate night employees and conduct periodic medical checks. If a night employee has health problems related to night work, the employer must transfer them to a day shift if available and if the employee is professionally qualified for it.

4.3. Shift Work

Special attention must also be paid to shift work. In paragraph 3 of the article under discussion (Article 36 ET), shift work is defined as the form of productive organization in which employees successively occupy the same job positions according to a certain continuous or discontinuous rhythm, implying the need to provide their services at different hours over a specific period of days or weeks. This provision contains its main regulatory aspects, which are essentially as follows:

- In companies with 24-hour productive processes, employees cannot be on the night shift for more than 2 consecutive weeks unless they volunteer.
- Generally, the principle of adapting work to the person must be considered to mitigate monotonous and repetitive work.

5. Overtime

5.1. Concept

Article 35 ET regulates overtime. It defines overtime as those hours worked beyond the maximum duration of the ordinary working day applicable. Therefore, it is crucial to ascertain the maximum ordinary working day applicable in each specific case, with particular emphasis on what is provided in the collective agreement or, to

a lesser extent, in the employment contract. All hours exceeding the annual limit will be considered overtime.

5.2. Compensation

Regarding compensation, the ET provides for both payment and rest compensation. The collective agreement or, in its absence, the individual agreement, will determine whether payment or rest compensation applies, with the latter being presumed in the absence of an agreement. This compensation must be granted within 4 months from the overtime performance. Regarding payment, the amount must not be less than the ordinary hourly rate. In this sense, current Spanish legislation does not require payment at a rate higher than the ordinary hourly rate, which may, however, contravene international regulations (Article 4 of the European Social Charter and Article 6 of the ILO Working Hours Convention of 1919).

5.3. Types of Overtime

Two types of overtime are differentiated: regular and force majeure. The first type, regular overtime, is voluntary, allowing the employee to accept or reject it unless otherwise agreed in the collective agreement or employment contract, which may obligate the performance of overtime within the limits specified later. Refusal to perform such regular overtime constitutes a serious contractual breach of work. The following characteristics apply to regular overtime according to the ET:

- It is prohibited for employees under 18 years of age, night employees, and part-time employees.
- The employer must keep a daily record of the overtime hours worked by each employee.
- There is an absolute limit of 80 overtime hours per year, although force majeure overtime (or compensated overtime) does not count towards this annual limit, as will be discussed next.

Force majeure overtime is established to prevent or repair disasters and other extraordinary and urgent damages. As such, this type of overtime is mandatory, and the employee must respond to the employer's requirements if the cause exists. As mentioned, these hours are not subject to the quantitative limits specified in the previous paragraph and may also be performed by night employees. They will be compensated or paid similarly to regular overtime.

6. Rest, Holidays and Vacations

6.1. Rest Periods

Throughout this chapter, several rest periods have already been mentioned. This term refers, in contrast to the time during which the employee is at the employer's disposal and performing their duties (working time), to a period not considered as working time (Article 2.1 of Directive 2003/88). Specifically, minimum breaks between working days, weekly rest, and the so-called "snack break" have been mentioned. These regimes have already been discussed and, it should be noted, may be subject to exceptions provided in the regulation of special working days.

However, beyond these breaks that function more as maximum limits or restrictions on daily and weekly working hours, Article 37 ET contemplates a series of interruptions or cessations of a very different nature. In this sense, we will now discuss holidays and vacations.

6.2. Holidays

Holidays (Article 37.2 ET) are specific days when the norm imposes non-performance of services for others. They are, therefore, non-recoverable and paid days, initially with the ordinary daily wage unless otherwise agreed upon for better conditions. These days are limited to a maximum of 14 per year. Two of these holidays are set by local entities, and two more are determined by Autonomous Communities, which in any case must respect the following national holidays: Christmas Day (December 25), New Year's Day (January 1), May 1 as Labor Day, and October 12 as National Day of Spain.

6.3. Vacations

Vacations are a principle of European Union social law based on occupational safety and health, as expressly stated in the aforementioned Directive 2003/88/EC. Additionally, at the international level, the right to annual vacations is widely recognized, for example, in ILO Convention No. 132 of 1970. Moreover, as previously mentioned, it is also a guiding principle of our domestic legal system, explicitly recognized in Article 40.2 CE, which refers to "paid periodic holidays". The rationale for vacations is to provide a paid period of rest and leisure that allows the employee to recover from the psychophysical wear and tear of work. This motivation is precisely why vacations cannot be fragmented, as established in the aforementioned ILO Convention, which states that at least one vacation period must be

at least 2 uninterrupted weeks, a requirement often reflected in collective agreements.

The duration of vacations is set in the ET at 30 calendar days per year, a provision frequently extended by collective agreements. A common regulatory option in collective agreements is to calculate vacations in working days (excluding holidays) instead of calendar days (it is understood that 22 working days are more beneficial than 30 calendar days).

The vacation period will be set by mutual agreement between the employer and employees. To this end, the company must prepare a vacation calendar, and employees must be informed of their vacation dates two months in advance. In case of disagreement between the company and the employee regarding the vacation period, the employee may challenge the company's decision before the social jurisdiction in a preferential and summary procedure whose resolution is unappealable.

Regarding the wages earned during vacations, these periods must be remunerated according to the normal or average remuneration received by the employee during the year, without prejudice to any improvements established in the collective agreement (so-called "vacation bonuses" are common).

The enjoyment of vacations is mandatory, and there can be no renunciation or economic compensation (this would contravene Article 3.5 ET). This implies that vacations must be taken within the year and cannot be accumulated in longer periods. Exceptions to these rules are contractual terminations without having taken the vacations, which must be compensated, or cases of maternity, temporary disability before the start of the established vacation period in the company, and coinciding with it, and temporary disability occurring during the vacation period, in which vacations can be taken in periods exceeding the calendar year.

7. Reduction of Working Hours: For Childcare and Dependent Persons; For Business Reasons

7.1. Reduction of Working Hours for Childcare and Dependent Persons

The employee's right to request adaptations of their working hours to make effective their right to work-life balance, previously mentioned, is complemented in Spanish law by other measures with a similar purpose but with very different effects on the employment relationship. The situations discussed in this section allow for the attention and compatibility of family life with work, but they involve a reduction in the reciprocal obligations arising from the employment relationship since the authorization to attend to these family needs is at the cost of a reduction in working hours, with the consequent and proportional reduction in remuneration.

The first situation refers to direct care due to legal guardianship of a child under 12 years old or a person with physical, mental, or sensory disability who does not engage in paid activity. In these cases, the employee responsible for the child or person with a disability has the right to reduce their daily working hours with a proportional reduction in salary between at least one-eighth and a maximum of half of the duration of the working hours.

Similarly, this right applies to those who need to care for a relative up to the second degree by consanguinity or affinity who, due to age, accident, or illness, cannot fend for themselves and do not engage in paid activity.

Moreover, the adoptive parent, guardian for adoption purposes, or permanent foster carer has the right to reduce their working hours with a proportional reduction in salary by at least half of the duration of the working hours for the care during hospitalization and continued treatment of the minor in their care affected by cancer or any other serious illness requiring direct, continuous, and permanent care, as accredited by the report of the public health service or the corresponding autonomous community administrative health authority. This right can be recognized until the minor turns 23 years old, the maximum period for which the reduction can be extended if the need for direct, continuous, and permanent care persists. However, if a disability degree equal to or greater than 65 per cent is accredited before the age of 23, the reduction can be extended until the age of 26.

In these cases, Articles 190 and following LGSS provide a subsidy for parents, adoptive parents, or foster carers who exercise this right by reducing their working hours to care for the minor affected by cancer or another serious illness. This benefit aims to compensate for the loss of income suffered by the interested parties due to the need to reduce their working hours with the consequent reduction in salary to care directly, continuously, and permanently for their children or minors in their care during hospitalization and continued treatment of the illness. This economic benefit can only be conceded to one of the parents.

These reductions for the care of dependent minors or minors affected by cancer or another serious illness are provided as an individual right. However, if employees generating this right for the same cause coincide, the employer may limit their simultaneous exercise for justified reasons related to the company's operations. The employee, except in cases of force majeure, must give the employer at least fifteen days' notice or the notice period determined in the applicable collective agreement, specifying the start and end dates of the lactation care permit or working hours reduction.

In these cases, the employee determines the specific hours and the terms of the permits and reductions of working hours provided for in the sections within their ordinary working hours. However, collective agreements may establish criteria for the specific hours of working hours reduction referred to in Article 37.6 ET, considering the employees' rights to reconcile personal, family, and work-life and the company's productive and organizational needs. Any discrepancies between the employer and the employee on this matter will be resolved by the social jurisdiction through a specific procedural modality to enforce reconciliation rights provided for in Article 139 LRJS.

Finally, it should be noted that the reductions mentioned in this section concerning reconciliation rights place the beneficiary employee in a position of special protection against objective and disciplinary dismissal. These situations are known as "objective nullity" since they are explicitly recognized in Articles 53.4 and 55.5 ET as cases in which nullity will be declared unless the concurrence of the cause justifying the termination decision is accredited, and the formal requirements provided in the regulations for dismissals are met. That is, in these cases, the declaration of unfair dismissal is not possible. Furthermore, in these cases, for the purposes of calculating the compensations provided for in the ET, the salary to be considered will not be the one effectively received after the reduction but the one that would have corresponded to the employee without considering the reduction (additional provision nineteen of the ET).

7.2. Reduction of Working Hours for Business Reasons

In another context, we will now address reductions of working hours motivated by business reasons. These business reasons can be of various kinds: economic, technical, organizational, or production; force majeure; or cyclical or sectoral issues of activity, for which the so-called RED Mechanism must have been activated by the competent institution.

In this case, we are dealing with mechanisms that allow both the reduction of working hours and the suspension of the contract, as provided for in Articles 47 and 47 bis ET. However, the first measure is prioritized over the second since these are temporary mechanisms intended to restore production to normal levels, considering that reduction is less traumatic for the employee than suspension. For this purpose, the allowed reduction in working hours must be between ten and seventy per cent of the normal working hours the employee maintains in the company. Additionally, during the period of reduced working hours, no overtime can be performed except for force majeure.

The first of the cited articles, Article 47 ET, provides for two possibilities regarding the enabling cause of the measure and the procedure for its adoption in each case (the procedural aspects are developed in Royal Decree 1483/2012 of October 29, approving the Regulations of the procedures for collective dismissal and suspension of contracts and reduction of working hours). On the one hand, the reduction—or, remember, suspension—due to economic, technical, organizational, or production causes according to the provisions of Article 47.1 ET. On the other hand, reductions—or suspensions—due to force majeure. These are internal flexibility measures that allow the employer to adapt employment and production to various vicissitudes without terminating the employment contract. Both types of mechanisms gained significant prominence during the Covid-19 period, known as ERTES (Temporary Employment Regulation Files).

7.2.1. Reduction Due to ETOP Causes

As mentioned, the first modality applies to economic, technical, organizational, or production causes of a temporary nature, defined in several passages of the ET, including the provision under discussion (Article 47.2 ET). The adoption of this measure requires communication to the labor authority (not authorization, as the measure we will discuss next requires). During the reduction period, the affected employees will be in a legal situation of (partial) unemployment.

The procedure begins with communication to the labor authority and the simultaneous opening of a consultation period with the legal representation of the employees, lasting no more than fifteen days (seven in companies with fewer than fifty employees).

After communication, the labor authority will seek a mandatory report from the Labor and Social Security Inspectorate. The consultation period is a deadline.

During the consultation period, the employer and the legal representatives of the employees will negotiate in good faith to reach an agreement. After the consultation period ends, the employer notifies the employees' representatives and the labor authority of their decision on the reduction of working hours. After this communication, the employer will individually notify the affected employees of the implementation of the corresponding measures. Employees may challenge the employer's decision before the social jurisdiction. In this forum, the measure will be declared justified or unjustified. In the latter case, the company will be condemned to pay the wage differences received by the employee from the start of the measure until the resumption of activity at ordinary working hours, as well as the differences in Social Security contributions. If the decision exceeds the thresholds provided in Article 51.1 ET for collective dismissals, it may be challenged through collective conflict without prejudice to individual action. However, the filing of a collective conflict will suspend the processing of individual actions initiated until its resolution.

7.2.2. Reduction Due to Force Majeure

The existence of force majeure can also motivate the reduction of working hours. This concept includes any exogenous event that occurs extraordinarily (unforeseeable) or foreseeable but inevitable, traditionally linked to natural events (fires, floods, etc.)—proper force majeure—but also covers events arising from administrative or judicial decisions—improper force majeure. The latter aspect is explicitly mentioned in Article 47.6 ET after the 2021 labor reform, contemplating the possibility of using this avenue for impediments or limitations on the company's normal activity resulting from decisions adopted by the competent public authority, including those aimed at protecting public health.

In these cases, the procedure to reduce working hours—or, where applicable, suspend contracts—requires administrative authorization. It begins with a request to the labor authority, along with the evidence justifying the request, and communication to the legal representation of the employees. Before issuing the resolution, the labor authority will seek a report from the Labor and Social Security Inspectorate (except in cases of improper force majeure due to public authority decisions). The labor authority has 5 days to issue the resolution, and if no decision is made within this time, the request will be deemed granted by positive administrative silence. The resolution will only confirm the existence or non-existence of the alleged force majeure or limitations or impediments in activity due to the public authority.

7.2.3. Reduction through RED Mechanism

Finally, a novel mechanism introduced with the 2021 labor reform also enables the reduction of employees' hours. It is provided separately from the previous ones in Article 47 bis ET but closely related to the classic temporary employment regulation files (ERTES) previously discussed. It is known as the "RED Mechanism for Flexibility and Employment Stabilization."

The first characteristic to mention about this RED Mechanism is that it has two modalities: cyclical and sectoral. Both require activation by the Council of Ministers upon a joint proposal from the Ministry of Labor and Social Economy, the Ministry of Economic Affairs and Digital Transformation, and the Ministry of Inclusion, Social Security, and Migration. Once this institutional activation is carried out and during its validity, employers can apply to the labor authority for the mechanism through reductions in working hours or contract suspensions. The application must be simultaneously communicated to the employees' representation. The procedure will follow the steps provided for force majeure ERTES, preceded by a consultation period similar to that provided in Article 47.3 ET for ERTES due to economic, technical, organizational, and production circumstances. The final outcome will depend on whether consensus is reached during the consultation period. If an agreement is reached, the administrative resolution must be favorable, allowing the employer to implement the corresponding reductions in working hours—or contract suspensions. If no agreement is reached during the consultation period, the labor authority—not the employer—will decide to grant or deny the application based on the submitted documentation and the existence—or not—of the cyclical or sectoral situation. As can be seen, the administration's role in the decision-making process of reduction—and suspension—in this type of file is reinforced compared to classic ERTES.

Regarding the two modalities, the cyclical one is provided for general circumstances, specifically when a general macroeconomic situation is identified that advises adopting additional stabilization instruments.

In contrast, the sectoral modality will be activated when permanent changes are identified in a specific sector or sectors of activity that generate the need for requalification and professional transition processes for employees. The initial maximum duration of both modalities is one year. However, while the sectoral modality allows for two six-month extensions, the cyclical variant is non-extendable, with the one-year duration acting as the absolute maximum limit.

Salary organization

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Contents

1. Legal concept of salary

Wages and their protection, in the Spanish legal system, are regulated in a series of legal and regulatory norms, which are listed below:

- ET.
- Royal Decree-Law 3/2004, of 25 June 2004, to rationalise the regulation of the minimum interprofessional wage and to increase its amount (BOE nº. 154, of 26/06/2004).
- Royal Decree 145/2024, of 6 February, which sets the minimum interprofessional wage for 2024 (BOE nº. 33, of 07/02/2024).
- Order of 27 December 1994 approving the model of the individual salary receipt (BOE nº. 11, of 13/01/1995).
- Royal Decree 902/2020, of 13 October, on equal pay for women and men (BOE nº. 272, of 14/10/2020).
- Royal Decree 505/1985 of 6 March 1985 on the organisation and operation of the Wage Guarantee Fund (BOE nº. 92, 17/04/1985).
- Order PCM/1047/2022, of 1 November, which approves and publishes the procedure for the assessment of jobs provided for in Royal Decree 902/2020, of 13 October, on equal pay for women and men (BOE nº. 03/11/2022).
- Pursuant to Article 3.1 ET (relating to the sources of the employment relationship), "the rights and obligations concerning the employment relationship" (of which the salary forms part) are also regulated - within the hierarchy of rules established by the article - by: a) the applicable collective agreements (letter d) of Article 3.1), b) the "will of the parties, expressed in the employment contract, the purpose of which is lawful and under no circumstances may conditions less favourable or contrary to the employee's interests be established that are less favourable or in breach of the employment contract. 3.1), (b) the "will of the parties, expressed in the employment contract, the purpose of which is lawful and under no circumstances may less favourable conditions or conditions contrary to the legal provisions and collective agreements mentioned above be established to the detriment of the employee" (Article 3.1 (c)) and c) by "local and professional customs and practices" (Article 3.1 (d)), being the source of obligations in relation to the employee's salary.

In order to be able to talk about the organisation of wages, we must start from the characteristics of the employment relationship established in Article

1 ET, section 1 of which states that it "shall apply to employees who voluntarily provide their paid services as employees and within the scope of organisation and management of another person, natural or legal, called an employer or entrepreneur". Remuneration, therefore, for the provision of services as an employee, will entail the materialisation of the receipt of a salary for the provision of a specific service. The ET regulates wages and wage guarantees in Section 4, Chapter II, Chapter II, Title I. Article 26 establishes the legal concept of wages. Wages based on the provisions of paragraph 1 of the aforementioned article are: a) all of the employees' economic benefits, whether in cash (legal tender) or in kind (non-monetary payment, such as company car, housing, etc.). In no case may the salary in kind exceed thirty percent of the employee's salary benefits, nor may it lead to a reduction of the full amount in money of the Minimum Interprofessional Wage (hereinafter SMI). This also applies to the special employment relationships referred to in Article 2 ET. b) For the professional provision of services as an employed person in return for actual work, irrespective of the form of remuneration or the periods of rest that can be counted as work (weekly rest, public holidays, holiday time).

In the opposite direction, paragraph 2 of the same Article 26 also establishes which items are not to be considered as wages: a) amounts received by the employee as compensation or allowances for expenses incurred as a result of his work, b) Social Security benefits and indemnities, c) compensation corresponding to transfers, suspensions or dismissals.

2. Salary structure and composition

Article 26.3 ET establishes that the wage structure shall be determined on the basis of two possibilities: a) through collective bargaining, which takes the form of collective agreements. As a result, the wage structure is conditioned by the wage system adopted in the company or in the corresponding sector of activity. b) Alternatively, through an individual contract. With the qualification that, even if collective bargaining establishes the wage structure, through the employment contract these conditions can be improved on the basis of the agreement of the parties reflected in the employment contract.

The composition of the salary, also established in the same section of Article 26, shall be as follows:

a) Basic salary, as fixed remuneration: 1) per unit of time (year, month, fortnight, week, day, hour), 2) per unit of work (product or effective performance in the provision of the work: parts produced, operations carried out, metres built, etc.), 3) but there is a third option not expressly contemplated in the ET, which is a mixed system that contemplates both the unit of time and the unit of work (daily wage or, monthly, combined with another item calculated on the results obtained by means of a system of bonuses or incentives). The amount of the basic salary usually varies according to the professional group or level in which the employee is classified, which is established in the salary tables of the applicable collective bargaining agreements.

b) Where applicable, wage supplements, which shall be calculated in accordance with the criteria agreed for this purpose. These allowances shall be set according to a series of relative circumstances: the employee's personal conditions, the work carried out or the company's situation and results.

Wage supplements are established through collective bargaining. They may vary from one collective bargaining agreement to another. The following wage supplements, among others, can be found: 1) seniority: length of service in the company, 2) extraordinary bonuses: special payments (July and December), 3) bonuses and incentives: depends on the company's production process and the procedure established for their calculation and receipt by the employee, 4) commissions: which may constitute a salary supplement or a special type of salary based on results (for example, for sales), 5) profit-sharing: recognition of amounts that are added to the salary, formation of assets, investment funds, pension funds, etc., 6) company stock options, 7) any other that can be agreed with the employer by collective agreement or company agreement with the legal representatives of the employees, 8) as well as any other that may be agreed between the employee and the employer reflected in the employment contract.

It may also be agreed whether or not salary supplements can be consolidated. In any case, the following allowances shall not be consolidated, unless otherwise agreed: those linked to the job, and those linked to the situation and results of the company. In relation to wages, it is important to bear in mind that paragraph 4 of Article 26 itself establishes that, "All tax and social security charges payable by the employee shall be paid, and any agreement to the contrary shall be null and void". This means that the employer will be

responsible for those tax or Social Security expenses established by the appropriate regulations, and it is not possible to agree otherwise with the employee on the basis of the provisions of this section, as well as the provisions of section 5 of Article 3 ET, which regulates the non-availability of the necessary employment rights on the part of the employees: "Employees may not validly dispose, before or after their acquisition, of the rights that they have recognised by legal provisions of necessary law. Nor may they validly dispose of rights recognised as unavailable by collective agreement".

Extraordinary bonuses (pagas extraordinarias) regulated in Article 31 ET also form part of the salary. They consist of two extraordinary bonuses per year. One of them on the occasion of the Christmas holidays. The other will be fixed by collective agreement by company agreement between the employer and the legal representatives of the employees in the month agreed, although it usually coincides with the summer holidays (June or July). The amount of the extraordinary bonuses will be fixed by collective agreement. It is also possible, by agreement, to establish more than two extraordinary bonuses per year. These bonuses may not be prorated in the monthly payroll over the twelve monthly payments, unless expressly provided for in the applicable collective bargaining agreement.

Likewise, overtime worked by the employee will also form part of the salary. Its legal configuration is based on Article 35 ET. Based on the provisions of paragraph 1, they will be considered as such "those hours of work carried out over and above the maximum duration of the ordinary working day" fixed, in relation to working time, in accordance with the provisions of Article 34 ET with regard to the working day. The collective agreement or, if applicable, the employment contract, may opt for payment or compensation of such overtime (for equivalent paid rest periods). Payment shall be made according to the amount to be determined. However, in no case may the value of the overtime be less than the value of an ordinary hour and compensation. In the absence of an agreement in this respect, it is understood that overtime worked "shall be compensated by rest within four months of its completion" (last paragraph in fine of Article 35.1).

With regard to the total number of annual overtime hours, section 2 of Article 35 ET establishes that they may not exceed eighty hours per year, with the qualifications contained in section three of the article, which we will see below. In the case of part-time employees (working hours which, in annual terms, are less than the company's general working hours), the maximum number of overtime hours must be reduced in real proportion to those working hours. For this purpose, overtime compensated by rest within four months of its completion (and not paid for financially) may not be counted. In any case, the Government may abolish or reduce the maximum number of overtime hours per specified period, either generally or for certain branches of activity or territorial areas, in order to increase job opportunities for unemployed employees. There is a caveat to the total calculation of overtime. When the reason for the overtime is "to prevent or repair accidents and other extraordinary and urgent damage", such hours must be paid as overtime, but they will not be taken into account for the purposes of the maximum duration of the ordinary working day, nor for the calculation of the maximum number of authorised overtime hours.

As stipulated in section 4 of Article 35 ET, overtime is voluntary for the employee, unless otherwise stipulated in the collective bargaining agreement or in the employment contract, but always within the legal limits analysed above. For the purposes of calculating overtime, each employee's working day shall be recorded day by day and totalled in the period established for the payment of remuneration, and a copy of the summary shall be given to the employee in the corresponding receipt (Article 35.5 ET). However, in addition to the above, there is another limitation to overtime. Article 12 ET establishes that employees with a part-time contract (when the provision of the service has been agreed for a number of hours per day, per week, per month or per year, which is less than the working hours of a comparable full-time employee) and employees with a relief contract (that which is agreed for a number of hours per day, per week, per month or per year, (when the service has been agreed for a number of hours per day, per week, per month or per year that is less than the working hours of a comparable full-time employee) and employees with a relief contract (that which is entered into to enable a employee to take partial retirement to replace the working hours left vacant by the employee who partially retires or to replace employees who partially retire after having reached ordinary retirement age) may not work overtime (Article 12.4(c), except in cases of "preventing or repairing accidents and other extraordinary and urgent damage" (Article 35.3 ET). However, they may work additional hours, which may be previously agreed or voluntary. They may not exceed the legal limit for part-time work in accordance with the part-time nature of the employment contract. In order not to incur in illegality, the working hours of part-time employees will be recorded day by day and totalled on a

monthly basis, and a copy will be given to the employee, together with the salary receipt, of the summary of all the hours worked in each month, both ordinary and supplementary.

Article 12.5 ET considers supplementary hours to be those performed "in addition to the ordinary hours agreed in the part-time contract". The regulation establishes rules for the performance of supplementary hours:

a) The performance of additional hours may not be required if it has not been agreed in advance with the employee. Such an agreement, which must necessarily be in writing and which shall constitute a specific agreement of the employment contract, may be made either at the time of conclusion of the employment contract or subsequently.

b) The additional hours agreement may only be concluded for part-time contracts with a working week of not less than ten hours per week on an annual basis.

c) The agreement must reflect the number of hours that may be required by the employer, which may not exceed thirty per cent of the ordinary working hours covered by the contract, unless the applicable collective bargaining agreement establishes another maximum percentage, which in no case may be less than thirty per cent or exceed sixty per cent of the ordinary hours contracted.

d) The employee must know both the day and the time when the additional hours are to be worked with at least three days' notice, unless a shorter period has been established by collective bargaining.

e) The employee may waive the additional hours agreement by giving fifteen days' notice to the employer, provided that one year has elapsed since the agreement was entered into. However, one of the following circumstances must apply: the employee has family responsibilities as provided for in Art. 37.6 ET, the employee has training needs (provided that there is a sufficiently accredited time incompatibility) or that there is an incompatibility with another part-time contract in another company.

f) In the event of non-compliance with the rules on the performance of supplementary hours, "the employee's refusal to perform supplementary hours, despite having been agreed, shall not constitute punishable employment conduct".

g) The employer may offer the employee the possibility of being able to work additional hours - in addition to those agreed - on a voluntary basis. The latter may not exceed fifteen per cent, which may be increased to thirty per cent by collective agreement, of the ordinary hours covered by the contract. The employee's refusal to work these hours shall not constitute punishable employment conduct. These voluntary additional hours shall not be counted for the purpose of calculating the percentage of agreed additional hours.

h) The performance of additional hours shall comply with the limits on working hours and rest periods established in Articles 34.3 and 4; 36.1 and 37.1 ET.

i) The additional hours worked shall be paid as ordinary hours and shall be calculated for the purposes of the Social Security contribution bases and periods of grace and the regulatory bases of benefits. The number and remuneration of the additional hours worked shall be recorded on the individual wage slip and in the social security contribution documents.

3. Setting the salary amount

Article 26.3 ET establishes the procedure for setting the amount of wages. It will be carried out through collective bargaining. Failing that, through the individual employment contract. Even the employment contract can improve the setting of the wage rate in the event that the applicable collective bargaining agreement so provides. In traditional production sectors, the habits and customs of the company, the sector of activity or the location may play a certain role in the setting of the wage rate. The different sources act according to the hierarchy of rules (Article 3 ET). State legislation usually establishes minimums that must be respected both by collective agreements and by individual agreements. In turn, what is established in the collective agreement acts as a minimum with respect to what may be agreed in the individual contract. But it is collective bargaining that is the main source for regulating wage rates, distinguishing between basic pay and bonuses, using the classification into occupational groups or levels. Inter-professional agreements usually establish the wage bands, sectoral agreements usually establish the basic rates, and company agreements usually specify the amount corresponding to each employee or group of employees. The employment contract and the individual agreement can improve wage levels. However, this possibility is almost exclusively reserved for highly qualified employees.

However, in any case, the salary structure must include the basic salary (as remuneration fixed per unit of time or work) and, where appropriate, salary supplements fixed according to circumstances relating to the personal conditions of the employee, the work performed or the situation and results of the company, which shall be calculated in accordance with the criteria agreed for this purpose. It shall be agreed (by collective bargaining or employment contract) whether or not these wage supplements can be consolidated, and those that are linked to the job or to the company's situation and results shall not be consolidated, unless otherwise agreed. Article 28 ET makes clear the employer's obligation to maintain equal pay on the basis of sex within the company. In such a way that he/she is obliged to pay the same salary for the same service (equal work, equal value), without any discrimination on grounds of sex. One job is of equal value to another when the nature of the functions or tasks effectively entrusted, the educational, professional or training conditions required for their exercise, the factors strictly related to their performance and the working conditions under which such activities are actually carried out are equivalent.

In order to ensure correct compliance with the regulation, the employer is obliged to keep a register with the average values of the salaries, salary supplements and non-wage payments of his staff, broken down by sex and distributed by professional groups, professional categories or jobs of equal or equal value. Thus, female employees have the right to access, through the legal representation of the employees in the company, to the wage register of their company. In the case of a company with at least fifty employees, when the average remuneration of employees of one sex is twenty-five percent or more higher than that of the other sex (taking the total wage bill or the average of the payments made), the employer must include in the wage register a justification that this difference is due to reasons unrelated to the sex of the employees. The approval of Royal Decree 902/2020 of 13 October on equal pay for women and men and Order PCM/1047/2022 of 1 November approving and publishing the procedure for the evaluation of jobs provided for in Royal Decree 902/2020 of 13 October on equal pay for women and men has been important for equal pay for reasons of sex within the company.

4. Minimun interprofessional wage

Within the catalogue of rights and duties of Spanish citizens, Article 35 CE recognises the right of employees to obtain sufficient remuneration to satisfy their needs and those of their families. This constitutional provision is transferred to Article 27 ET. Thus, the National Government is responsible for determining the minimum wage on an annual basis. Based on this basic legal provision, the amount of the SMI for each year is fixed by Royal Decree. The minimum wage has been attributed a double effect. One direct and strictly labour-related, serving as a floor or sufficient wage guarantee as a minimum for employees. The SMI is applied to those employees who are not covered by collective bargaining and serves as a minimum starting point for establishing wage tables in collective agreements negotiated by employers and employees' legal representatives. The other effect attributed to the minimum wage is indirect and, in turn, multiple. It is used as an income level indicator that allows access to certain benefits or the application of certain measures. It is also used as a reference parameter for the quantification of social benefits, which are systematically increased by the same amount as the SMI.

After consulting with the most representative trade union and employers' organisations, taking into account the CPI, the average national productivity achieved, the increase in the share of labour in national income and the general economic situation, the Government shall set the minimum wage annually, which may be revised every six months if the CPI forecasts are not met. Royal Decree-Law 3/2004, of 25 June 2004, for the rationalisation of the regulation of the minimum interprofessional wage and for the increase of its amount, was published in the BOE (Official State Gazette) nº. 154 of 26 June 2004. Article 1.1 of the decree dissociates the minimum wage from other effects other than employment "in order to guarantee the function of the minimum interprofessional wage as a minimum wage guarantee for salaried employees established in Article 287".

The labour effects to which the SMI is linked, among others, are: the salary of the employee in special employment relationships, the remuneration of the employee hired for training, the limits of protection of the Wage Guarantee Fund (FOGASA), the remuneration of employees declared to be Partially Permanently Disabled (IPP) who return to the company, etc. The link with the SMI is also maintained in order to determine the minimum contribution bases in the Social Security systems, as well as for the requirements for access to and, where applicable, maintenance of widowhood pensions, orphan's pensions, benefits in favour of family members, protection for the birth or adoption

of a third or successive child, for the amount of the financial benefit for multiple births or adoptions and for the requirements for access to and maintenance of the benefits that make up the unemployment protection system. In such a way that, as we have been discussing, Article 27 ET regulates the SMI, which will be set in accordance with what has already been analysed. In addition to all the above, it should be noted that the revision of the minimum wage will not affect the structure or the amount of professional salaries when these, as a whole and on an annual basis, are higher than the minimum wage.

Article 27.2 provides, within the protectionist framework of the SMI, for the non-attachability of the SMI both in its monthly and annual amount. The period of accrual will be taken into account for this purpose, as will the method of calculation (whether or not it includes the prorating of special payments), guaranteeing the non-attachability of the amount that results in each case. In the event that, together with the monthly salary, a bonus or special payment is received, the limit of non-attachability will be constituted by double the amount of the monthly minimum wage. In the event that the monthly salary received includes the proportional part of the extraordinary payments or bonuses, the limit of non-attachability will be constituted by the amount of the SMI in annual calculation prorated over twelve months. In BOE Nº 33 of 7 February 2024, by means of Royal Decree 145/2024 of 6 February, the minimum interprofessional wage for 2024 was set. In compliance with the mandate to the Government to set the minimum interprofessional wage annually, contained in Article 27.1 ET, this Royal Decree establishes the amounts that will apply from 1 January 2024, both for permanent employees and for temporary or seasonal employees, as well as for domestic employees. The new amounts represent an increase of five per cent with respect to those foreseen for 2023, being the result of taking into consideration all the factors contemplated in Article 27.1 ET.

The Royal Decree incorporates the rules of effect in a single transitory provision with the aim of preventing the increase in the SMI from causing economic distortions or unintended consequences in non-labour areas that use the SMI for its own purposes. Article 1 of the RD regulates the SMI for any activity in agriculture, industry and services. It does not distinguish between the age and sex of employees. It sets it at the following amounts: 37.8 euros/day or 1,134 euros/month, depending on whether the wage is fixed by days or by months. In the SMI, only the remuneration in cash is calculated, without the salary in kind being able, in any case, to give rise to a reduction of the full amount in cash. This wage is understood to refer to the legal working day in each activity, not including in the case of daily wages the proportional part of Sundays and public holidays. If a shorter working day is worked, it shall be paid on a pro rata basis. With regard to wage supplements as part of the employee's salary, Article 2 of the Royal Decree regulating the minimum wage for the year 2024 establishes that the minimum wage will be increased (serving as a module, where applicable, and according to what has been established in the applicable collective agreements and/or in the employment contracts) by the wage supplements referred to in Article 26.3 ET (personal conditions of the employee, work carried out, company results, etc.) and the amount corresponding to the guaranteed increase in the salary on time in the remuneration at a premium or with production incentive.

Article 4 of the Royal Decree establishes certain particularities in relation to the minimum wage for certain groups: temporary employees, seasonal employees and domestic employees. In the case of temporary employees, as well as seasonal employees whose services to the same company do not exceed 120 days, they will receive, together with the minimum wage referred to in Article 1, the proportional part of the remuneration for Sundays and public holidays, as well as the two extraordinary bonuses to which, as a minimum, all employees are entitled, corresponding to the salary of 30 days in each of them, without the amount of the professional salary being less than 53.71 euros per legal working day in the activity. With regard to holiday pay, the employees referred to in this article shall receive, together with the minimum wage set in Article 1, the proportional part of this corresponding to the minimum legal holidays in cases where there is no coincidence between the period of enjoyment of the holidays and the duration of the contract. In other cases, the payment for the holiday period will be made in accordance with Article 38 ET and other applicable regulations. For persons working in domestic employment, and in accordance with Article 8.5 of Royal Decree 1620/2011, of 14 November, which regulates the special employment relationship of the family household service, which takes as a reference for the determination of the minimum wage of domestic employees who work by the hour, in an external regime, that set for temporary and seasonal employees and which includes all remuneration concepts, the minimum wage of these domestic employees will be 8.87 euros per hour actually worked. In the amounts of the minimum wage per

days or hours fixed in the previous sections, only the remuneration in cash is taken into account, without the wage in kind being able, in any case, to give rise to a reduction in the full amount in cash of the wages.

Finally, the Single Transitional Provision of the Royal Decree-Law on the minimum wage establishes clauses that do not affect the new amount of the minimum wage in the references contained in non-State regulations and private relations. Thus, in accordance with the express legal authorisation established in Article 13 of Royal Decree-Law 28/2018, of 28 December, for the revaluation of public pensions and other urgent measures in social, labour and employment matters, the new SMI amounts established in this RD will not be applicable: a) to the regulations in force on the date of entry into force of this Royal Decree of the Autonomous Communities, of the cities of Ceuta and Melilla and of the entities that make up the Local Administration that use the SMI as an indicator or reference of the level of income to determine the amount of certain benefits or to access certain benefits, benefits or public services, unless expressly provided otherwise by the Autonomous Communities themselves, by the cities of Ceuta and Melilla or by the entities that make up the Local Administration, b) to any contracts and agreements of a private nature in force on the date of entry into force of this Royal Decree that use the SMI as a reference for any purpose, unless the parties agree to apply the new amounts of the SMI.

5. Compensation and absorption of salaries

Wage levels are usually revised over time, usually in an upward direction. The minimum levels established in general by state regulation are usually revised upwards on a regular basis, as are the professional levels established by collective bargaining agreements. The question is whether the increase of the lower level is added to the higher ones or whether it is absorbed or compensated by the higher figures. The regulation of compensation and absorption of wages is carried out in Article 26.5 ET. It states that, "Compensation and absorption shall take place when the wages actually paid, as a whole and on an annual basis, are more favourable for the employees than those set in the reference regulatory or conventional order". This means that, as the SMI is established as the floor for the salary to be received by employees, if by agreement or by means of an employment contract the remuneration received by employees is more favourable than that established annually in the RD of the SMI, the salary will not increase by the percentage established in the RD of minimum salaries, as it continues to be higher. In such a way that compensation and absorption will take place until such time as the minimum wage is higher than the wage established in the agreement or contract.

Article 3 of Royal Decree 145/2024, of 6 February, which sets the minimum interprofessional wage for 2024, also clarifies aspects of compensation and absorption of wages, developing the provisions of the legal regulations. The rules for the application of compensation and absorption are as follows:

1. The revision of the minimum wage shall not affect the structure or the amount of the professional salaries that employees have been receiving when such salaries as a whole and in annual computation are higher than said minimum wage. The SMI in annual computation that will be taken as a term of comparison will be the result of adding to the minimum wage set in Art. 1 of this RD the payments referred to in Article 2, without in any case an annual amount of less than 15,876 euros being considered.

2. These payments may be compensated with the income that employees have been receiving for all concepts on an annual and full-time basis in accordance with legal or conventional rules, arbitration awards and individual employment contracts in force on the date of enactment of this RD.

3. The legal or conventional rules and arbitration awards in force on the date of enactment of this Royal Decree shall subsist in their own terms, without any modification other than that which is necessary to ensure the receipt of the amounts in annual computation resulting from the application of paragraph 1 of this article, and consequently, professional salaries lower than the indicated annual total shall be increased by the amount necessary to be equal to the latter.

The purpose of wage absorption and compensation is to avoid the overlapping of wage increases originating from different regulatory sources. If the figure resulting from a wage increase is still lower than what the employee receives, this figure remains unchanged, as the difference can be absorbed by the latter amount. On the other hand, if the wage increase exceeds the amount of the employee's salary, the latter has to be replaced by the new salary to make up the difference.

6. Form, place, manner and time of salary payment

The form, place, manner and time of payment of wages is generally laid down in Article 29 ET (settlement and payment). Wage settlement and payment shall be carried out in a timely manner. It must be documented, and it must be made on the agreed date and at the agreed place or in accordance with the customs and practices relevant to the company or sector of activity. As we will see below, the documentary form is reflected in the receipt for the payment of wages (the payroll). The date of payment is generally established in the applicable collective agreements. Normally, wages are paid from the 1st to the 5th of each month. However, in the employment contract, in the absence of conventional regulation, these or other terms may also be reflected. As for the agreed place of payment, this is the norm because, traditionally, it was paid at a specific place. It is important to take into account the fact that nowadays it is normal for wages to be paid by bank transfer, which provides a record of the specific event. However, it was normally paid at an agreed place, which was usually the company's premises at a time and place determined by company custom.

The settlement period may not exceed one month's work. The regulation also contemplates the possibility that the employee or his or her duly authorised legal representatives may receive advances on the payroll and on the work already carried out prior to the end of the month if the employee so requires. The settlement of the wages corresponding to those who provide services in jobs that are of a permanent-discontinuous nature, in the event of the conclusion of each period of activity, shall be carried out subject to the formalities and guarantees established in Article 49.2. Thus, in these cases, the employer, on the occasion of the termination of the contract, when notifying the employees of the termination of the contract, or, where appropriate, the advance notice of termination, must accompany a proposal of the document for the settlement of the amounts owed (settlement). Wage documentation shall be carried out by means of the delivery to the employee of an individual receipt justifying the payment thereof. The wage receipt shall conform to the model approved by the Ministry of Employment and Social Security unless, by collective agreement or, failing this, by agreement between the company and the employees' representatives, another model is established that contains, with due clarity and separation, the employee's different payments, as well as the legally applicable deductions. The wage receipt model is established in the Order of 27 December 1994 approving the individual wage receipt model.

If the employer is in arrears in the payment of wages, the interest for late payment of wages shall be ten per cent of what is due. In the case of the impossibility of providing the service, Article 30 ET establishes that, if the employee is unable to provide his services once the contract is in force because the employer is late in giving him work due to impediments attributable to the employer, the employee will retain the right to his salary, without being able to be made to compensate for the lost salary with other work carried out at another time.

The salary, as well as the delegated payment of social security benefits, may be paid by the employer in legal tender or by cheque or other similar means of payment through credit institutions, after informing the works council or personnel delegates. The salary is gross, and therefore acts as the basis for the legally applicable deductions and withholdings (tax and social security). These deductions must be made at the time of payment.

7. Salary protection

The Spanish legal system establishes a series of precepts aimed directly at protecting the employee's salary against the possible enforcement of the claims of the employee's creditors in respect of remuneration.

7.1. Salary non-attachment

Article 27. 2 ET dictates a rule of balance between the interests of the employee and those of his creditors. In such a way that the SMI, in its annual and monthly amount, is non-attachable. For the purposes of determining the above, both the period of accrual and the method of calculation will be taken into account, whether or not the proration of the special payments is included, guaranteeing the non-attachability of the amount that results in each case. In particular, if a bonus or special payment is received together with the monthly salary, the limit of non-attachability will be constituted by double the amount of the monthly minimum wage and in the event that the monthly salary received includes the proportional part of the special payments or bonuses, the limit of non-attachability will be constituted by the amount of the minimum wage in annual calculation prorated over twelve months. In this way, the employee's salary protection is established as an indispensable minimum.

Law 1/2000, of 7 January, on Civil Proceedings (BOE nº. 7, of 08/01/2000), in its Art. 607 regarding the attachment of salaries and pensions, reiterates the unattachable nature of the salary, wage, pension, remuneration or its equivalent, which does not exceed the amount indicated for the SMI. If the executed party is the beneficiary of more than one payment, all of them will be accumulated in order to deduct the unattachable part only once. In such a way that salaries, remuneration or pensions that are higher than the SMI will be seized according to the following scale: 1st) For the first additional amount up to that which represents the amount of double the SMI, 30 per cent. 2nd) For the additional amount up to the amount equivalent to a third SMI, 50 per cent. Third) For the additional amount up to the amount equivalent to a fourth SMI, 60 per cent. Fourth) For the additional amount up to the amount equivalent to a fifth SMI, 75 per cent. Fifth) For any amount exceeding the above amount, 90 per cent.

7.2. Salary credit privileges

Article 32 ET establishes the guarantees for employees' wages. In such a way that, in the face of possible competition with other creditors of the employer, a series of preferences are established for collection in the face of the different situations of risk for the employee caused by the employer:

1. Wage claims for the last thirty days of work and in an amount not exceeding twice the minimum wage shall take precedence over any other claim, even if the latter is secured by pledge or mortgage. This is a maximum level of protection.

2. Wage claims shall take precedence over all other claims in respect of objects produced by employees as long as they are owned or held by the employer. Medium level of protection.

3. Wage claims not protected in the previous sections shall have the status of singularly privileged in the amount resulting from multiplying three times the minimum wage by the number of days of salary pending payment, enjoying preference over any other claim, except for claims in rem, in the cases in which these, in accordance with the law, are preferential. The same consideration shall apply to severance pay in the amount corresponding to the legal minimum calculated on a basis not exceeding three times the minimum wage. Third level of protection.

The period for exercising the preferential rights of the wage claim is one year, starting from the time when the wage should have been received, after which time these rights will lapse. The preferences recognised by the rule will be applicable in all cases in which, although the employer is not declared bankrupt, the corresponding claims concur with one or more other claims on the employer's assets. In the event that the company has been declared bankrupt, the provisions contained in Royal Legislative Decree 1/2020, of 5 May, approving the revised text of the Bankruptcy Law, relating to the classification of claims and to enforcement and seizures, shall apply.

Thus, we can distinguish between two possible stages: 1st) a company with financial problems vis-à-vis creditors outside a bankruptcy situation and, 2nd) a company already immersed in bankruptcy proceedings declared by a judge. In the first case, the rules of the ET apply and, in the second, the provisions of the Insolvency Act apply. Both cases involve a process of liquidation of debts or monetary execution in which the relevant preferences for collection must be established. Insolvency proceedings may be declared at the request of the debtor entrepreneur himself (voluntary insolvency proceedings) or at the request of his creditors (necessary insolvency proceedings). The management of the company is no longer in control of the company and the functions are transferred to the insolvency administrators. The problem for employees in the event of insolvency proceedings in relation to wages is that outstanding wage claims must be claimed and paid within the joint operations for all creditors in accordance with insolvency law. Labour claims can have different classification and different order of recovery.

7.3. Guaranteed salary fund (FOGASA)

The protection systems analysed above are not always sufficient to ensure that the employee receives the corresponding income. Faced with this possibility, this system has been created, which applies to both the wage credit and the compensation credit, anticipating or assuming payment in advance when the employer lacks liquidity or assets. Article 33.1 ET establishes that the Wage Guarantee Fund (FOGASA) is an Autonomous Body attached to the Ministry of Employment and Social Security, which has its own legal personality and capacity to act for the fulfilment of its purposes. One of the most important of these is the payment to employees of the amount of wages pending payment due to the insolvency or bankruptcy of the employer. Wages are considered to be the amount recognised as

such in conciliation proceedings or in a court decision for all the concepts referred to in Article 26.1 ET, as well as the wages for processing in the cases in which they legally apply, without FOGASA being able to pay, for either concept, jointly or separately, an amount greater than the amount resulting from multiplying double the daily minimum wage, including the proportional part of the extraordinary payments, by the number of days of wages pending payment, with a maximum of 120 days.

FOGASA will pay compensation recognised as a result of a judgement, order, judicial conciliation or administrative resolution in favour of employees due to dismissal or termination of contracts in accordance with Articles 50 ET (termination at the employee's will), 51 ET (collective dismissal), 52 ET (termination of the contract for objective reasons), 40.1 ET (geographical mobility) and 41.3 ET (substantial modifications of working conditions), and termination of contracts in accordance with Articles 181 (termination in the event of agreement) and 182 (termination in the event of no agreement) of the consolidated text of the Insolvency Act, approved by Royal Legislative Decree 1/2020, of 5 May, and Article 11. 2 of Royal Decree 1620/2011, of 14 November, which regulates the special employment relationship of the family home service, as well as compensation for termination of temporary or fixed-term contracts in the legally applicable cases. In all cases, with the maximum limit of one year's salary, except in the case of Article 41.3 ET, in which the maximum limit will be 9 monthly payments and in the case of Article 11.2 of Royal Decree 1620/2011, of 14 November, in which the limit will be 6 monthly payments, without the daily salary, the basis for the calculation, exceeding twice the minimum wage, including the proportional part of the special payments. The amount of compensation, for the sole purpose of payment by FOGASA for cases of dismissal or termination of contracts in accordance with Articles 50 and 56 (unfair dismissal), shall be calculated on the basis of thirty days per year of service, with the limit set in the previous paragraph. In the case of bankruptcy proceedings, as soon as the existence of labour claims is known or the possibility of their existence is presumed, the judge, either ex officio or at the request of a party, shall summon FOGASA, without which FOGASA shall not assume the obligations indicated in the previous paragraphs. The Fund shall appear in the case file as a subsidiary legally liable for the payment of the aforementioned claims, and may request whatever it deems appropriate and without prejudice to the fact that, once this has been done, it shall continue as a creditor in the case file.

For the purposes of the payment by FOGASA of the amounts recognised in favour of the employees, the following rules shall be taken into account: a) without prejudice to the cases of direct responsibility of the body in the legally established cases, the recognition of the right to the benefit shall require that the employees' claims appear on the list of creditors or, as the case may be, recognised as debts of the masses by the bankruptcy body competent to do so in an amount equal to or greater than that requested from FOGASA, without prejudice to the obligation of the employees to reduce their claim or to reimburse the Fund the corresponding amount when the amount recognised on the final list is less than that requested or that already received, b) the compensation to be paid by FOGASA, regardless of what may be agreed in the insolvency proceedings, shall be calculated on the basis of twenty days per year of service, with the maximum limit of one year's salary, without the daily salary, the basis for the calculation, exceeding twice the minimum wage, including the proportional part of the special payments, c) in the event that the employees receiving this compensation request FOGASA to pay the part of the compensation not paid by the employer, the limit of the compensation benefit payable by the Fund shall be reduced by the amount already received by them.

FOGASA will assume the obligations specified in the preceding paragraphs, subject to the prior investigation of the proceedings to verify their appropriateness. For the reimbursement of the amounts paid, FOGASA will be compulsorily subrogated to the rights and actions of the employees, retaining the privileged nature of the credits conferred on them by Article 32 ET. If these claims concur with those that the employees may retain for the part not paid by the Fund, both will be paid pro rata to their respective amounts. This subrogation constitutes a legal mandate, as it is a matter of public interest. This enables FOGASA to place itself in the position of the employees concerned as the holders of the corresponding claim against the company, and gives it the possibility of bringing appropriate actions against the company with a view to recovering the sums paid. FOGASA is financed by the contributions made by all the employers referred to in Art. 1.2 ET, whether they are public or private. The contribution rate will be set by the Government on the wages that serve as the basis for calculating the contribution to cover the contingencies arising from accidents at work, occupational illnesses and unemployment in the Social Security system (annually in the Quotation Order). The insolvency of the employer shall be deemed to exist when, once enforcement has been requested in the manner established by LRJS,

satisfaction of the labour claims is not obtained. The decision stating the declaration of insolvency shall be issued after hearing the FOGASA. The right to request from FOGASA the payment of the benefits resulting from the previous sections shall expire one year after the date of the conciliation act, judgement, order or resolution of the labour authority in which the debt for wages is recognised or the compensation is fixed. This period shall be interrupted by the exercise of enforcement actions or actions for recognition of the claim in bankruptcy proceedings and by the other legal forms of interruption of the limitation period.

FOGASA shall be considered as a party in the processing of arbitration proceedings, for the purposes of assuming the obligations provided for in this article. It shall waive the protection regulated in this article in relation to the unpaid claims of employees who work or have habitually worked in Spain when they belong to a company with activity in the territory of at least two Member States of the European Union, one of which is Spain, when the following circumstances jointly concur: a) a request has been made for the opening of collective proceedings based on the insolvency of the employer in a Member State other than Spain, provided for by its legal and administrative provisions, involving the partial or total divestment of the employer and the appointment of a liquidator or person exercising a similar function, b) proof that the competent authority has decided, in accordance with those provisions, to open the procedure; or that it has verified the definitive closure of the employer's undertaking or place of business and the insufficiency of the assets available to justify the opening of the procedure.

Where FOGASA is responsible for the protection of unpaid claims, it shall request information from the guarantee institution of the Member State in which the collective insolvency proceedings are being conducted on the outstanding claims of the employees and on the claims satisfied by that guarantee institution and shall request its cooperation in ensuring that the sums paid to the employees are taken into account in the proceedings and in securing the reimbursement of those sums. In the event of insolvency proceedings requested in Spain in relation to a company with activity in the territory of at least one other Member State of the European Union, in addition to Spain, FOGASA will be obliged to provide information to the guarantee institution of the State in whose territory the employees of the company in a state of insolvency have carried out or habitually carry out their work. In particular, they must inform it of the employees' outstanding claims, as well as those paid by FOGASA itself. Likewise, it shall provide the competent guarantee institution with the collaboration required in relation to its intervention in the procedure and the reimbursement of the amounts paid to the employees.

FOGASA will proceed with the investigation of a file to verify the validity of the wages and compensation claimed, respecting in all cases the limits provided for in the regulation. Once the proceedings have been completed, the competent body will issue a decision within a maximum period of three months from the date the application was submitted in the proper form. The interested party must be notified within 10 days of the date on which the decision was issued. Once this period has elapsed without an express decision having been issued, the applicant may consider the application for recognition of the obligations charged to FOGASA to have been accepted by administrative silence, and under no circumstances may the recognition of obligations be obtained by silence in favour of persons who cannot legally be beneficiaries or for an amount greater than that resulting from the application of the limits set out in the previous sections. The nature and organisation of FOGASA, the contribution and benefit system, the procedure and actions for subrogation before the body, etc. are regulated in Royal Decree 505/1985, of 6 March, on the organisation and operation of the Wage Guarantee Fund (BOE nº. 92, of 17/04/1985).

Modifications to the employment relationship

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Contents

1. Introduction

The continuity over time of the employment relationship which, by its very nature, is expected to be maintained, subdues it to possible changes that may affect the subjects and the different aspects that make it up. Hence, the alterations to the relationship focus on the type of functions that were initially agreed to be provided by the employee -functional mobility-; on the place where the services are provided -geographical mobility-; on the figure of the employer -business subrogation- and on the working conditions.

The legal-regulatory treatment of such changes, which are basically the result of the employer's power of management, is the subject of this topic, which focuses on presenting the reasons, the procedure and the effects that derive from them.

In order to approach such a study, we must first turn to Title I, Chapter III, Sections 1 and 2 ET, which regulate these modifications, understood as alterations to the employment relationship arising both from the individual will of the employer -in the exercise of his/her power of management when the circumstances foreseen by the legislator are present- and by mutual agreement of the parties affected. Thus, while Section 1 deals with geographical and functional mobility and modifications affecting working conditions, Section 2 deals with guarantees due to a change of employer and, more specifically, company subrogation.

2. Functional mobility. The *ius variandi*

The market and the production of goods are not static but are subject to numerous variables that influence their modulation -the rise and fall of new technologies, consumer trends, etc.-. Therefore it is necessary to set up a flexible legal regime that allows for the adaptation of the conditions initially agreed in the employment contract.

Common contracting law allows the parties to agree on the modification of a signed contract, otherwise maintaining its validity -*ex* Art. 1284 Cód.Civ. However, in Labour law, the special feature is that the employer can unilaterally modify the conditions -*ius variandi*-, without the employee's consent. Such contractual novations are part of the nature of the development of the business activity, which requires the permanent adaptation of the provision of work. To maintain employment (or rather to pamper the employers who create it), the legislator allows such modifications, even if they are sometimes contrary to the employee´s interests.

There are two categories of changes in working conditions: non-substantial and substantial.

2.1. Ordinary or non-substantial functional mobility

This modification entails a change in the provision of services to be performed by the employee at the employer´s request. It can be defined as any change in the performance of the employment contract that involves the employee carrying out professional tasks or activities that are different from those initially assigned to him/her according to the position assigned and within the professional group to which he/she belongs.

These are alterations to the tasks entrusted to the employee that are part of the work agreed between the parties. The modifications are decided unilaterally by the employer in the exercise of his or her power of management and adopted by mere communication to the person concerned.

The employee will receive the remuneration corresponding to the functions that he/she actually performs, and therefore may increase or reduce his/her remuneration according to the new tasks entrusted, without the right to maintain the original remuneration unless the collective agreement has declared it –Art. 26.3 ET-. For this reason, allowances such as those related to hardship, toxicity or dangerousness, responsibility bonus, housing, exclusive dedication, etc., could be lost.

The legislator has established four types of limits to this non-substantial modification, namely academic qualifications, professional group, personal dignity and respect for fundamental rights and occupational hazards.

A) Academic qualifications

Mobility must be carried out under the academic and professional qualifications required to perform the job (Art. 39.1 ET). In other words, functions cannot be assigned to an employee whether their performance requires the possession of a qualification that he or she does not have. This limitation is justified for reasons of public order, based on the constitutional right to the free choice of profession or trade -Article 35 CE-.

B) Occupational group

Ordinary mobility is also limited by the occupational classification system. The limit is constituted by the occupational group and the "grouping of professional skills, qualifications and general content of the service", which may include different tasks, functions, professional specializations or responsibilities assigned to the employee. If the employment contract assigns the employee to a particular occupational group, in practice and in principle, the employee may be assigned to any task that falls within the corresponding occupational group.

C) Dignity and fundamental rights (Articles 39.2 and 4.2.(e) ET)

The problem with this qualification is to determine when work may be "undignified" or "degrading" in such a way as to affect a person's dignity. In principle, any work that can be lawfully contracted or entrusted to a person is never undignified. Therefore, perhaps, the root of degrading treatment is connected to an intentional element, i.e. a change brought about with the will to humiliate or offend the employee. In this way, the change will be contrary to the employee's dignity if it causes a situation of comparative aggravation with the rest of the employees who remain in their tasks or, even, when a material or routine job that technology allows to be carried out and that is no longer carried out by a human being is commissioned.

Any infringement of fundamental rights or public freedoms constitutes a limit to functional mobility, although there will always be certain work that must be carried out by someone and whoever undertakes it will have to bear certain limitations on their fundamental rights and public freedoms. In accordance with the guarantee of procedural indemnity, functional mobility must not be imposed as a reprisal or sanction for the exercise of legal actions.

D) Occupational risks

However, Article 25.1 LPRL stipulates that functional mobility may under no circumstances lead to employees being employed in positions in which, due to their personal characteristics, they, or other employees in the company, could put themselves or other employees in the company in a dangerous situation.

2.2. Extraordinary or substantial functional mobility

Under Art. 39.2 ET, "functional mobility for the performance of functions, both higher and lower, not corresponding to the professional group shall only be possible if there are, in addition, technical or organisational reasons that justify it and for the time that is essential for it to be carried out. The employer must communicate his decision and the reasons to the employees' representatives".

It involves mobility by unilateral decision of the employer, on a temporary basis, between functions that do not correspond to the professional group or, where appropriate, to the work agreed by the employee (Articles 39.2 and 22.4 ET). Two modalities are differentiated:

A) *Ius variandi in peius*, when the assignment is to the performance of professionally inferior duties.

B) *Ius variandi in melius*, when the change is to higher professional functions.

Both constitute so-called vertical mobility to higher or lower functions and entail a significant alteration of the work performance, which is why the legislator imposes specific limits and obligations:

- Causal limitation: this will only be possible when there are technical or organisational reasons that justify it, both *in peius* and *in melius*, linked to business needs that must be explained by the employer and communicated to the employee concerned.
- Time limit: its duration is restricted to "the time necessary" to deal with the extraordinary cause.
- Respect for the employee's dignity and the safeguarding of the prevention of occupational risks. In this respect, Article 4.2.(b) ET indicates that, when selecting the employee concerned to carry out the new tasks, the company should select the one who is least professionally prejudicial or whose employability is favoured.
- The employer shall communicate this situation to the employees' representatives. If possible before adopting it or immediately after adopting it. If there is no communication, it is classified as a serious infringement of Article 7.6 LISOS.
- In the case of the assignment of lower functions: the original remuneration will be maintained, i.e. that of the post occupied in the higher professional group, except for the allowances of the new post, which are not consolidated (Article 26.3 ET) and will therefore depend in this case on what is indicated in the collective bargaining agreement.
- In the case of the assignment of higher, better-paid duties: the employee shall be entitled to the remuneration corresponding to "the duties performed", *ex* Article 39.3 ET.
- In the event that the employee is assigned to perform functions other than the usual ones, according to Article 39.3 ET, the supervening ineptitude or lack of adaptation to the new tasks unilaterally awarded by the employer, produced by functional mobility or by application of *ius variandi*, may not be invoked as a cause for objective dismissal under Article 52(a and b) ET.
- Furthermore, Art. 23.1(d) ET establishes that the employee has the right to access the training necessary to adapt to changes in the job. This shall be at the company's expense, and in all cases the time spent on training shall be considered effective working time.

2.3. Promotion and advancement

A) Automatic promotion

According to Article 39.4 ET, when, because of *ius variandi*, "functions superior to those of the professional group or equivalent categories are performed for a period of more than six months during one year, or eight months during two years, the employee may claim promotion". This consolidation rule applies only in cases where collective bargaining has not provided for an objective system for promotions and the employee claims the corresponding wage difference for the months of "excess". In addition, the provision states that "collective bargaining may establish periods other than those specified therein to claim vacancies".

B) Promotions

Promotion at work is a constitutionally recognised right under Article 35.1, which is echoed in Article 4.2(b) ET. Although the current trend in the labour market is towards a system in which job rotation is becoming more and more frequent and where everything suggests that professional careers will no longer be forged within the same company, but rather within an indefinite amalgam of companies, professional promotion within the same organisation is still possible. And, in this sense, the configuration of this right is contained in Article 23 ET, which is directly connected to training and promotions in the category regulated in Article 24 ET.

The right to career advancement is an individual employee's right and its typical content is the right to access a more qualified, better-paid, or a job with better prospects, on the basis of experience and professional merit.

As this is a statutory right, the legislator has left part of its regulation to collective autonomy, which can more adequately detect the particular aspects of work organisation that the different sectors of activity and companies have in this area. According to Art. 24.1 ET, promotions within the professional classification system "shall take place following what is established in the collective agreement".

The employee's right to economic promotion based on the work performed under the terms established in the collective bargaining agreement or individual employment contract, established by Article 25 ET, implies that there is a right to wage increases.

Although Article 24 ET provides rules to regulate the promotion system "taking into account the training, merits, seniority of the employee, as well as the organisational powers of the employer", it does not define the concept of promotion, which could be settled as a leap to a different, better qualified or paid position within the same or different professional group. Therefore the functions and normally the employee's remuneration will change, leaving it to the employee's free will to accept the promotion or not.

Professional promotion in the company "shall be adjusted to criteria and systems that aim to guarantee the absence of direct or indirect discrimination between women and men, and positive action measures may be established aimed at eliminating or compensating for these situations of discrimination" (Article 24.2 ET). This prohibition extends to the other grounds referred to in Article 17 ET (discrimination based on status).

3. Non-substantial and substantial geographical mobility. Change of place of work. Transfers and displacements

Parallel to what was studied in the previous section, geographical mobility is also a manifestation of the employer's *ius variandi* and its content can be non-substantial and substantial.

The place of provision of services must be stated in the contract, except in the case of mobile or itinerant activities. However, after the contract has been signed, the employer may change the place of work in the ordinary exercise of his or her managerial powers. Thus, when, as a result of the change of workplace, the employee is obliged to change his or her usual place of residence, we would be referring to the so-called geographical mobility foreseen in Article 40 ET, this is substantial geographical mobility. Whereas, when geographical mobility does not require a change in the employee's place of residence, we are referring to non-substantial geographical mobility, which usually occurs when there is a change of workplace within the same locality. These cases, unless otherwise agreed, would not give rise to a right to compensation.

It should be noted that the ET does not provide any indication as to the circumstances in which a change of domicile of the employee is necessary -nor what should be understood by domicile- so there is no uniform criterion. This regulatory vacuum can be filled by collective bargaining, but in its absence, by recourse to case law or to the provisions contained in other regulations, which are described below. Thus, according to Article 40 Cód.Civ. "the domicile of natural persons is the place of their habitual residence". Article 10.2 of Royal Decree-Law 2/2008, of 21 April, on measures to boost economic activity indicates when geographical mobility must be considered to exist to be the beneficiary of a subsidy. In this way, it establishes that the subsidy may be applied when "there is an effective transfer of the employee's habitual residence" or when "the destination locality where the job is located is more than 100 kilometers from the locality of origin (...)". On the other hand, case law provides that the specific circumstances of each case must be considered, such as the distance to be travelled by the employee between his/her home and the workplace, the means of transport and their accessibility, the general climatic conditions of the area, social customs or practices, etc.

It seems to reject the fact that a change of locality or municipality alone establishes the existence of a change of residence, since, for example, if the new workplace is close to the previous one, but in a different locality bordering or nearby, this does not imply the need for a change of residence.

Substantial geographical mobility comprises two manifestations: transfer and displacement. In both cases involving the mobility of the employee from the workplace where he/she has been providing his/her services to another workplace, in the same company, which requires him/her to change his/her habitual residence. This mobility is carried out by a unilateral decision of the employer that must be justified by one of the reasons identified as ETOP: Economic, Technical, Organisational or Production reasons. Moreover, these must be subject not only to information but also to proof in the event that they are objected. Therefore, other modifications are excluded as it happens with:

- those made by mutual agreement of the parties;
- at the employee's request;
- changes with employees who have been recruited to work in mobile or itinerant companies,
- transfer by exchange
- or, literally, those transfers that have been imposed as a disciplinary sanction.

The **transfer** involves a change of the employee to a different workplace within the same company that requires a change of address, on a permanent basis. When this mobility exceeds 12 months in a period of 3 years, it is a transfer, while if it does not exceed this period, it is a displacement.

Displacement also requires the employee to move to a different workplace within the same company and a change of address but on a temporary basis.

There are certain rules regarding the transfer of certain employees from the company:

- In the case of a transfer, if the employee is a **employee´s representative,** he/she has **priority to remain** in his/her job.
- When the **employee´s couple** works in the same company, he/she will have the right to be transferred to the same new location, but only if there is a job vacancy. Article 40.3 ET does not mention the unmarried partner, which should not prevent this preference from being applied by analogy.
- The procedure to be followed by the employer to carry out the transfer differs for individual or individual-plural transfers, which follow the same regime, and for collective transfers, which follow a different and more complex procedure.

Individual relocations are when the posted employees are one or more -individual-plural relocations- but without reaching the numerical thresholds required for a collective relocation.

Collective transfers are when affect all the employees of a workplace, provided that it employs more than 5 persons, or when, without affecting all the employees of the workplace, within 90 days it affects at least:

- 10 employees in enterprises employing less than 100 employees
- 10% of employees in companies employing between 100 and 300 employees
- 30 employees in companies with 300 or more employees

Individual transfer procedure

The employer must give at least 30 days' notice of the date of the transfer to the employee concerned (and the employee´s representative) using the so-called mobility order which must state the reason, duration, destination and departure date.

Collective transfer procedure

The management of the company is required to inform the employees' representatives or the employees, if there are no representatives, of its intention to initiate a collective transfer procedure.

A consultation period between the employer and the employees' representatives must be opened for a period of no more than 15 days. The law provides for the possibility of replacing the consultation period with the application of the mediation or arbitration procedure by agreement between the employer and the employees' representatives, which must be carried out within the same maximum period of 15 days.

During the consultation period, the parties must negotiate in good faith with a view to reaching an agreement. The consultation should cover the reasons for the employer's decision and the adoption of the

necessary measures to mitigate the consequences for the employees concerned.

The opening of the consultation period and the positions of the parties after its conclusion shall be notified to the labour authority for its knowledge.

From the consultation procedure, it should be noted that:

- An agreement is reached when the majority of the employees' legal representatives or, where appropriate, the majority of the members of the employees' representative committee give their consent, provided that, in both cases, they represent the majority of the employees at the establishment(s) concerned.
- No agreement is reached. The employer may carry out the transfer unilaterally and the decision must be notified to the employees at least 30 days in advance.

Employee's options in the case of individual transfers

The ET offers the employee the possibility of exercising different options depending on whether or not he/she agrees with the company's decision to transfer him/her, and in this sense, he/she will be able to choose:

1. If he/she agrees to be transferred, **he/she shall accept the transfer** and shall be entitled to receive financial compensation for the expenses incurred by the transfer, including those of his/her dependants (moving expenses, travel expenses, subsistence allowance). In this case, the employee has 30 days in which to take up the new job.

2. If he/she does not agree to the transfer and therefore does not accept it, he/she shall have the right to **terminate** his/her employment contract with the right to receive compensation legally assessed at 20 days' salary per year of service, prorated by months for periods of less than one year and with a maximum of 12 monthly payments.

3. When the employee does not agree with the transfer and therefore does not accept it, he/she may **challenge the transfer** before the social jurisdiction, the deadline for the challenge is 20 working days from the date of notification of the transfer, although in this case, the employee must comply with the transfer and do so within the established period (no less than 30 days).

The **judgment** may declare the transfer to be **justified, unjustified or null and void**:

- If the judgment declares the **transfer** to be **justified**, the employee is entitled to receive financial compensation for the costs of transferring him and his family. But, in addition, he/she may at this time exercise his/her option to terminate his/her contract with the right to the compensation already mentioned: 20 days' salary per year of service, with a maximum of 12 monthly payments.
- If the judgment declares the **transfer to** be **unjustified**, it will recognise the employee's right to be reinstated in the workplace of origin and, if not, to the termination of the contract with the maximum compensation provided for in the ET for unfair dismissal.

Special cases of transfer are those foreseen in paragraphs 4 and 5 of Article 40 ET, referring to being a victim of gender violence, a victim of terrorism or a disabled person.

A **woman** who can prove that she is **a victim of gender violence** or a employee who is considered a **victim of terrorism** may request a transfer to any other work centre of the company, in another location, to occupy a vacancy in the same professional group or equivalent category.

This transfer will last for **6 months,** during which time the employer must reserve the post previously occupied by the employee requesting the transfer. At the end of the 6 months, the employee must choose between returning to his/her original post or staying in the new post, but if he/she stays in the new post, the right to the reservation of his/her previous post lapses.

In order to make their right to health protection effective, employees with disabilities who can prove the need to receive habilitation or medical-functional rehabilitation treatment or psychological care, treatment or guidance related to their disability outside their locality shall have the preferential right to occupy another job, in the same professional group, that the company has vacant in another of its work centres in a locality where such treatment is more accessible, under the terms and conditions established in the previous section for female employees who are victims of gender violence and for victims of terrorism.

4. Changes in the person of the employer: corporate subrogation

Retirement, death, incapacity or even a change of the companie´s legal personality does not in itself automatically terminate the employment relationship -*ex* Article 44.1 ET-.

This is a protection of employees' rights in the face of situations of uncertainty, which is why a series of fundamental guarantees are legally established concerning the maintenance of the job and working conditions. Therefore, the new employer is "subrogated to the employment and social security rights and obligations of the previous employer, including pension commitments, under the terms set out in its specific regulations, and, in general, any obligations in terms of complementary social protection that the transferor may have acquired".

According to Article 44.2 ET -which must be applied in the light of Directive 2001/23 of 12 March and the case law of the CJEU in this respect- business succession occurs when "the business sale affects an economic entity that maintains its identity, understood as a set of means organised for the purpose of carrying out an economic activity, whether essential or ancillary". In other words, business succession occurs when the productive elements necessary for the activity to continue are transferred and, for this, two elements concur:

- Subjective element: it consists of the replacement of one entrepreneur by another. There is an act of transfer, whereby there is a change of ownership of the company, which entails contractual succession.
- Objective element: this involves the actual handing over of all or part of the company's essential means to ensure the continuity of the production process, both technical and organisational, as well as its assets.

Succession, when it occurs following the law and the applicable collective agreement, will be mandatory and will have substantive and procedural scope, as it places the successor in the same position as the previous one.

This business succession can take place through *inter vivos* or *mortis causa* acts.

4.1. Succession by "inter vivos" acts

Inter vivos acts include cases of sale of the company, retirement and incapacity of the employer. In these successions, the parties -transferor and transferee- are jointly and severally liable for three years for the employment obligations arising before the transfer and which have not been satisfied (Article 44.3 ET). This liability, as it is configured as joint and several, means that responsibilities are shared on an absolute level of equality and applies to any debts incurred by the transferor such as:

- Processing salaries
- Interest on late payment of wages
- Interest for procedural delay
- Severance payments

Liabilities arising thereafter are not considered to be joint and several, but must be covered by the new employer, unless they had committed an offence at the time of formalising the transfer (Article 44.3 ET).

4.2. Succession "mortis causa"

In such cases, subrogation depends exclusively on the will of the employer's heirs, who have a genuine right to terminate the employment relationship without cause. They must expressly or tacitly state, within a reasonable period of time, whether or not they wish to continue operating the business. The manifestation of not continuing with the company must be clear and unequivocal.

In these cases, the liability of the heirs is ensured by the general rules of succession, unless the inheritance is accepted with the benefit of inventory.

4.3. Business succession and employees representatives

The employees' representatives may expressly agree with the transferee after the succession not to apply the collective bargaining agreement that at the time of the transfer was applicable in the company, work centre or production unit transferred, ex Article 44.4 ET. Therefore, in the absence of such an agreement, the same agreement that governed labour relations before the succession will continue to apply "until the date of expiry of the agreement or until the entry into force of another new collective agreement applicable to the transferred economic entity". Article 44.5 ET establishes that "the change of ownership of the employer shall not in itself extinguish the mandate of the legal representatives of the employees, who shall continue to exercise their functions in the same terms and under

the same conditions as before". Before the transfer, the transferor and transferee companies are obliged to inform their employees' representatives (Article 44.6 ET), and in their absence, the employees affected (Article 44.7 ET), of the following points (Article 44.8 ET):

- Planned date of transmission
- Reasons for transmission
- Legal, economic and social consequences of the transfer for employees
- Measures envisaged for employees

When labour modifications are to be made in relation to employees, a consultation period must be initiated with the legal representatives on the measures envisaged and their consequences (Article 44.9 ET). In cases where these measures consist of transfers or substantial modifications of working conditions on a collective basis, the procedure must comply with the provisions of Articles 40.2 and 41.4 ET.

5. Substantial changes in working conditions

For the company to adapt to changes in the market, the legislator allows modifications to the working conditions initially agreed. These variations can be carried out by agreement between the parties, and without it. However, in this regard, the employer's power of management is not unlimited but requires justification, especially in order to be able to alter some of the agreed working conditions. Therefore, Article 41 ET states that "The management of the company may agree to substantial modifications of working conditions when there are proven economic, technical, organisational or production reasons. These are considered to be those related to competitiveness, productivity or technical or work organisation in the company".

Article 41 ET allows the employer to modify the conditions initially agreed by the parties (individual contract) and those conditions included in collective agreements. However, the procedure will be different depending on the source of the condition that the employer intends to modify.

5.1. Delimitation of the case of modification

5.1.1. The substantial nature of the amendment

Article 41.1 ET establishes the employer´s capacity to substantially modify working conditions and also a list of issues which can be affected. In this regard, two ideas must be highlighted. On one hand, the modification must be monitored according to the importance, intensity or scope. And, on the other hand that this article contained a list of matters which is understood as a *numerus apertus*, being the casuistry necessary to interpret it.

These are the mentioned matters:

a) Working day.

b) Working hours and distribution of working time.

c) Shift work.

d) Remuneration system and salary level.

e) System of work and performance.

f) Duties, where they exceed the limits for functional mobility provided for in Article 39.

A broader explanation is given in the next two epigraphs focused on the modifiable issues and the reasons to do it.

5.1.2. Subjects to be amended

A) Working day: the working day corresponds to the time spent by the employee to carry out the duties agreed with the employer. It may also affect the working time set out in the calendar. On the other hand, it should be noted that the unilateral modification by the employer of a part-time contract into a full-time contract and vice versa cannot be carried out through this procedure.

B) Shift work regime: when modifying work shifts, the employer must follow the rules of this article, as long as it is considered substantial and involves a detriment to the employee. It will have to be considered on a case-by-case basis.

C) Remuneration system: includes salary and any other remuneration received in return for work performed in the employment relationship. Remuneration also includes "compensation or allowances for expenses incurred as a result of their work".

D) Work system and performance: The work system is the form of internal organisation of the company. This implies that employees perform their functions in one way or another and will therefore influence the work processes and their organisation. Performance, on the

other hand, refers to how each employee develops his or her functions.

E) Functions, when they exceed Article 39 ET: among the powers granted to the employer is functional mobility. This requires less rigorous procedures than those established for the substantial modification of working conditions. Therefore, if the variation of working conditions carried out by the employer exceeds what is permitted by Article 39 ET, the rules of Article 41 ET must be followed.

5.1.3. Causes

The ET requires "proven economic, technical, organisational or production reasons" to justify the company's decision to make a substantial modification. This implies the existence of an objective reason based on the company's productivity that goes beyond the simple desire of the employer. The aim of this reason must be to optimise the use of the company's human and material resources in order to obtain better economic results. The concept of these causes has been defined by Article 51 ET, according to which:

- Economic causes are understood to exist when the company's results show a negative economic situation. In cases such as the existence of current or forecast losses, or the persistent decline in its level of ordinary income or sales. The decline will be understood to be persistent if for three consecutive quarters the level of ordinary income or sales in each period is lower than that recorded in the same quarter of the previous year.
- Technical causes are understood to exist when changes occur, inter alia, in the field of means or instruments of production;
- The causes are organisational when changes occur in the area of personnel systems and working methods or in the way production is organised;
- And the causes will be productive when changes are generated, among others, in the demand for the products or services that the company intends to place on the market.

5.2. Individual and collective modifications

The second paragraph of Article 41 ET distinguishes between individual and collective substantial modification of working conditions which are connected to the number of affected employees.

5.2.1. Substantial modification of working conditions of an individual nature

A modification is considered to be of an individual nature if, in a period of ninety days, it affects a number of employees of at least:

- 10 employees in companies with less than 100 employees.
- 10 per cent of the number of employees of the company in companies with between 100 and 300 employees.
- 30 employees in enterprises employing more than 300 employees.

When to avoid the actions to be taken in the case of collective modifications, the company makes substantial modifications to working conditions in successive ninety-day periods in a number lower than the thresholds established for collective modifications, without new causes justifying such action, these modifications are considered to have been made in fraud of the law and shall be declared null and void.

This is the procedure to be followed in the case of individual modification:

A) The employer must notify the affected employee and his/her legal representatives of the decision on the modification at least fifteen days before the date on which it is to take effect.

In the event that a judgment of the social court declares the modification unjustified, the employer must reinstate the employee to his or her previous working conditions.

B) Employees´ actions

- Accept the employer´s decision. The modification will be implemented without further consequences.
- Accept the decision but disagree with it. In these cases, the employer's decision may be appealed before the Labour Court, without prejudice to the enforceability of the modification within the established period. The judgment ruling on the appeal shall declare the modification to be justified or unjustified and, in the latter case, shall recognise the employee's right to be reinstated in his/her previous conditions. When a court ruling has declared unjustified the modification, the employer's refusal to reinstate the employee in their previous working conditions will give the employee the option to terminate the

employment relationship by the procedure of Article 50 ET. It will be established a compensation for unfair dismissal: thirty-three days' salary per year of service, up to a maximum of twenty-four monthly payments.

- Terminate the employment relationship with the company, before the effective term of the decision adopted has expired. In this case, the modification must be proved to be harmful to the employee and must affect all types of substantial modifications, except those referring to the work and performance system. The employee must receive a financial compensation of twenty salary days per year of service and with a maximum of nine months. The employees may also terminate the employment contract, through the procedure corresponding to Article 50 ET, -termination at the employee's will-, when substantial modifications in the working conditions are carried out without respecting the provisions of Article 41 ET and which result in a reduction of the employee's dignity. It is foreseen a compensation for unfair dismissal.

5.2.2. Collective modifications

A substantial modification of working conditions is considered to be of a collective nature if, within a period of ninety days, it affects at least:

- 10 employees in companies with less than 100 employees.
- 10 per cent of employees in companies between 100 and 300 employees.
- 30 employees in enterprises employing more than 300 employees.

This is the procedure to be followed in the case of collective modifications:

A) The employer must open a consultation period with the legal representatives of the employees. This period of consultation will last no more than fifteen days. The consultation shall be carried out in a single negotiating committee, although, if there are several work centres, it shall be limited to the centres affected by the procedure.

B) The consultation period

It should deal with:

- the motivating causes of the business decision
- the possibility of avoiding or reducing their effects,
- the necessary measures to mitigate the consequences for the employees concerned.

During the consultation period, the parties shall negotiate in good faith, with a view to reaching an agreement by a majority of the members of the special negotiating body.

The employer and the employees' representatives may agree at any time to replace the consultation period with the application of the mediation or arbitration procedure applicable in the company, which must be carried out in no more than fifteen days.

If an agreement is reached after the consultation period, it will be presumed to be justified and can only be challenged before the competent jurisdiction for the existence of fraud, coercion or abuse of rights in its conclusion.

After the end of the consultation period, the employer shall notify the employees of his decision on the modification, whether or not there is agreement. The adopted decision shall take effect within seven days of its notification. The decision may be challenged in a collective dispute.

The modification of working conditions established in collective agreements must be carried out in accordance with the provisions of Article 82.3 ET.

C) Employees' responses:

- Accept the modification,
- Accept the modification but claim in a collective conflict. The filing of the conflict will paralyse the processing of the individual actions until it is resolved.
- Accept the modification but challenge the employer's decision without terminating the contractual relationship. This option is provided for in Article 41.3 ET. The challenge procedure is regulated in Article 138 LRJS. This procedural modality will be used when the employee considers the employer's decision to be unjustified, or when the modification or the transfers, both of an individual nature, have been carried out by fraudulent means. In other words, when it is a collective modification that the employer has tried to mask by following the procedure for individual modifications. Likewise, this procedural modality will be used when there is disagreement with the employees who have been selected for the modification or transfer.

However, in cases where the employer's decision is the result of an arbitration award derived from the corresponding out-of-court dispute procedure provided for in the agreement, the appropriate procedural channel will be the one provided for the challenge of collective agreements, regulated in Articles 163 et seq. LRJS.

- Exercise their individual right to terminate their employment relationship with the company, before the end of the period of effectiveness of the decision taken by the employer. It must be proved that the modifications are harmful to the employees. Substantial changes to the system of work and performance are excluded.

  In such case of termination, the employees shall receive compensation of 20 salary days per year of service, up to a maximum of nine months.

- Termination of the employment contracts through the procedure foreseen in Article 50 ET, -termination at the employees´ will- when the substantial modifications are carried out without respecting the provisions of Article 41 ET which results in the undermining of the employee's dignity. The compensation established for unfair dismissal is applied.

Vicissitudes of the employment relationship

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Contents

1. Interruptions in the provision of work for reasons related to the employee: paid leave

Article 37.3 ET lists under the heading of permits a series of cases in which the employee, with prior notice and justification or in some cases justifying it a posteriori, can be absent from work, with the right to remuneration. These assumptions can be improved by collective agreement or individual contract.

For personal reasons, the employee may be absent in the following cases:

- For marriage or registration of a de facto couple: 15 calendar days.
- Due to a serious accident or illness, hospitalization or surgical intervention without hospitalization of family members (2nd degree of consanguinity or affinity) or cohabitants (when they require care): 5 days.
- Due to the death of family members: 2 days or 4, if there is displacement.
- Pregnant women: the time required for prenatal examinations and childbirth preparation practices that must be carried out within the work day.
- In the case of premature children or those who have to be hospitalized after childbirth: 1 hour a day.
- Transfer of the habitual residence (moving), 1 day.
- For fulfillment of civic duties or performance of public office: Compliance with an inexcusable, public and personal duty, including the right to exercise the vote, for the necessary time.
- Force majeure (Article 37.9): for urgent family reasons related to family members or cohabitants, in the event of illness or accident that makes their immediate presence essential, employees have the right to remuneration 4 days a year, in accordance with the provisions of the collective agreement.

2. Interruptions in the company's activity

Cases of suspension of the employment contract due to events beyond the control of the employee are included here.

Temporary force majeure. Temporary Employment Regulation File (ERTE)

Procedure: the affected company must initiate a procedure through a request from the company addressed to the competent labor authority accompanied by the means of proof it deems necessary and simultaneous communication to the employment regulation, who hold the status of interested party during its processing. The existence of temporary force majeure as a cause must be verified by the labor authority, regardless of the number of employees affected. The labor authority will request a mandatory report from the Labor and Social Security Inspection. The resolution of the labor authority will be issued

within a period of five calendar days from the request, and must be limited, where appropriate, to verifying the existence of force majeure alleged by the company. The resolution will take effect from the date of the event causing the force majeure, and until the date determined in the resolution itself. If no resolution is issued, it is deemed authorized. It is up to the company to decide whether to reduce working hours or suspend employment contracts.

Improper temporary force majeure (ERTE, section 6 of Article 47 ET)

The ERTES due to temporary force majeure due to impediment or limitation in the normal activity of the company when they are a consequence of decisions taken by the competent public authority, including those aimed at the protection of public health.

In these cases the procedure is the same, but with the following particularities:

- ITSS report is not mandatory.
- specific limitations or impediments must be justified in the application documentation
- authorization by the labor authority will occur if they are deemed justified.

ETOP (Economic, technical, organizational or production causes)

This cause of suspension is contemplated for when the suspension of employment contracts or the reduction of the working day is necessary, to overcome a situation of economic crisis in the company.

There are two possibilities in Article 47 ET:

- The temporary suspension of employment contracts, which will take place when the temporary cessation of labor benefits affects full, continuous or alternate days, for at least one ordinary work day.
- And the reduction of working hours consisting of the temporary reduction of between 10% and 70% of the working day -computed on the daily, weekly, monthly or annual working hours-. During the period of reduced working hours, overtime hours may not be carried out unless they are due to force majeure. The employee who is temporarily suspended will receive unemployment benefits, and in the case of reduction in working hours, provided that the salary is subject to a similar reduction, the employee will receive unemployment benefits partially.

RED mechanism

Under the name of the RED Mechanism for Flexibility and Stabilization of Employment, companies are allowed to activate measures to reduce working hours or suspend employment contracts, always with the authorization of the Council of Ministers.

It is therefore a very special employment protection mechanism that requires Government action. There are two modalities:

- Cyclical: general macroeconomic situation that advises the adoption of additional stabilization instruments. The maximum duration is one year.
- Sectoral: in the sector/s of activity in which permanent changes are observed that generate needs for requalification and professional transition processes of employees. The maximum initial duration is one year, with the possibility of two extensions of six months each.

3. Suspension of the contract

- Article 45 ET defines suspension as the "exoneration of the reciprocal obligations to work and remunerate work" and lists thirteen causes that may give rise to the temporary suspension of the employment contract.
- Suspensions are always temporary in nature, since if the interruption were permanent we would be facing the termination of the employment relationship.
- The causes of suspension are usually established with reservation of the employment, since there is only one case in which the right of preferential re-entry can be agreed upon, the case of suspension by mutual agreement of the parties.
- The main difference between the different causes of suspension is that in some suspensions a period for the employee's reinstatement is determined in advance, while in others, its duration is uncertain.

Suspension by mutual agreement of the parties (Article 45(a) and (b) ET)

These suspensions are possible, even if there is no objective cause for it, as long as there is no abuse on the part of the employer or waiver of rights on the part of the employee.

Its duration and effects will depend on what is established in the agreement itself, -including the right or not, to reserve the job-, since reinstatement must necessarily be agreed upon.

Suspensions dependent on the will of one of the parties

A) At the will of the employee

- For the exercise of public, representative or union office, voluntarily assumed by the employee, who must return to the company the month following his or her cessation of office.
- For the exercise of the right to strike (understood as a legal strike).

In all of them there is the right to reserve the job.

B) By will of the employer (Article 45 ET)

- Suspension of employment and salary, given the disciplinary power that the employer has to sanction serious and very serious offenses committed by the employee with this sanction.
- Lockout.

Independent of the will of each of the parties

Incidents on the employee's health (Article 45(c) ET and Article 169 LGSS)

- The health of the employee due to illness (occupational or common) or accident (professional or common) may prevent the performance of work for a certain time.
- The Temporary Disability (IT) of the employee will have a maximum duration of 365 days, extendable for another 180 days (in total 545 days), when it is presumed that during them the employee can be discharged medically for a cure. Although, in those cases in which the need for medical treatment persists, due to the expectation of recovery or improvement in the employee's condition, said maximum duration may be delayed up to a maximum of 730 days from the date on which the temporary disability began.
- The lack of reinstatement, after medical discharge, determines the termination of the contract.

Now, if the employee did not improve after these periods, we would be faced with a new case of disability, Permanent Disability (IP) in its degrees of total permanent disability for the usual profession, absolute permanent disability for all work and great disability and in these cases, the suspension of the employment relationship only subsists when, in the opinion of the qualification body, the employee's situation can improve in such a way that he can return to work, with reservation of the job for a period of 2 years, from the date of the declaration of permanent disability.

As of 1-6-2023, the following special situations of temporary disability due to common contingencies also exist:

- the woman in case of secondary disabling menstruation
- termination of pregnancy, voluntary or not, while receiving health care from the Public Health Service and is unable to work. In cases where the termination of pregnancy is due to a work accident or occupational disease, it will be considered a situation of temporary disability due to professional contingencies.
- the pregnancy status of the working woman from the first day of the thirty-ninth week.

Thus, situations of illness or accident, together with special disabling situations, that make it impossible to provide work produce the suspension of the contract with the right to reserve a position and the other general effects of suspensive situations.

Suspension of the employment contract due to birth and care of the minor for both parents

Includes maternity and paternity due to childbirth, adoption, custody for adoption and foster care. The suspension includes 16 weeks, for each of the parents, 6 of them uninterrupted and full-time, obligatorily following childbirth. It is an individual right of each of the parents so it is non-transferable.

In the case of biological maternity, the suspension includes the birth and care of the child under 12 months, with mandatory enjoyment of the 6 weeks immediately after birth to ensure the protection of the health of the biological mother, who may advance her enjoyment until 4 weeks before delivery.

These 16 weeks are extendable in the following situations:

- in 2 weeks per child from the second (multiple birth), and in the event of the child's disability.

- due to hospitalization of the newborn for more than 7 days after delivery. Maximum 13 weeks additionally.
- In the case of single-parent families, the sole parent will be able to enjoy the previous extensions.

There is also a special suspension of temporary disability for pregnant women from the first day of the 39th week of pregnancy.

In the event of the death of the child, the suspension is not reduced, unless the mother wants to return after the mandatory 6 weeks after childbirth.

In the case of a parent other than the biological mother, the contract is also suspended for 16 weeks, of which the 6 uninterrupted weeks immediately after childbirth are mandatory, which must be enjoyed full-time.

Regarding the remaining 10 weeks for both parents, they will be enjoyed at their will, starting from the 6 weeks of mandatory rest after childbirth, until the child is 12 months old. It can be enjoyed cumulatively or interrupted on a full- or part-time basis, subject to prior agreement between the company and the employee.

Article 38 ET indicates that when the vacation period set in the company's vacation calendar coincides with suspensions of the contract due to risk during pregnancy, risk during breastfeeding, birth and care of a minor, adoption, custody for adoption or fostering purposes, you will have the right to enjoy vacations on a different date at the end of the suspension period, even if the corresponding calendar year has ended.

In cases of disability due to situations other than the above, the vacations must be enjoyed once the temporary disability ends and provided that no more than 18 months have passed from the end of the year in which they originated.

Suspension in cases of adoption, custody for the purposes of adoption or pre-adoption or permanent foster care

Included in Articles 45.1(d) and 48.5 ET, for minors up to 6 years of age, minors over 6 years of age who are disabled or who, due to their personal circumstances or because they come from abroad, have special difficulties in social and family insertion (must be accredited by the competent social services), 16 weeks will be enjoyed for each parent (extendable by 2 weeks for each of them for each child from the second). The terms are identical to those, for the suspension due to birth, that is, from the judicial resolution of adoption or administrative of pre-adoptive or permanent foster care. The form of enjoyment is for both, 6 mandatory weeks from the adoption or foster care, the remaining 10 weeks, in weekly periods accumulated or interrupted in the 12 months following the adoption or fostering, on a full-time or part-time basis, prior agreement between the company and the employee. Prior notice to the company, at least 15 days. When both parents work for the same company, it may limit the simultaneous enjoyment of the ten voluntary weeks for well-founded and objective reasons, duly justified in writing.

In cases of international adoption, when prior travel of the parents to the adoptee's country of origin is necessary, the suspension period may begin up to 4 weeks before the resolution constituting the adoption.

Suspension of the contract due to risk during pregnancy and during breastfeeding (Article 45.1(e) ET, Article 48.7 ET and Article 26 LPRL)

It should be noted that not all risk situations during pregnancy and breastfeeding have to lead to the suspension of the contract, since it will not be necessary, when possible, to change the employee to another position in which the risk does not exist. The 50% of the business contribution will be subsidized in the Social Security contribution for common contingencies, while the job change lasts. If this possibility does not exist: suspension of the employment contract. This suspension entails the right to reserve a job in 2 different situations.

- Risk during pregnancy: It will end when the suspension due to childbirth begins or when the employee can return to her job or another job compatible with her situation.
- Risk during natural breastfeeding: a minor up to 9 months. It will end when the risk ceases or the employee can return to her job or another job compatible with her situation.

Employee victim of gender violence

When the employee is forced to leave her job as a result of being a victim of gender violence, she may exercise her right to suspension. Its initial duration may not exceed 6 months, and may be judicially extended, when deemed necessary, for periods of 3 months and with a maximum of 18 months.

Deprivation of freedom of the employee while there is no conviction,

- Constitutes another legal cause for contractual suspension.
- Once the sentence is pronounced, if the employee is convicted, the employer can choose between dismissing the employee or maintaining the suspension; if he is acquitted, he may return to his job.

4. Non-paid leaves

- Like suspensions, leaves of absence represent an interruption in the provision of work.
- In addition to those contemplated in the ET, there may be other cases of leave established by collective agreement.
- Article 46 ET regulates leaves of absence by establishing a confusing legal regime that can be specified, for the purposes of its analysis, as follows:

Forced leave

The leave will be forced, when it can be decreed unilaterally by the employer, or must be granted compulsorily when requested by the employee, in the following cases:

A) By the appointment of the employee to the exercise of a public position that makes it impossible for him to attend work (mayors, deputies, senators...) in which case the employer may suspend the contract, placing the employee on forced leave when the employee exercises representative or elective public office, but also designated or non-elective, if the exercise of said office makes it impossible for him or her to attend work. Only in this case would we be faced with a forced leave -Article 46.1 ET-.

B) To fulfill a duty, the company will have such power when the employee cannot provide his or her services for more than 20% of the working hours for 3 months (for example, a employee chosen as a member of a Jury).

The effects produced by forced leave are very beneficial for the employee since the job position is maintained for up to 30 days after termination of the position and the period of time during which the leave has lasted will be counted as a period of seniority. in the company.

Common voluntary leave of absence

- The employer is obliged to grant it whenever the employee requests it, without being able to deny it due to service needs and without the employee having to justify the reasons for his decision.
- The only requirement is that the employee has been in the company for at least 1 year.
- The requested leave of absence may not be less than 4 months nor more than 5 years and may only be granted again to the employee when 4 years have passed since the previous leave.
- Its legal effects are that in this case there is no right to automatic re-entry or job reservation, since the employee only retains the right to preferential re-entry, in the event of a vacancy of the same or similar category in the company.
- The employee must request reinstatement before the leave ends. Furthermore, it does not count towards seniority in the company.
- Leave of absence to care for children, and to care for helpless relatives (Article 46.3 ET).

Childcare leave, the purpose of which is to provide care for each biological or adopted child, is saved for the purposes of adoption or permanent foster care. It cannot exceed 3 years in duration.

Leave to care for family members is intended to care for a spouse or common-law partner, or a family member up to the 2nd degree of consanguinity or affinity, or a common-law partner, who for reasons of age, accident or illness cannot take care of themselves. and does not carry out paid activity. It cannot exceed 2 years in duration.

The common characteristics for both are the following:

- Individual right -man or woman-. The employer may limit the simultaneous exercise by the same person responsible if both work in the company, in which case he must justify it in writing, and offer an alternative plan that ensures the enjoyment of both employees and that makes possible the exercise of the rights of conciliation.
- Improved in collective agreement.
- Computed for purposes of seniority in the company.
- Regardless of the type of contract.
- It can be enjoyed in fractions.

- Right to attend training courses while the suspension lasts.
- Job reservation for 1 year. Expandable for large families from general category to 15 months, and special category to 18 months. If both parents carry out the same suspension, 18-month job reservation.

For the rest of the time, reserve a job in the same professional group or equivalent category.

Termination of the employment relationship

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Contents

1. Introduction

The legal employment relationship begins with the conclusion of the contract and continues throughout its duration through the exchange of services between the employee and the employer. However, in the development of the employment relationship itself, we may encounter certain incidents, such as suspensions and even the termination of employment. However, one nuance to bear in mind is that termination is not the same as suspension. While in the case of suspension the relationship is temporarily paralysed, in the case of termination the employment relationship is completely and, in principle, definitively eliminated.

The termination of the employment contract implies the termination of the employee's relationship of dependence with the employer, and therefore the cessation of the respective reciprocal obligations.

The grounds for termination of the employment contract provided for in labour law are numerous and diverse in nature. There are many reasons for the termination of an employment contract. However, once again we must point out that termination is not the same as dismissal. While in a dismissal there is also an extinction of the reciprocal relations, when we speak of termination, we are not really referring -or at least not necessarily- to a dismissal. In a dismissal there is a will on the part of the company to terminate the employment relationship unilaterally, either due to the employee's behaviour (disciplinary causes) or for objective reasons or force majeure.

In the case of the termination of the employment relationship, we can say that a series of circumstances naturally arise that will lead to the end of the employment relationship.

Depending on the cause of the termination of the employment relationship between the employer and the employee, the documents and the communication will be different.

In this sense, first, we must talk about whether the employee or the company must give prior notice to proceed with the termination. The prior notice is the announcement in advance that the contract will soon be terminated, but it is only a warning that is made as required by law to warn - and remind - the other party that the termination of the employment relationship will take place.

The notice period is an aspect to be considered in cases of termination of the employment relationship, however, the source regulating the notice period is not dealt with in a unitary manner, but can be regulated by individual agreement, collective agreement or custom. If it is not

regulated by the collective agreement, the custom of 15 days' notice prior to termination applies.

Once this notice has been given, a formal notice must be given to terminate the employment relationship. This is the official communication by which the responsible agent informs the other party of the desire to cease or terminate the employment relationship, the effective date, and the reason for the termination.

In addition, the termination of the employment relationship must be accompanied by a document formally referred to as a settlement. This is the document in which all outstanding balances are settled at the end of the employment relationship. It includes the number of holidays accrued by the employee up to the date of termination and not taken, as well as the number of extraordinary payments accrued up to the date of termination and not paid, as well as any other accruals pending payment.

2. Causes of extinction

The termination of the employment contract is regulated in Article 49 ET. In general terms, the regulation indicates that the employment contract will be terminated for one of the following reasons:

a) By mutual agreement of the parties.

b) For the reasons validly stated in the contract, unless they constitute a manifest abuse of right on the part of the employer.

c) By expiry of the agreed period.

d) By resignation of the employee, subject to the advance notice stipulated in collective agreements or local custom.

e) Due to death, severe disability or total or absolute permanent disability of the employee, without prejudice to the provisions of Article 48.2.

f) On retirement of the employee.

g) Due to death, retirement in the cases provided for in the corresponding Social Security system, or incapacity of the employer, without prejudice to the provisions of Article 44, or due to the extinction of the legal personality of the contracting party.

h) Due to force majeure that makes it definitively impossible to provide work, provided that its existence has been duly established in accordance with the provisions of Article 51.7.

i) Due to collective dismissal based on economic, technical, organisational or production causes.

j) Due to the will of the employee, based on a breach of contract by the employer.

k) Due to dismissal of the employee.

l) Due to objective causes that are legally applicable.

m) By decision of the employee who is forced to leave her job permanently because of being a victim of gender violence.

With these reasons in mind, we should then point out some relevant issues for each of them, irrespective of whether we focus on those that are considered most important in Chapter 9.

Firstly, focusing in this case on termination at the will of the parties - although this issue will be dealt with in greater depth in the following section - we must point out that we are dealing with free employment, this being one of the fundamental characteristics of any employment relationship (Article 1 ET).

Thus, no one can be obliged or feel forced to work for a company if they do not want to. Therefore, the termination of the employment relationship is allowed with the simple agreement of the parties. However, it is important that this manifestation of willingness to terminate the employment relationship must be given freely, without being a situation of abuse of rights mainly on the part of the company.

In this case, generally, the most frequent form is the employee's request for voluntary termination, with the employer's acceptance, signing the document called "*Finiquito*" (in Spanish), and at the same time settling all outstanding obligations between the parties. The employee may request the presence of a legal representative of the employees at the time of signing the receipt of the settlement, stating on it the fact that it was signed in the presence of a legal representative of the employees, or that the employee has not made use of this possibility. If the employer prevents the presence of the representative at the time of signing, the employee may state this on the receipt itself, for the appropriate purposes.

One aspect to bear in mind in this case is that there is no right to compensation on the part of the employee, as they maintain an evident will to proceed to terminate the employment relationship.

On the other hand, in relation to section b) we can say that, by virtue of the principle of personal autonomy, the parties can include in the employment contract all those rights and obligations that they consider relevant, as long as it is not an abuse of rights by the employer, in the sense that it imposes conditions contrary to the labour legislation or the collective agreement, which are inalienable rights of the employee.

One of these agreements is to establish a cause for termination of the employment relationship. This must be stated in writing in the employment contract and is valid for both temporary and open-ended contracts.

This clause cannot be completely outside the employee's own will or activity, i.e. its fulfilment or non-fulfilment cannot depend on the employer's behaviour, as this would provide the employer with a mechanism by means of which he could proceed to dismiss the employee at any time he wishes.

Consequently, those causes that go against the employee's inalienable rights or that the employee has no possibility of avoiding their fulfilment, and therefore the termination of his employment contract, are not valid. For example, the maintenance of the contract by the company with an external client or the maintenance of the workplace in a certain location.

Such clauses are often linked to the achievement of certain objectives. For these objectives to be valid, they must be feasible, considering the employee's situation. Therefore, it is an indication that the clause is void if the same targets are imposed on all employees who have different sales systems. Moreover, they must have been previously negotiated and cannot be left to the will of the company to modify.

In this sense, the STS of 3 July 2020 (rec. 217/2018) resolves a collective conflict in which the nullity of a minimum performance clause established for the fundraisers of this NGO is requested. Also referring to the aforementioned STS of 14 December 2011 (appeal 774/2011) and confirming the criteria of the STSJ Galicia of 18 July 2018 (appeal 30/2016), the Supreme Court concludes that the contractual clause is null and void due, among other aspects, to the fact that it is imposed by the company on all employment contracts in the scope of the dispute, without it being possible to admit in any way that it was freely agreed with the employees. Furthermore, the clause establishes objectives proposed unilaterally by the company, which can also modify them unilaterally, regardless of the intensity of the change, which clashes head-on with the provisions of Article 1.256 Cód.Civ. and with Article 41.1(e) ET.

Similarly, the judgement points out that the mere decrease in the agreed value cannot and in an objective manner signify the concurrence of the cause for termination but must operate considering the different objective and subjective factors. Therefore, the mere fact that the company reserves the right, in the event of non-compliance with the objectives, to replace the termination of the contract with other disciplinary formulas (such as written reprimands, suspension of employment and salary), reveals that the proposed objectives are unreasonable due to the practical impossibility of achieving them. Moreover, it has been fully established that the objectives are impossible to achieve.

On the other hand, turning now to Article 49(c) ET, it should be noted that termination is possible when the agreed term of the employment contract has expired.

In this case, we are referring to the termination of the employment contract when the period previously agreed between the employer and the employee has expired. In this case, the employment relationship comes to an end without the need for a specific cause or a unilateral decision on the part of the employee.

This form of termination is common in fixed-term contracts. In these, a specific period is established for the employment relationship, e.g. a temporary contract for six months or one year. Once the end of the agreed period is reached, the employment relationship is automatically terminated.

In some cases, fixed-term contracts may have clauses or provisions allowing for the extension or renewal of the contract at the end of the initially agreed period. In turn, the employee and employer may agree to an extension or renewal of the contract for an additional period if they so wish.

It should be borne in mind that fixed-term contracts with an established maximum duration, including training contracts, concluded for a duration of less than the legally established maximum, will be understood to be automatically extended up to that period when

there is no express denunciation or extension, and the employee continues to provide services. If the fixed-term employment contract exceeds one year, the terminating party is obliged to notify the other party of the termination of the contract at least fifteen days in advance.

Thus, the contract will be deemed to be tacitly extended for an indefinite period, unless proof to the contrary is provided to show the temporary nature of the service. Consequently, the termination of the employment relationship is essential for the termination of the employment relationship.

When the contract is terminated, except in the case of training contracts and fixed-term contracts due to substitution, the employee will be entitled to receive compensation equivalent to the proportional part of the amount that would result from paying twelve days' salary for each year of service, or the amount established, where applicable, in the specific regulations that apply. They will also have access to unemployment benefit if they have contributed for sufficient time.

On the other hand, focusing in this case on section d) of Article 49 ET, which refers to the employee's resignation, we must say that it refers to a unilateral declaration of the employees will be addressed to the employer to terminate the pre-existing employment relationship without the need to provide any cause. This withdrawal is exercised through a unilateral, constitutive and irrevocable declaration of will, which aims to terminate the pre-existing contractual relationship, but it must be executed by the rules of good faith, which requires compliance with certain requirements such as prior notice and non-abuse.

Thus, in this case, the employee is required to give notice to the employer with the advance notice stipulated in the agreement, contract or what is customary following local customs, and without the need to state reasons.

The employment relationship may also be terminated due to death, severe disability or total or absolute permanent disability of the employee, without prejudice to the provisions of Article 48.2 ET. In this case, it is necessary to mention that, in the event of death due to natural death, the employer shall be obliged to pay certain relatives an indemnity equivalent to 15 days' salary. On the other hand, regarding the incapacity, the company may terminate the employment relationship or give him/her a job under his/her disability, since, if there is complete recovery or the qualification is transformed into partial incapacity, the employee has the right to be reintegrated into the company when there is a vacancy.

Similarly, the employment relationship may be terminated if the employee retires. When an employee reaches retirement age, they have the option of terminating his/her employment relationship and accessing the retirement benefit to which they may be entitled. This may be contributory or non-contributory, and provided that the legal requirements are met.

The employee´s age is a circumstance that modifies his or her capacity to act. Retirement implies that the employee stops working regularly and continuously and voluntarily retires from the labour market.

It is important to note that retirement is a personal decision of the employee, so it does not require the consent or approval of the employer. When opting for retirement, the employee must notify his or her employer of his or her intention to terminate the employment contract. This must be done in accordance with the notice periods established in the contract or the applicable collective bargaining agreement, which as a rule is 15 days.

In this case, following the tenth additional provision of the ET, collective agreements may establish clauses that make it possible to terminate the employment contract when the employee reaches the age of 68 or over, if they meet the requirements of the Social Security regulations for entitlement to one hundred per cent of the ordinary retirement pension in its contributory form. The measure must be linked, as a coherent employment policy objective expressed in the collective agreement, to generational replacement through the full-time, indefinite-term hiring of at least one new employee.

Termination of the employment relationship due to retirement does not entitle the employee to receive any severance pay unless this is established in the applicable collective bargaining agreement. The employee is also entitled to the balance and severance pay. That is, the salaries and other items due up to the date of termination of the employment relationship.

In the same way, we find the same cases related to the figure of the employer, that is, due to death, retirement in the cases foreseen in the corresponding Social Security regime, or incapacity of the employer, without prejudice to the provisions of Article 44, or due to extinction of the legal personality of the contracting party - which must follow the procedures of Article 51

ET. In cases of death, retirement or incapacity of the employer, the employee is entitled to the payment of an amount equivalent to one month's salary. It should be borne in mind that in this case there is no provision for continuity in the business activity by means of figures such as, for example, subrogation.

On the other hand, although we will not go into these issues in depth as there are specific chapters for this, termination can be caused by force majeure that makes it definitively impossible to provide work, collective dismissal based on economic, technical, organisational or production causes; and also by dismissal of the employee or by decision of the employee who is forced to leave her job definitively as a result of being a victim of gender-based violence.

Finally, it should be noted that the employee may also seek to terminate the employment relationship based on a breach of contract by the employer. In this case, it will depend on the type of breach and whether it may - or may not - lead to the termination of the employment relationship. In this sense, we will devote a more specific section to address the casuistry.

3. Termination by the concurrent will of the parties

The contracting parties may terminate the employment relationship voluntarily, requiring the simple agreement of the company and the employee. Thus, both parties may voluntarily terminate the employment relationship and the conditions of such termination obviously depend on what they establish regarding the date, possible compensation, among other aspects.

In this case, the will to terminate must be externalised, both expressly, by verbal or written manifestation, and tacitly, deduced from acts or facts that demonstrate the unequivocal intention to terminate the employment relationship, evidencing an unequivocal, clear and definitive will to leave the job.

What is relevant in this case is that this manifestation of willingness to terminate the employment relationship must be freely given and, in this sense, when the contract is terminated for this reason, no entitlement to unemployment benefit is generated, since the employee is not in such a situation involuntarily. Likewise, the employee is not entitled to receive any compensation when the employment relationship is terminated.

However, when faced with this scenario, it is necessary for the employer to provide the employee with the settlement document, which reflects all outstanding obligations between the parties.

4. Termination due to disappearance or incapacity of the parties

In cases of termination due to the disappearance or incapacity of the parties, it is required that, due to this situation, the company or the work provided is effectively terminated. In other words, in this case, we must move to the scenario in which there is no provision for the possible subrogation of the parties implying the continuity of the employment relationship.

The contract would also be terminated if the employer is a legal entity and it is liquidated, although an objective or collective dismissal of the employees must be processed, and this must be based on economic, technical, organisational or production causes, i.e. the decision of the partners to liquidate the company is not sufficient.

This being the case, it is necessary to fundamentally consider the question of whether we are referring to situations of disappearance or incapacity of the company or the employee:

a) In the case of the employer:

The employment relationship is extinguished by the death of the employer and the consequent notification to the employees by the heir of the non-continuation of the business activity, without the need to resort to a redundancy procedure. In this case, the employee is entitled to at least one month's salary, a minimum that can be improved by the collective agreement or individual contract.

The employment contract will be terminated due to the termination of the legal personality of the employer, when the employer is a legal person and there is no company succession. In this case, termination of contracts must be authorised by the administrative authority, regardless of the number of employees. The employee will be entitled to compensation of 20 days' salary per year of service, prorated by months for periods of less than one year, with a maximum of 12 monthly payments.

Having said that, focusing about incapacity of the company, we find that, beyond the similarity with death, it is required that there be a manifest inability of the fact

that makes it impossible for the employer to develop his managerial faculties.

Referring in this case to the STS 600/2023, 27 September 2023 (appeal no. 4408/2021), the Court has established that a period of ten months between the employer's absolute permanent incapacity and the dismissal of the team is reasonable. In a recent judgement, the court has stated that the employer tried to maintain the viability of its business before dismissing its employees.

Previously, a business owner was found to be permanently and totally disabled, but it took ten months before he dismissed the employees. Case law establishes that the decision to terminate the contracts does not have to be simultaneous with the declaration of incapacity. In fact, the case law allows a "reasonable or prudent lapse" between the two for the employer to evaluate its options and make the best decision.

In this case, the dismissal took place 10 months after the declaration of absolute incapacity. The account of the facts shows that the employer tried to keep his company in operation, the result of which did not allow him to continue with all the employees. It is therefore recognised that there is a causal connection between the employer's illness and the termination of the employee's contract, despite the time that has elapsed. Therefore, it is not necessary that the incapacity and the closure of the company coincide exactly in time, it is sufficient that there is a reasonable period in which a solution has been tried to be found.

b) In the case of the employee:

In the first instance, focusing on termination due to permanent incapacity, this occurs when a employee suffers an illness or injury that leaves them with a permanent incapacity that prevents them from performing their work effectively and safely.

Once the employee applies for the declaration of permanent incapacity through the corresponding legal and medical procedures, if it is granted and the incapacity prevents the continuation of his or her usual employment, the employment contract may be terminated.

In this case, the employee is entitled to apply for the benefits or allowances established in social security legislation or in the applicable collective agreements for employees in a situation of permanent incapacity. In addition, the employee's job will be reserved for the period of 2 years.

It is important to bear in mind that, in these situations of termination of the employment relationship, the employee or his/her legal representatives must notify the employer or the company of the situation, to comply with the procedures and formalities established in the labour and social security legislation.

In this regard, we must highlight the novel Judgment of the High Court of Justice of the European Union of 18 January 2024 (Case C-631/22), which declares Article 49.1(e) ET to be contrary to Community Law, in the part that enables companies to terminate the employment contract of an employee declared to be permanently incapacitated for work, unless the situation is expected to improve within two years.

This proviso is relevant, because if the permanent incapacity could be reviewed before that period (2 years), in no case would the employment contract be terminated, but rather suspended, in accordance with Article 48.2 ET.

Focusing on the case in question, until now, the termination of the employment contract in the event of a declaration of permanent disability - which is not technically a dismissal - operated automatically, without the need for any justification or assessment on the part of the company, as it was a cause for termination of the employment relationship that was autonomous and completely "outside" the employer's will or not. In short, if the competent public body (National Social Security Institute) declared the permanent incapacity, the employment contract was automatically terminated. And that is unless: the applicable collective bargaining agreement required the employee's job to be adapted, or the employee to be relocated to another job compatible with the ailments, if possible, or the company voluntarily decided to grant this better treatment to the employee, despite not being legally obliged to do so.

The relevant change offered by the Judgment of the CJEU analysed consists of imposing on the employer the obligation to try to make reasonable adjustments to another job to guarantee, whenever possible, the continuity of employment of the employee affected by the declaration of permanent incapacity.

In this way, and without prejudice to the foreseeable legislative reform on the matter, the possibility of automatically and without justification terminating the contract of employees in a situation of permanent incapacity, without first exhausting all possible employer

actions aimed at maintaining their employment, disappears.

Indeed, it is necessary to add that for the termination to be in accordance with the law, the company must make the reasonable and necessary adjustments to guarantee the employee's continuity in his job despite the incapacitating situation. In other words, the termination of the employment contract will not be carried out automatically and directly, but rather, whenever possible, the company must guarantee the employee a position in accordance with his pathology and health situation.

Therefore, if such modifications are not possible, or constitute an excessive and disproportionate burden, the company must prove this impossibility and only then can we move into the scenario of contractual termination.

This means an added difficulty to the termination of the employment contract derived from the incapacity of the employees, focusing the role of the company not only on checking if there is another job position adapted or susceptible of being adapted to the employee's situation, but also allowing it to justify and accredit that it is not possible, or even if it were, it would mean an excessive and unjustified burden for the company to relocate the employee to another job position.

5. Termination by decision of the employee

The right to terminate the employment relationship is not exclusively reserved to the employer Termination of the employment relationship by the employee refers to the act by which an employee decides to terminate his or her contractual relationship with his or her employer. It is a right recognised in labour law that allows the employee to terminate the employment relationship voluntarily.

In this case, the employee also has the power to terminate his or her employment contract in certain circumstances, which are established in the ET and in the applicable collective agreements. Specifically, we are referring to Article 50 ET, which expressly states the just causes for the employee to be able to request the termination of the contract based on two fundamental reasons. The first of these refers to the termination of the employment relationship due to the company's failure to fulfil its employment obligations. And, secondly, by simply causing a voluntary resignation or resignation and even in cases of abandonment.

5.1. Termination for prior breach by the employer

For the employee to be able to terminate the employment contract, it is required that the employer's breach is due to the causes set out in Article 50 ET.

Firstly, the precept states that the employee's right to terminate the contract is triggered when there are substantial modifications in the working conditions carried out without respecting the provisions of Article 41 ET and which result in the undermining of the employee's dignity.

Article 41 ET covers substantial modifications of working conditions, which may be agreed by the company when there are proven economic, technical, organisational or production reasons. These are those related to competitiveness, productivity or technical or work organisation in the company.

Substantial modifications of working conditions shall be, among others, those that affect the following matters:

a) Working time.

b) Working hours and distribution of working time.

c) Shift work system.

d) Remuneration system and wage rates.

e) Work and performance system.

f) Duties, when they exceed the limits for functional mobility set out in Article 39 ET.

As can be seen, the substantial modification to the detriment of the employee's vocational training as a cause entitling the employee to request the indemnified termination of his or her employment contract has disappeared. Consequently, the employee affected by a substantial modification to the detriment of his professional training may only challenge it by invoking a formal or procedural defect in its introduction or questioning the concurrence of the economic, technical, organisational or production causes required by Article 41 ET.

When substantial modifications of working conditions take place, the company must respect that, in the case of a decision of substantial modification of working conditions of an individual nature, it must be notified by the employer to the affected employee and their legal representatives at least fifteen days prior to the effective date. On the other hand, if the substantial modification

decision is of a collective nature, it must be preceded by a period of consultation with the employees' legal representatives, lasting no more than fifteen days, which will deal with the reasons for the employer's decision and the possibility of avoiding or reducing its effects, as well as the measures necessary to mitigate its consequences for the employees affected. The decision on the collective modification of working conditions shall be notified by the employer to the employees after the end of the consultation period without agreement and shall take effect within seven days of its notification.

In the cases provided for in letters a), b), c), d) and f) - that is, working hours, working time and distribution of working time, shift work, remuneration system and salary amount, and functions when they exceed the limits - if the employee is harmed by the substantial modification, he shall be entitled to terminate his contract and receive compensation of twenty days' salary per year of service, with periods of less than one year being prorated by months and with a maximum of nine months.

If there is a double requirement that, on the one hand, the company substantially modifies the working conditions without observing the provisions of Article 41 ET and, on the other hand, that this modification is detrimental to the employee's dignity, the employee may request the termination of his or her contract with the compensation corresponding to unfair dismissal.

On the other hand, Article 50 also empowers the employee to terminate the employment contract when there is non-payment or continuous delays in the payment of the agreed salary. Generally, non-payment occurs when the salary is not paid continuously for at least three-monthly payments.

In this case, for the delay in the payment of the salary to be considered a reason for the termination of the contract by the employee, it is necessary that the delay occurs continuously and persistently. And, furthermore, the conduct of non-payment or delay in the payment of wages by the employer must be culpable.

Therefore, in this case, we are faced with the possibility of terminating the employment relationship if the employer does not pay wages regularly and on time, or if there is a significant delay in payment.

STS 8754/2012, of 3 December (Appeal no. 612/2012) condemns the company alleging that there is cause for termination of the employment relationship by paying the salaries of its employees nine months late. In the case, there were irregular delays in payments from the 11th of the current month to the 8th of the following month. The question to be resolved in this appeal for the unification of doctrine consists of determining whether the delays in paying the wages of the two plaintiff employees are sufficient to be considered just cause for the termination of their employment contracts under the provisions of Article 50.1(b) ET.

The judgment also mentions a relevant aspect. According to the literal wording of that decision, "the evolution of the case law of this Social Division of the Supreme Court on the classification of employer breaches of the obligation to pay remuneration on time has experienced a marked tendency towards the objectification of such breaches.

The aforementioned case law doctrine can be summarised in the following points: 1) it is not required for the concurrence of the cause for termination of Article 50.1.(b) ET, the employer must be guilty of non-compliance; 2) in order for the cause of termination based on "non-payment or continuous delays in the payment of the agreed salary" to be valid, only the requirement of seriousness in the employer's non-compliance is required; and 3) this objective criterion of assessment of continuous, repeated or persistent delay in the payment of the salary is not applicable when the delay does not exceed three months (STS 25-9-1995; appeal no. 756/1995).

Finally, the last of the grounds provided for in Article 50 ET is a ground open to any other serious breach of obligations by the employer, except in cases of force majeure. In this case, unlike the two cases mentioned above, it is left to the discretion of the court to determine whether this breach is serious enough to cause the termination of the employment contract. This ground occurs when the employer significantly and repeatedly violates the obligations set out in the employment contract or in the labour law. This serious breach may affect the employee's rights and working conditions. Generally, we find cases of non-compliance in situations arising from sexual or moral harassment.

Examples of serious non-compliance by the employer could include failure to pay social security contributions, which may have negative consequences for the employee in terms of benefits and social rights; or, for example, failure to provide a safe working environment, i.e. if the employer does not comply with occupational

health and safety standards, putting the employee's health and safety at risk.

In such cases, the employee has the possibility to terminate the employment contract unilaterally and without liability, invoking the employer's serious breach. However, it is advisable to collect evidence and documentation to support the serious breach to be able to substantiate your decision. It is important to note that each situation of serious breach will be assessed on an individual basis.

When faced with a serious breach of the employer's obligations, the employee can terminate the employment relationship and, in addition, receive the compensation indicated for unfair dismissal. In other words, the employee may receive the compensation of 33 days per year worked. In the case of seniority prior to February 2012, the compensation will be 45 days and/or 33 days per year worked. Firstly, when the employment contract is after 12 February 2012, the company must pay the employee a severance payment of 33 days per year, up to a maximum of 24 monthly payments (in this case, the severance payment cannot be higher than the result of multiplying the monthly salary by 24).

If the employee's contract was concluded prior to 12 February 2012, for the calculation of the amount of severance pay, the amounts of two different tranches must be added together. For the total number of seniority days accrued before 12 February 2012, a severance payment of 45 days' salary per year worked will be paid, with a maximum of 42 monthly payments. For seniority days accrued after 12 February 2012, compensation of 33 days' salary per year worked will be paid, with a maximum of 24 monthly payments.

However, this is not automatic. The employee must initiate proceedings and wait for a judge to resolve the issue. Thus, the employee must remain in the company until his or her claim is upheld by the court. All this, except in cases where the employer's serious non-compliance endangers the employee's health.

If the company dismisses the employee after the lawsuit has been filed, the employee must challenge the dismissal, which could probably be qualified as null and void due to the violation of the guarantee of indemnity.

5.2. The resignation of the employee. Abandonment

Article 49.1(d) ET states: "the employment contract shall be terminated by resignation of the employee, subject to the prior notice stipulated in collective agreements or local custom".

The employee's resignation is legally a withdrawal. A legal transaction by which an obligatory relationship is terminated, with no other justification than the employee's own will. Resignation is equivalent to the employee's resignation from the contract. By the mere fact of maintaining a contract in force, any employee is fully entitled to resign. In the case of minors, they can resign by themselves without needing (for the validity of their decision to terminate the contract) the assistance of their legal representative.

In the field of labour law, the basis of this institution is to be found in the protection of the employee's freedom and, of course, also in the protective character that informs the system of labour law in favour of the employee.

In the labour law relationship with an employee, only the employee binds his or her own person to the relationship, since the performance to which he or she is obliged is of a "very personal" nature, while the main performance of the employer, in the contract, is fundamentally financial, i.e., payment of the salary.

It is based on these principles that the right to terminate the relationship at any time is justified. However, while a dismissal requires a reasonable cause to be shown by the company, resignation is a free and voluntary act of the employee.

Resignation, at first sight, seems to go against the general contracting principle of contract performance, which indicates that the termination of a contract cannot be left to the discretion of one of the contracting parties alone. However, it seems that the intention is to differentiate between the employer and the employee.

Withdrawal is an exceptional and extraordinary way of terminating binding relationships arising from legal transactions. For this reason, the law reserves this form of termination only for certain types of contracts - including employment contracts - and always admits it in a restrictive manner. By opting for voluntary severance, the employee gives up his or her job and is not entitled to financial compensation from the employer. Similarly, they are not entitled to unemployment benefit. However, the employee is entitled to receive the balance and severance pay. This includes the salary corresponding to the days worked up to the date of effect of the voluntary resignation, as well as any other economic

concept pending payment, such as holidays not taken or extraordinary payments if they were not prorated.

The free withdrawal or resignation of the employee is thus configured as an institution of protection and personal protection for the employee, as well as a legal guarantee of his or her personal freedom.

Voluntary resignation must be communicated in a clear manner and respecting the procedures and deadlines established in the labour regulations and in the employment contract, to guarantee an adequate process and avoid possible conflicts or legal repercussions. To this end, the employee's consent must be clear and unequivocal, i.e. a conscious, deliberate, clear and definite desire not to return to work.

In practice, in addition to an express, clear and definite notice of termination, we can find a tacit form of notice, which is present in various disputes. The tacit form presupposes, according to doctrine and case law, conclusive conduct on the part of the employee that leaves no room for doubt as to his real and true intention to terminate the relationship.

When there is a tactical resignation, i.e. without giving notice, we are in the scenario of a figure known as abandonment. Abandonment of the job is considered a type of tacit resignation, but the intention to terminate must be unequivocally deduced from the employee's contemporaneous and subsequent acts, so that there is no abandonment when, for example, he tells his colleagues that he has been dismissed and then files a conciliation petition for dismissal.

The employee's abandonment does not constitute an autonomous cause for termination of the employment contract but must be understood within the framework of Article 49.1 (d) ET, as a case of defective resignation, due to non-observance of the requirement of prior notice. For there to be abandonment of work, there must be an explicit (express or tacit) manifestation of the employee's will to terminate the employment relationship. If there is abandonment, the contract is understood to be terminated without the need for the employer to dismiss; if there is not, the employee's absence constitutes a breach of contract justifying disciplinary dismissal.

In this case, the employee may be entitled, in addition to claiming compensation for the damages caused to the company, to a deduction from the employee's pay for the days for which notice was not given.

In other words, we may find ourselves faced with a resignation by means of written or oral signs addressed to the employer, as it is a receptive decision; or by means of behaviour from which it is possible to deduce this intention to terminate the employment. Thus, it has been declared that the employee's resignation does not have to conform to a formal declaration of intent; it is sufficient that the conduct followed by the employee indisputably manifests his or her option for the termination or extinction of the employment relationship.

In this case we must refer to the STSJ Andalusia, Seville 4th Court, of 31 March 2022, appeal no. 2103/2020. In the present case we have an express declaration of intent by the plaintiff, who on 8 June 2018 stated before witnesses that he would not return to work. And the fact that this constitutes a categorical, clear and unequivocal manifestation of intent, which makes clear, beyond any doubt, his intention to terminate the employment relationship, can be deduced from his subsequent actions, which tacitly confirm that express manifestation of intent, as he stopped going to work, abandoning it, during the following working days. This shows, as stated above, that it was a decision expressed without subsequent retraction. On the other hand, the employee has not provided any justification for such behaviour, i.e. he has not provided any explanation as to why he stopped coming to work during the following working days after his statement on the 8th that he would not return to work, other than what such behaviour apparently seems to confirm, i.e. that it was indeed his intention to stop working definitively on the 8th".

For all the above reasons, it concludes, as did the Social Court, that the employment relationship was terminated at the employee's will, and therefore there was no dismissal but rather resignation, due to an unequivocal intention to abandon the employment relationship.

Likewise, the resignation must be unequivocal in relation to the will expressed, which must consist, precisely, in the determination to permanently terminate the employment. For this reason, the temporary, even prolonged, absence of the employee from the company and the job should not automatically lead to the existence of a resignation if it is not accompanied by a clear intention to definitively terminate the employment and other clear and decisive external manifestations of that intention to terminate the employment. An absence or abandonment of the employee, of these characteristics, may constitute, eventually, a just cause for disciplinary

sanction or even dismissal for unjustified absences, but it is not, always and necessarily, a withdrawal.

Normally, 15 days' notice is required, and, in the event of non-compliance, it is deducted from the settlement. A relevant aspect that should be highlighted is that during the notice period, the employee may withdraw. Regarding this casuistry, we may encounter certain difficulties when there is no express communication from the employee to terminate the employment relationship, but rather, if applicable, tacit behaviour. What is recommended in this case is that, when there is a notice period and there is a tacit resignation or the employee merely expresses to the employer that he will not continue in the company, without further specification, but fails to comply with the notice, by no longer attending his job, the most prudent and correct thing to do is to wait for the notice period to elapse before terminating the employee, with the certainty that it is then clear that the employment relationship has been terminated by resignation under Article 49.1(d) ET.

On the other hand, when there is no notice period and the aforementioned situations occur, for greater assurance, it seems advisable for the employer to notify, with acknowledgement of receipt, a deadline for the absent employee to join the company and, after the expiry of that period, if the employee does not join the company, it is understood that the employee has resigned and the company proceeds to terminate the employee's employment.

Finally, we can point out a case that will involve the termination of the employment relationship by the employee during what is known as the probationary period, where the employee's decision to terminate the employment contract without the need to allege a specific cause. The probationary period is an initial stage in the employment contract in which both the employer and the employee could assess the employee's suitability for the job and the working conditions.

About the probationary period, we must highlight STS 270/2023, appeal number 1269/2022 of 12 April 2023. TS reiterated that the clause regulating the probationary period must be clear, unequivocal and set out the specific duration, and that a mere generic reference to the collective agreement is not valid (reiterating doctrine 1246/2021 of 9 December).

In fact, in the case of the judgment, the employment contract established a "trial period according to the agreement", without further details. The collective agreement establishes several trial periods with maximum durations varying between 15 days and 6 months depending on the professional category of the employee. Therefore, the collective agreement does not set specific durations for each of the trial periods.

In this regard, the TS considers that the employee's right to a written determination of the exact duration of the trial period has been infringed, which created serious legal uncertainty for her in relation to the scope of a contractual clause allowing the termination of the employment contract, without any compensation whatsoever.

The probationary period may vary according to the terms of the employment contract or the applicable collective agreement. During this period, the employee has the option to resign from the job without incurring any legal consequences or compensation, and without any notice period being applicable.

When resigning during the probationary period, the employee is not obliged to justify the reasons for his or her decision or face financial penalties. This option allows the employee to assess whether the job matches his or her expectations and skills, and the employer to assess the employee's performance and adaptation to the job. It is important to note that in cases where the employee was previously receiving unemployment benefits, if they leave the relationship during the probationary period, they will not be able to resume unemployment benefits.

Dismissal

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1. Termination by the employer's decision: dismissal

Every employment relationship has a start date and a termination date. With the termination of the employment contract, the obligations between the employee and the employer are definitively extinguished. The causes of termination are diverse, and may depend on the will of the parties or be due to objective circumstances beyond their control. In short, and very briefly, the termination of the employment contract is nothing more than the end of the employment relationship, the moment in which an employee ceases to render their services for a specific employer.

There are various causes for termination of the contract that affect the employer's person: force majeure (Article 49.1(h) ET), collective redundancy (Article 49.1(i) ET), disciplinary dismissal (Article 49.1(k) ET), objective causes (Article 49.1(l) ET) and death, disability, retirement or extinguishing of the employer's legal personality (Article 49.1(g) ET).

This generates a series of obligations for the employer at the time of the termination of the contract, in particular, two:

- To propose a settlement document for the amounts owed to the employee. This proposal will be communicated together with the termination notice.
- To issue the company certificate so that the employee can request the unemployment benefit in case they are entitled to it.

2. Dismissal as a causal institution

The aspiration of the employee is stability in his employment, although they also have the right to terminate their relationship when they deem it convenient and opportune, pleading their right to work and to the free choice of profession or trade under Article 35.1 CE.

On the other side, the employer aspires to a wide margin of freedom in the hiring and management of his employees, pleading his freedom of enterprise under Article 38 CE.

The legal system has taken care to cover these conflicting interests, but without forgetting the desire to protect the rights of the employee, although this aspiration has slightly faded with the passing of time in the face of the position of power held by the employer within the employment relationship. As a result, the following are the principles that inspire the legal provisions on the termination of the employment contract:

- *Principle of causality*: the causes for termination of the employment contract are only those set forth in Article 49 ET. However, dismissal without cause is possible: since 1994, *ad nutum* dismissal is not null but wrongful, which only entails an economic compensation to be paid by the employer.
- *Principle of indemnification or compensation*: unless the termination is directly linked to the will of the employee, the termination of the employment contract usually entails an economic compensation in favor of the employee. Its amount depends on the reasons that have led to the termination and on the damage it may cause to the employee.
- *Principle of proceduralization*: the termination of the employment contract must follow, as a general rule, certain pre-established steps, among which it is required to communicate the cause in writing to the employee.

3. Disciplinary dismissal

Pursuant to Article 58 ET, employees may be sanctioned by the management of the companies for non-compliance with labour law, in accordance with the graduation of faults and sanctions established either in the ET or in the Collective Bargaining Agreement. Article 49.1(k) ET includes the dismissal of the employee as one of the causes for termination of the employment relationship.

Disciplinary dismissal as a very serious penalty will require written communication to the employee in compliance with a series of requirements, but always bearing in mind that very serious misconduct is subject to a prescription period of sixty days from the date on which the company became aware of its commission and, in any case, six months after it has been committed.

3.1. Definition of disciplinary dismissal

It is regulated in Article 54 ET, although it must be completed with precepts outlined in Articles 55 and 57 ET, as well as in Articles 103 and following LRJS.

Briefly, we can say that disciplinary dismissal is the termination of the employment contract at the will of the employer based on a "*serious and culpable breach by the employee*" (Article 54.1 ET). It is the most serious

sanction that can be imposed by the employer in the exercise of his disciplinary power and, for this reason, the characteristics of seriousness and transcendence must necessarily be present.

Thus, the infraction must be serious, but also culpable; in other words, it must be imputable to the employee, whether due to fraud, fault, malice or negligence. In addition, it must be a breach of contract and in no case can it be a reaction to the exercise of the rights granted to the employee by law.

The seriousness of the employee's conduct must be assessed by its magnitude, entity or importance. Plus, it must be evaluated according to its nature and its frequency or repetition, as well as the particular circumstances during the rendering of services, the characteristics of the job position and even the professional qualifications of the employee. Also, a gradual assessment must be made to achieve the adequacy between the facts, the person and the severity of the sanction.

As we have already mentioned, dismissal is the most serious sanction that can be applied within the scope of an employment relationship, and for this reason, the employer can only resort to it when the circumstances of the specific case merit such seriousness.

3.2. Substantive aspects: grounds for disciplinary dismissal

Disciplinary dismissal is related to the so-called "contractual breaches" of Article 54.2 ET that can give rise to disciplinary dismissal. These causes are as follows:

a) Repeated and unjustified lack of attendance or punctuality to work.

We are faced with a double cause: non-attendance and unpunctuality. Obviously, only unjustified absences from work are punishable. As regards unpunctuality, the cases in which the employee arrives late to work, leaves early or is absent unjustifiably during the course of the working day must be considered, since what is penalized is the failure to comply with the required time spent at the workplace.

In addition, this conducts must be "repeated", which makes them incompatible with the proper performance of work in the company. The Collective Bargaining Agreement will determine the number of absences or tardiness that may give rise to the employer's decision to terminate the employment. The employer must prove the employee's absences or lack of punctuality.

b) Indiscipline or disobedience in the workplace.

Compliance with the employer's orders arises from the regular exercise of the employer's power of direction and organization (Article 20.2 ET), as well as from the employee's duty of obedience ex Article 5(c) ET. This duty of obedience is a consequence of the employee's subordinate position derived directly from the employment contract that binds them to the company under "the scope of organization and direction of another person" (Article 1.1 ET). By indiscipline we must understand the attitude of open and confrontational rebellion against the orders received from the employer in the exercise of his managerial functions, as well as the conscious and willful breach of the obligations under the employment contract. It must be a serious, significant and unjustified breach so, consequently, disobedience that does not result in damage to the company cannot be punished by dismissal.

c) Verbal or physical offenses against the employer or people working in the company or family members living with them.

Regarding companies that have the form of a legal entity, the offenses would be referring those people who represent it. In the case of verbal offenses, these must be judged within the context in which they take place. The seriousness must be assessed according to the circumstances in which they occur, since the same expression or conduct may or may not be offensive depending on its context. However, physical aggressions are always considered a serious misconduct in the workplace. In case of manifestations that are a consequence of the constitutionally protected right to freedom of speech, there can be no sanction, although it should be remembered that in the labour sphere this right is limited by the obligations inherent to the contract, such as good faith.

d) The transgression of contractual good faith, as well as breach of trust in the performance of work.

This cause considers as punishable by dismissal the breach of the duty of upholding good faith that the law imposes on the employee (Articles 5(a) and 20.2 ET), also known as the so-called breach of mutual trust. This is a generic and ambiguous cause that makes it possible to sanction very diverse behaviors of the employee and that contains innumerable situations that do not find legal

motivation in the rest of the sections of Article 54.2 ET (*v.gr.* diligence, collaboration or not engaging in unfair competition). Furthermore, the existence of economic damage to the company is not essential. Abuse of trust occurs when an employee takes advantage of their condition as such to commit an act of misconduct.

e) Continuous and voluntary decrease in the normal or agreed work performance.

The employee is obliged to provide a regular level of productivity to the employer. Therefore, underperformance below the usual or agreed level is cause for sanction and, even, for disciplinary dismissal when it is serious enough. To constitute grounds for dismissal, decrease of the normal or agreed work performance must be continuous or prolonged in time (in quantity or in quality) and have no justification. In addition, it must be voluntary or, at least, derived from negligence or lack of diligence of the employee. It is essential to specify certain parameters or thresholds of the employee's "normal" performance that will serve as grounds for dismissal in the event that they are not achieved. The "agreed performance" is the one referred to a previous agreement between employer and employee that is taken as a comparative reference to determine the decrease in performance.

f) Frequent drunkenness or drug addiction if it has a negative impact on work.

The drunkenness or drug addiction contemplated in this article must be frequent and have a negative impact on the professional activity that the employee carries out in the company. This cause is linked to the duties of diligence and good faith, as well as to the obligation of observing health and safety measures at work. These situations are extremely serious and extraordinarily difficult to prove, being necessary medical tests, with the possible refusal of the employee due to their affecting the right to privacy and even the constitutional right to dignity and honor. It must be frequent, that is to say, a conduct repeated regularly over time, so in cases of occasional or sporadic drunkenness or drug intoxication, there is no legal cause for dismissal, and it can even be used as a mitigating circumstance for other offenses. It does not apply to people with drug addiction or drinking problems who are in the process of rehabilitation or social reintegration when they have been hired by an insertion company.

g) Harassment based on racial or ethnic origin, religion or beliefs, disability, age or sexual orientation and sexual harassment or harassment based on sex against the employer or people working in the company.

Harassment can be defined as any behavior, be it verbal or physical, that has the purpose or the effect of violating the dignity of a person. It must be potentially harmful, unwanted and exercised repeatedly against one or more employees in the workplace, creating a degrading or offensive environment. The situation of harassment generates an intimidating, hostile and humiliating work environment for those who suffer it, and may affect the safety, health and physical and moral integrity of the employee who suffers from it.

These conducts often go unpunished due to the difficulty of gathering evidence that may prove them. The absence of criminal liability regarding these behaviors does not imply a lack of liability in other legal areas.

3.3. Form requirements

Disciplinary dismissal is an act of unilateral will of the employer and, therefore, requires compliance with a series of formalities established as guarantees for the employee (Article 55 ET as well as 103 and following LRJS).

The aim of these requirements is to facilitate the employee's knowledge of the reasons why they are dismissed, so that they can organize their defense against the employer's disciplinary measure. Therefore, Article 55.1 ET states that the dismissal "*must be notified in writing to the employee, stating the facts that motivate it and the date on which it will take effect*".

In practice, there may be situations in which the dismissal is produced through verbal communication or simply tacitly (through external acts that imply the dismissal): in such cases the dismissal will be considered unfair for not following the required formal procedure. However, it will be the employee who, not being in agreement, will have to challenge the possible wrongfulness or even nullity of the dismissal by filing the corresponding lawsuit before the Social Jurisdiction.

3.3.1. The termination letter

As we have said, in order for the disciplinary dismissal to be classified as lawful -in other words, justified and with a proven cause- it is essential that it is communicated in writing to the employee (Article 55.1 ET).

The letter of dismissal is the document through which the employer's intention to dismiss the employee is communicated, and it must contain the facts on which the dismissal is based and the date on which it will take effect.

The letter of dismissal must be issued by the person who holds the management and disciplinary power in the company, since it is in their will where the decision to dismiss resides. However, this decision can also be exercised by the legal representative of the company when they hold the capacity to exert disciplinary power. The letter serves to prove the legal situation of unemployment. In addition, such communication must contain at least the following:

a) The facts that give grounds for the dismissal

This requirement is established in order to inform the employee of the reasons for the employer's dismissal so that they can challenge it. It must clearly and forcefully state the employer's decision to dismiss the employee, "*stating the facts that motivate it and the date on which it will take effect*", although, "*other formal requirements for dismissal may be established by collective agreement*" (Article 55.1 ET).

Said content must be concrete, clear and precise, including the misconduct to which it refers, the days on which it was committed, etc. Moreover, it is not enough to refer to the specific type of fault imputed to the employee, but the facts or conduct attributed to the employee must be clearly and precisely stated. If they are ambiguous, it can generate defenselessness to the employee, causing the dismissal to be ruled wrongful.

The degree of detail required will vary from one case to another and will depend on the type of breach attributable, the employee's position in the company, etc. The termination letter serves to define the terms of the judicial controversy, since the employer cannot present in court facts other than those contained in this letter.

b) The date on which the misconduct was committed

It is essential to specify the date on which the misconduct that gives grounds for the dismissal took place, otherwise the employer's decision to terminate will be considered wrongful.

There is an exception to this general rule: when the misconduct is continuous or of great transcendence due to its seriousness, its notoriety makes it unnecessary to determine or specify its date.

Dates are very important since the prescription period for imposing the penalty of dismissal as a consequence of a misconduct classified as very serious is sixty days from the date the company becomes aware of it (Article 60.2 ET).

In cases in which the fault is constituted by several events, the prescription period will be computed as of the commission of the last computable event. For example, in the event of continuous unpunctuality of the employee, the last day on which the employee was late will be the one considered as the reference point for calculating the prescription period.

c) The date on which the dismissal will take effect

In disciplinary dismissal, it is not necessary to respect a notice period, unless it has been established in the applicable collective bargaining agreement. The only time limitation that always applies is that of the prescription period of the misconduct committed. Furthermore, the effective date of the dismissal does not necessarily have to match a working day, and may even coincide with the date on which the misconduct was committed or with the date of reception of the termination letter.

This effective date of the dismissal is used to calculate the time in which the employee will be able to challenge the dismissal through the filing of a lawsuit (20 working days).

3.3.2. The importance of the termination letter being correctly notified

The employer must ensure that the termination letter has been notified in writing effectively to the employee. It will be up to the employer to decide which means is the most suitable for the notification, but they must make sure that the chosen one serves to prove the delivery.

It is important that the chosen means of delivery allows the employee to acknowledge receipt of the letter, so that the legal requirement that the employee be reliably informed of the reasons and circumstances under which they are being dismissed, as well as the date on which the dismissal will take effect, can be deemed to be fulfilled.

The termination letters are usually delivered by hand -making the employee sign a receipt- or by postal mail, in which case it is essential that the letter is dated and stamped at the post office from which it is sent (burofax), in addition to being certified and allowing acknowledgment of receipt.

In case the employee refuses to receive the communication or it is not possible for reasons attributable to the employee to receive it, the lack of effectiveness of the notification could be attributed to the employee, thereby releasing the employer from any liability with regard to such breach of form. In order for this to happen, it is necessary that the employer has sufficient evidence or witnesses to prove the fault of the employee in the non-receipt of the notice. Under such circumstances, the dismissal will produce all its effects on the date indicated on the letter.

3.3.3. Communication to directly-elected representatives and union representatives

Dismissal is the most serious sanction that can be imposed by the employer. When a dismissal is carried out, the employer is obliged to inform the employees' representatives (Article 64.1. 7º ET and Article 10.3 LOLS).

3.3.4. Cases of special protection

A) Disciplinary dismissal of employees affiliated with a trade union

Article 55.1 ET and Article 10.3. 3º LOLS recognize the right of union delegates, elected in accordance with Article 10.1 LOLS, to be heard prior to the adoption of disciplinary measures when these affect members of their union who provide their services in the same work centre in which they exert their representation. This way, the law provides a reinforced protection for unionized employees against the disciplinary power of the employer.

Article 55.2 ET and Article 108.1 LRJS consider that the failure to comply with this requirement entails the declaration of wrongfulness of the dismissal due to lack of the required form.

It is sufficient that the employer addresses the union delegate and informs them of the planned dismissal, as well as the reasons for it and the relevant evidence of the veracity of the alleged facts. It is advisable to do this in writing.

B) Disciplinary dismissal of employee representatives

Article 55.1 ET establishes that "*when the employee is a directly-elected representative of the employees or a union delegate, a contradictory file will be opened, in which, in addition to the interested party, the other members of the representation to which they belong, if any, will be heard*" (also Articles 68 ET and 10.3 LOLS). This is also applicable to prevention delegates (Articles 30 and 37 LPRL).

Regarding the directly-elected representatives, according to Article 68(a) and (c) ET, this guarantee applies during their term of office and during the year following the date of their termination, unless the term is terminated by revocation or resignation.

Collective bargaining will be responsible for setting out the protocol of the contradictory file in the collective bargaining agreement that is reached.

3.4. Procedural defects and new dismissal

The legislator establishes the wrongfulness of the dismissal in case it suffers from procedural defects. In such cases, it is possible for the employer to carry out a second disciplinary dismissal, based on the same facts, rendering the first one invalid.

There law contemplates two opportunities to correct these procedural defects by means of a new dismissal:

3.4.1. Rectification contemplated in the ET

According to Article 55.2 ET, in the event of procedural defects in the dismissal, it is possible for the employer to remedy such formal defects with a second dismissal. This is a new dismissal which must comply with the requirements omitted in the first one and that will not link its effects to the first one, but will be a new dismissal in full rule, taking effect only from the date on which it occurs.

This new dismissal must be carried out within the twenty calendar days immediately following the effective date of the first dismissal. When the employer carries out a second dismissal to remedy the procedural defects of the first one, they must pay the employee the wages accrued in the days elapsed between the first dismissal and the second one, keeping them registered with the Social Security during these days.

When carrying out the second dismissal, the employer may include new reasons for justifying the termination

decision, since the legislator authorizes a new dismissal with all its consequences.

3.4.2. Rectification contemplated in the LRJS

Article 110.4 LRJS contemplates the possibility of a second opportunity for dismissal in cases where there is a judicial declaration of wrongfulness of the first dismissal due to lack of form, having opted the employer for the employee's reinstatement. In these cases, the employer has a period of seven days from the notification of the judgment to do so –experts consider these seven days as calendar days-.

On the other hand, as explained before, this second dismissal will not be a mere rectification of the first one, but a new dismissal that will take effect from its date. Once this seven-day period has elapsed, even if the misconduct for which the dismissal was decided is not time-barred, the employee may not be dismissed for the same acts.

3.5. Types of ruling and their effects

3.5.1. Immediate effects of dismissal

The sanction of dismissal has immediate extinctive effects in all cases, even when the aforementioned requirements are not met. Therefore, from the moment of the dismissal, the obligations and rights of the employee and the employer are extinguished, since the employment relationship has been terminated -however, without prejudice to the subsequent judgment of its lawfulness-.

Once the employment contract has been terminated, the employer must provide the employee with the severance payment in order to settle the amounts owed to the employee.

Within twenty working days after the date of effect of the dismissal (Article 59.3 ET), the employee may challenge the dismissal, first in the conciliation phase and then by means of a lawsuit. If the employee allows this period to elapse, the dismissal will become final and there will be no right of appeal against it.

When the employee contests the dismissal, it will maintain its extinctive effects as long as there is no conciliation agreement or judicial pronouncement in this regard. After the challenge, and in accordance with Articles 55.3 ET and 108.1 LRJS, the dismissal can be ruled as:

- **Null**: This ruling deprives the dismissal of its effects as if it never existed, and the employer must reinstate the employee in the same position and working conditions they enjoyed prior to the dismissal.
- **Wrongful or unfair**: This ruling deprives the dismissal of its effects from them moment it is issued, giving the employer the choice to reinstate or compensate the employee economically (in some exceptional cases this choice will be left to the employee).
- **Lawful**: This ruling considers the dismissal valid and adequately motivated in accordance with the law.

Regardless of whether the employee contests the dismissal or not, and regardless of the final ruling, the employee will be legally unemployed from the moment the dismissal takes effect.

3.5.2. Procedural salary

On the one hand, Article 56 ET only stipulates that in cases of wrongful dismissal and in the event that the employee opts for reinstatement, they will be entitled to the procedural wages. Evidently, when the reinstatement depends on the employer, it will never take place, since this would imply an important economic cost for the company, probably higher than the economic compensation for wrongful dismissal.

These will be equivalent to an amount equal to the sum of the wages not received from the effective date of the dismissal until the notification of the judgment declaring the wrongful dismissal or until the employee has found another job, if such placement was prior to said judgment and it can be proven by the employer the wages received by the employee for the new employment, so that this salary can be discounted from the processing wages.

On the other hand, Article 55.6 ET, referring to null dismissal, states that the employee must be paid the wages lost from the date of dismissal until the date of reinstatement.

Despite the fact that they have a compensatory nature, procedural wages are subject to Social Security contributions. If the employee has requested unemployment benefits during the process of challenging the dismissal and has begun to receive such benefits, the amounts received will be deducted from the processing wages by the employer, who will have to reimburse such amounts to the public administration.

Pursuant to Article 116.1 LRJS, in cases in which more than 90 working days have elapsed from the date on which the dismissal claim was filed until the ruling of the court declaring the dismissal to be wrongful for the first time, the employer, once the ruling has become final, may claim from the State the wages paid to the employee that exceed said period.

3.6. Lawful Dismissal

3.6.1. Requirements for this ruling

Articles 55.4 ET and 108.1 LRJS establish that "*the dismissal will be considered fair when the breach alleged by the employer in its written communication is proven*". A lawful dismissal is one that is adequately justified in accordance with the law. However, it must also comply with the formal requirements of the law and the applicable collective bargaining agreement, otherwise it will be considered wrongful due to lack of form (Article 55.4 ET).

The dismissal is justified because the employee's non-compliance, which has been the cause of the disciplinary sanction, is proven. It is the employer who has the burden of proof, as stipulated in Article 105.1 LRJS. It must be remembered that the termination letter must contain the proven facts that motivate the decision to dismiss on disciplinary grounds (Article 55.1 ET), and the defendant employer cannot present at trial "*other grounds for opposition to the claim than those contained in the written communication of the dismissal*" (Article 105.2 LRJS).

3.6.2. Effects of said ruling

The ruling declaring the lawfulness of the dismissal validates the termination of the contract decided by the employer, and the employee will not be entitled to compensation or procedural wages (Articles 55.7 ET and 109 LRJS).

In addition, this ruling proves that the employee is in legal situation of unemployment, so they may be entitled, if they meet the requirements of the law, to unemployment benefit, unless they have already requested it once the termination letter was received.

3.7. Wrongful dismissal

3.7.1. Due to form requirements

According to Article 55.4 ET, the disciplinary dismissal will be considered wrongful when its form does not comply with the legal requirements, as well as those deemed necessary by the applicable collective bargaining agreement. In these cases, the wrongfulness is automatically declared, without considering the arguments given by the employer.

3.7.2. Due to substantive aspects

The dismissal on substantive grounds is declared when the breach alleged by the employer is not proven (Articles 55.4 ET and 108.1 LRJS), in other words, when the judge considers that the misconduct imputed to the employee on the termination letter has not been proven by the employer.

Moreover, it is essential that the judge considers that such facts are sufficiently important as to be considered "*a serious and culpable breach*" (Article 54.1 ET) that can lead to the maximum sanction contemplated by our Labour Law -disciplinary dismissal-, otherwise the dismissal can also be declared wrongful.

3.7.3. Effects of the declaration of wrongfulness

Despite the enforceability of the dismissal from the date contemplated on the termination letter, once it is declared wrongful, the employer will be given two options: to reinstate the employee wrongfully dismissed or to compensate them. If the employer chooses the first option, the effects of the dismissal will extinguish and the employment relationship will return to the course prior to the dismissal. If the employer chooses the second option, they will have to economically compensate the employee in exchange for terminating the employment relationship.

In general, the employer has the right to choose between compensation or reinstatement, except in certain cases such as the dismissal of a employees' representatives (Article 56.4 ET) or of a employee responsible for prevention (Articles 30.4 and 35 LPRL).

a) Economic compensation

Article 56.1 ET specifies that "*when the dismissal is declared wrongful, the employer, within five days from the notification of the ruling, may choose between the reinstatement of the employee* (...)", or the payment of

an economic compensation that will terminate the employment relationship, despite the wrongfulness of the dismissal.

The option between reinstatement or compensation must be exercised in writing or by appearance before the Secretary of the Labour Court, within five days after notification of the judgement declaring the dismissal to be wrongful (Article 110.3 LRJS). If the option is not exercised within the indicated period, it will be understood that the employer opts for reinstatement (Article 56.3 ET).

The economic compensation will be "thirty-three days' salary per year of service, prorated by months for periods of less than one year, up to a maximum of twenty-four monthly payments" (Article 56.1 ET). Fractions of a month, regardless of the number of days, are considered as a full month.

The salary to be taken into account is that of the date of dismissal; specifically, the salary received in the last month plus the corresponding proportion of the extraordinary payments.

Regarding the computable period of service, it must be taken into account the one rendered from the date of entry to the date of dismissal. This period does not necessarily have to correspond to seniority, since there are cases such as forced leaves of absence that are taken into account for seniority but not for the calculation of this compensation.

b) Reinstatement

When reinstatement is chosen, the employee must return to the company and have "*the same conditions that applied before the dismissal*" (Article 110.1 LRJS).

The employer must communicate to the employee in writing, within ten days following notification of the judgment, the date of their reinstatement, which must take place within a period of no less than three days following receipt of the written notice (Article 278 LRJS).

When the employer opts for the reinstatement, but does not comply with it despite having communicated it, it cannot be carried out later, and the employment relationship must be declared as terminated with the right to the corresponding compensation for wrongful dismissal.

3.8. Null dismissal

3.8.1. Requirements for this ruling

A null dismissal is one in which the causes set forth in Articles 55.5 ET and 108.2 LRJS concur. Specifically, in accordance with Art. 55.5 ET, dismissals will be null if they are based on "*any of the causes of discrimination prohibited by the Constitution or the Law, or if they occur in violation of the fundamental rights and public liberties of the employee*".

In addition to said circumstances, the following situations also give grounds for the declaration of nullity of the dismissal (Article 55.5 ET):

a) Dismissal of female employees who are victims of gender violence for exercising the specific labour rights they have.

b) Dismissal of employees during the period of suspension of the employment contract due to birth, adoption or foster care; risk during pregnancy; risk during breastfeeding; parental leave of 8 weeks for the care of children or foster children until the child reaches the age of eight, ex Article 48.bis ET; illnesses caused by pregnancy, childbirth or breastfeeding, or when the dismissal is notified on a date such that the notice period granted ends within these periods.

c) Dismissal of pregnant employees, during the period between the beginning of the pregnancy and the beginning of the suspension period due to childbirth.

d) Dismissal of employees who have requested or are taking leave due to accident, serious illness, hospitalization or surgery (Article 37.3(b) ET); breastfeeding (Article 37.4 ET); hospitalization of a premature child (Article 37.5 ET), care of a child under 12 years old and disabled people (Article 37.6 ET); or adaptations to the work schedule to balance family and work life (Article 46.3 ET).

e) Dismissal of employees after having returned to work at the end of the periods of suspension of the contract due to birth, adoption or foster care (Article 45.1(d) ET), provided that no more than 12 months have elapsed after the date of birth, adoption or foster care.

3.8.2. Effects of the declaration of nullity

The declaration of nullity of the dismissal imposes on the employer the reestablishmnet of the employment

relationship with the dismissed employee, so that the only option is to reinstate said employee in his job and pay, in addition, the wages lost from the date of the dismissal (Article 55.6 ET).

In case of nullity, the judgment "*will be executed provisionally*", even if appealed by the employer or the employee (Article 113 LRJS). Furthermore, in the event that the null dismissal was the result of discriminatory causes, the employer may be ordered to pay the employee additional compensation for damages (Article 183 LRJS).

If the null dismissal has affected a directly-elected representative or a union representative, the judicial body must adopt the necessary measures to guarantee the correct exercise of their representative functions (Article 302 LRJS).

As regards enforcement, judgments declaring the nullity of a dismissal must be enforced "*in their own terms*" (Article 282(b) LRJS), which implies the immediate reinstatement with the payment of the wages lost. Therefore, once the employee has requested reinstatement, the judge will require the employer to reinstate the employee in his position within three days (Article 282.2 LRJS).

If the reinstatement is not carried out within said term or is carried out irregularly, the employee, within twenty days following the third day in which the reinstatement should have been carried out, may request before the court the execution of the judgment. After this, the judge will hear the parties and will issue an order. If the judge considers that the reinstatement was not in accordance with the law, he will require the employer to reinstate the employee within five days, warning the employer that if he does not do so, the measures established in Article 284 LRJS will be adopted.

In the event that the employer still does not reinstate the employee despite this incident:

- The plaintiff will continue to receive his salary as if he had been effectively reinstated, with the corresponding salary increases. In order for the employee to receive this salary effectively, the judge will issue a writ of execution for an amount of six monthly payments, as many times as necessary until the effective reinstatement.
- The plaintiff will continue to be registered with the Social Security, and the employer will be responsible for the payment of the employer's contributions.
- If the dismissed employee is an employee representative, they will continue to perform the functions entrusted to them by law within the company.

However, the situation may arise in which reinstatement is impossible due to closure of the company. In these cases, which must be proven, the judge may issue an order terminating the employment relationship, and the company will have to pay the lost wages and a compensation of thirty-three days' salary per year of service, with the possibility of being ordered to pay a supplementary compensation of a further fifteen days per year with a maximum of twelve monthly payments considering the circumstances and the damage caused to the employee (Article 281.2 LRJS).

4. Individual dismissal for objective causes

4.1. Grounds for an individual dismissal for objective causes

Article 52 ET states that the employment contract may be terminated for the following objective causes:

a) Ineptitude of the employee.

b) Lack of adaptation of the employee to the technical modifications in his job.

c) Economic, technical, organizational or production causes, so long the dismissal affects less than the number of employees established in Article 51.1 ET.

e) Insufficient budget appropriation for the execution of public plans and programs.

4.1.1. Causes related to the employee and the performance of their activity

Among the objective causes that are linked to the employee and the performance of their activity are those included in paragraphs a) and b) of Article 52 ET:

A) Ineptitude

It must be an ineptitude of the employee known or supervening after their effective hiring by the company, since the law expressly states that "*the ineptitude existing prior to the fulfillment of a probationary period may not be alleged after such fulfillment*".

Thus, this cause arises due to a lack of "subsequent" faculties regarding the professional activity, understood as the absence of the necessary conditions to adequately perform the job, which is what determines that the employer can decide to terminate the employment relationship.

The ineptitude can be either due to the lack of preparation or updating of the knowledge necessary to perform the functions corresponding to the job or occur when the employee, for whatever reason, loses their physical or mental aptitudes, preventing them from carrying out his work activity.

If the employee is unfit due to their inefficiency -although having physical or mental aptitudes to carry out their activity-, the employer can use their disciplinary power to dismiss the employee, since the Article 54.2(e) ET establishes as a cause for dismissal "*the continuous and voluntary decrease in the normal or agreed work performance*".

There is another limit that is perhaps not so clearly stated: the existence of unfitness must be assessed in relation to the functions of the job position held, so that, if the employee is assigned functions other than the usual ones -as a consequence of functional mobility ex Art. 39.3 ET or for another reason-, this cause for dismissal cannot be used.

In any case, if the dismissal is challenged, it is the judge who will have to assess the existence or not of the unfitness to perform the functions of the job -with the employer bearing the burden of proof of such unfitness, as well as of its knowledge or origin subsequent to the contract-, since it is the employer who alleges it in order to carry out the termination of the contract.

B) Lack of adaptation

The "*lack of adaptation of the employee to the technical modifications made to his job, when such changes are reasonable*" is an objective cause for dismissal.

It has been said that it is a "special case" of unfitness for work, with the peculiarity that the origin of the lack of adaptation "is external to the employee", since it does not lie in the personal or professional conditions of the employee but in the changes made to the job.

In order to carry out a dismissal for this reason, two requirements must be met:

- The employer must first offer the employee a course aimed at facilitating adaptation to the changes made. The time spent on the training will be considered in any case as effective working time and the employer will pay the employee the average salary they have been receiving.
- At least two months must have elapsed since the modification was introduced or since the end of the training aimed at adaptation.

4.1.2. Objective dismissal for causes related to business activity

Article 52 ET contains two causes for dismissal that have nothing to do with the employee but are based on internal or external circumstances of the company that require adjustments in the workforce, allowing for a better economic position of the company. In these cases, the dismissal does not necessarily have to be individual since it can affect a plurality of employees, as will be explained later on in this chapter.

A) Due to economic, technical, organizational or production causes

It occurs when any of the causes set forth in Article 51.1 ET apply and the termination affects less than the number of employees specifically established in the law.

More concretely, the number of terminations through this type of objective dismissal must be less than:

- 10 employees, in companies employing less than 100 employees.
- 10% of the number of employees of the company, in companies with between 100 and 300 employees.
- 30 employees in companies with 300 or more employees.
- 6 employees, if the dismissals affect the totality of the staff due to the closing down of the company.

Given that the procedure for collective redundancy is more complex than the one established for objective dismissal, and that the employer could try to avoid this procedure by "splitting" the terminations of the contracts to avoid reaching the number established by the law for the redundancy to be understood as "collective", a time limit of 90 days is established within which all the terminations must be computed, provided that they are at least 5 and that they have occurred in this period at the initiative of the employer, except for termination due

to expiration of the term of the employment contract ex Article 49.1(c) ET –if any-.

In other words, all dismissals occurring in the company's workforce and not only in the work centre must be taken into account. Thus, in these cases, the terminations will have to be understood as "accumulated" and classified, if applicable, as a collective redundancy. Furthermore, Article 51.1 ET *in fine* establishes another additional limit by stating that "*When in successive periods of 90 days and with the purpose of evading the provisions contained in this article, the company carries out terminations of contracts under the provisions of Article 52(c) of this Law in a number lower than the indicated thresholds, and without new causes justifying such action, such new terminations will be considered to have been carried out evading the Law, and will be declared null and void*" (this precaution is also contained in Article 122.2 (c) LRJS).

In relation to economic, technical, organizational or production causes, we refer to what will be said below regarding collective redundancy.

It is the employer who decides which employment contracts they want to terminate for this reason, being able to select those they deem appropriate regardless of the professional category, seniority or type of contract, with the only limit being that he must respect the employees' representatives who have priority of permanence in the company ex Article 52(c) ET.

B) Insufficient budget appropriation for the execution of public plans and programs

A special type of dismissal for economic reasons is contemplated in Article 52(e) ET, which indicates that indefinite employment contracts entered into by non-profit entities for the execution of specific public plans and programs, "*without stable economic endowment and financed by the Public Administrations through budgetary or extra-budgetary annual appropriations resulting from external income of a finalist nature, may be terminated due to the insufficiency of the corresponding appropriation for the maintenance of the employment contract in question*".

Evidently, if these dismissals affect a number of employees equal to or greater than that established in Article 51.1 ET, the collective redundancy procedure must be followed.

A dismissal can be carried out for this reason:

- when the economic endowment foreseen for the project or program is evidently exhausted, or
- when in subsequent editions of these plans or programs the economic subsidy obtained or the funds made available to the non-profit entity are less than those previously granted, which would result in "the insufficiency of the corresponding appropriation for the maintenance of the employment contract in question" to which the provision refers.

It should be remembered that there are two subjective elements to be taken into account in this type of dismissal:

- the dismissing party must be a non-profit entity.
- the dismissed party must be a permanent employee.

The objective element required is that this type of dismissal can only be used for employees hired for the realization or execution of public plans and programs with specific financing, without a stable economic endowment and for external income linked in a finalist manner to the execution of the specific plan or program.

4.2. Procedure in order to carry out an individual dismissal for objective causes

Article 53 ET establishes a procedural channel to carry out the dismissal for objective causes. Consequently, the employer, when dismissing for objective causes, must comply with the material requirements demanded by the specific cause, and also with some formal requirements that serve to guarantee the defense of the dismissed employee. Furthermore, Article 85.2 ET empowers collective bargaining agreements to establish "procedures for information and monitoring of objective dismissals", perhaps due to the possible employer's attempt to avoid the collective redundancy procedure, evading the law in doing so.

4.2.1. Termination letter stating the cause of the dismissal

The employer must communicate to the employee, in writing, its decision to terminate the employment contract and the objective cause that motivates it. This termination letter will allow the employee to know the motivating cause of the dismissal and to prepare their defense. Thus, the employer must indicate in the letter the data referring to the company, the information necessary to identify the employee, and, in general, all those circumstances that justify the decision adopted.

The facts must be described and specified clearly, although it is not necessary for this description to be exhaustive -it is enough with just the right amount of information that avoids the employee's lack of defense-.

Therefore, a dismissal for objective causes that has dispensed with the written termination letter will be considered wrongful, as will also happen in case this letter is insufficient (which can lead to the employee's lack of defense) or when the cause stated in it is not proven.

As establishes Article 53.3 ET, "*the termination decision may be appealed against as if it were a disciplinary dismissal*".

4.2.2. Provision of the corresponding compensation to the employee

Simultaneously with the delivery of the termination letter, the employer must make available to the employee an economic compensation of 20 days' salary per year of service, prorated by months for periods of less than one year and with a maximum of 12 monthly payments. A mere offer of the amount owed is not valid, nor is it possible for the payment or provision to be made after a few days have elapsed since the date the termination letter was notified to the employee.

The amount offered in payment must greater or equal to the one stipulated in the Law -never less than the compensation established by the ET-. The judicial doctrine admits that there may be a reasonable discrepancy in the amount made available to the employee: the excusable error in the calculation of the compensation will not determine the wrongfulness of the dismissal.

Nevertheless, in case of disagreement with the amount made available together with the communication of the termination later, the employee may challenge it in court.

In the event that the employer does not make the corresponding compensation available to the employee or makes it available incorrectly (except for excusable error), the dismissal decision will be considered wrongful.

The only exception, contained in Article 53.1(b) ET, is that when the termination decision is based on objective economic reasons (not technical, organizational or productive), if the economic situation prevents the employer from making said compensation available to the employee, the employer may refrain from doing so, provided that this is stated in the written communication. It seems that, in this case, the reasons why the payment is not possible should be justified in the letter (it is not possible to refer generically to the "economic situation of the company"), since if it is not proven, the dismissal would have to be considered wrongful. This does not prevent the employee from claiming payment when the termination decision becomes effective.

4.2.3. Granting of a prior notice

A prior notice of 15 days must be granted from the delivery of the termination letter to the employee until the effective date of the employment relationship extinction. In other words, the effects of the dismissal for objective causes cannot be earlier than 15 days from the termination letter.

The reason for this prior notice is to allow the employee to search for a new employment or to prepare, if necessary, for the claim against the termination decision. In addition, during this period the employee is entitled to a paid leave of 6 hours per week in order to look for a new job position.

If the prior notice is not granted, the dismissal will not be considered wrongful, but the employer will have to pay the employee the salaries corresponding to such period.

Finally, regarding dismissals due to objective economic, technical, organizational or production causes, a copy of the termination letter will be given to the employee's representatives for their knowledge.

4.3. Effects of objective dismissal

The effects will differ depending on the reaction of the employee:

4.3.1. Employee satisfied with the decision

The employee is not obliged to challenge the employer's decision before the Labour Court in order to be considered in legal situation of unemployment –which is a requirement to receive the unemployment benefit-.

4.3.2. Employee claiming against the decision

In the event that the employee decides to challenge the decision to terminate the contract, the rules of

Articles 120 to 123 LRJS will apply. The term to exercise the action to challenge the objective dismissal is 20 working days from the day on which the termination takes effect (taking into account that it is necessary to attend the prior conciliation act ex Article 63 LRJS and the effects that this may cause on the indicated term). Notwithstanding the foregoing, the employee may anticipate the exercise of their action from the moment they receive the employer's termination letter.

The employee can challenge the termination decision, even if they have received the compensation offered by the employer together with the termination letter, given that this fact does not imply that the employee is in agreement with the employer's decision.

In accordance with Article 53.5 ET, the Labour Court can rule the objective dismissal in the same way as indicated for disciplinary dismissal: lawful, wrongful or null -although taking under consideration the specific characteristics of this kind of dismissal-.

a) Ruling of the objective dismissal as lawful

As indicated in Article 122.1 LRJS, the termination decision adopted by the employer will be declared lawful when the employer, "*having met the legal formal requirements, proves the concurrence of the legal cause indicated in the written communication*". In this case, the employee will be entitled to the compensation of 20 days' salary with a maximum of 12 monthly payments, consolidating it if they have received it (Article 53.5(a) ET).

Article 123.1 LRJS indicates that in the event that the judge considers the objective dismissal to be lawful, the employment contract will be declared terminated. At the most, this sentence could condemn the employer, if applicable, to pay the employee the differences that may exist, both between the compensation already received and that which legally corresponds to them, as well as those relating to the salaries of the prior notice -in the cases in which this notice had not been complied with-.

Moreover, if the dismissal is declared lawful, the employee will be considered to be legally unemployed for reasons not attributable to them, with the right to access unemployment benefits. In order to receive said benefits, the dismissed employee will have to apply for them in 15 days from the moment of the notification of the judgement (unless they had already done so at the moment of the communication of the termination letter by the employer).

b) Ruling of the objective dismissal as wrongful

Article 53.4 ET states that the objective dismissal will be considered wrongful when the cause on which the termination decision was based is not proven. That is, if the alleged cause is not true or, if it is true, it is not sufficiently important to justify the termination decision in the Judge's opinion.

Furthermore, Article 122.3 LRJS indicates that the dismissal may be declared wrongful when the formal requirements regarding the termination letter or the economic compensation referred to in Article 53.1(b) ET have not been met. It should be borne in mind, however, that both the ET and the LRJS make it very clear that "the failure to give notice" will not determine the wrongfulness of the dismissal, but the employer will have to pay the salaries corresponding to said period.

Regarding the declaration of wrongfulness due to the failure to provide the employee with the economic compensation, it should be recalled that, in addition to the possibility of not doing so in the case of objective dismissals for economic reasons referred to above, the unreasonable mistake in the calculation of the amount of this compensation also entailed the wrongfulness of the dismissal. However, both the ET and the LRJS specify that the provision of a lower amount due to "excusable error" in its calculation will not imply the ruling of the dismissal as wrongful, although the employer will have to pay the differences with the correct amount.

If the objective dismissal is declared wrongful, the employer has 5 days from the date of notification of the judgment to choose between reinstating or economically compensating the employee.

If the employee is reinstated, they will be entitled to the wages lost and to the employer's contributions to the Social Security system for that amount. However, Article 53.5(b) ET indicates that the employee "*must reimburse the compensation received*", although it is common to compensate between the amounts owed by both parties, carrying out a settlement of differences.

If the employee is not reinstated, in addition to the fact that they will enter into the legal situation of unemployment necessary in order to obtain the unemployment benefits, the employer will have to pay them a compensation in the same amount as the one described before for disciplinary dismissal -33 days of salary per year worked, with a maximum of 24 monthly payments-. However, if the compensation for

the objective dismissal was previously made available to the employee, the employer will lessen this new compensation, deducting from it the amount already received by the employee.

c) Ruling of the objective dismissal as null

Pursuant to Article 122.2 LRJS, the company's decision to terminate the employment contract for objective causes will be null when:

- It is discriminatory or contrary to the fundamental rights and public liberties of the employee.
- It has been carried out evading the rules established for collective redundancies, but only in the event that the company terminates employment contracts for the same reason in successive periods of 90 days and provided that "*there are no new causes that justify such action*".
- It refers to employees who enjoy rights regarding balancing of work and family life, provided that the termination decision is not based on reasons unrelated to pregnancy or to the exercise of the right to the leaves of absence indicated before.

The declaration of nullity entails that the company has to reinstate the employee under the same conditions as before the termination.

Furthermore, the company is obliged to pay the wages lost (and also the corresponding Social Security contributions for them), and the employee must reimburse the compensation received or compensate it with the wages owed, settling the differences.

5. Collective redundancy

Companies in a crisis situation or in need of reorganisation or adaptation to the market can adopt employment regulation measures. Not only can they suspend or reduce working hours for economic, technical, organisational or production reasons, but they can also terminate the contracts of a group of employees for these reasons.

Collective redundancy shall be understood as the termination of employment contracts based on economic, technical, organisational or production causes when, in a period of 90 days, the termination of contracts affects at least:

a) 10 employees in companies with fewer than 100 employees.

b) 10% of the number of employees in the company for companies employing between 100 and 300 employees.

c) 30 employees in companies employing more than 300 employees.

Collective redundancy shall also be understood to be the termination of employment contracts affecting the entire workforce of the company, provided that the number of employees affected is greater than five, when this occurs as a consequence of the total cessation of the business activity due to the same causes as indicated above.

For the purposes of calculating the threshold exceedance, the terminations occurring in the reference period on the initiative of the employer for reasons other than those inherent to the employee must also be taken into account, excluding the terminations due to the expiry of the agreed period, *ex* Article 49.1(c) ET, provided that the number of employees affected is at least five.

When in successive periods of 90 days and with the aim of avoiding the collective redundancy procedure, the company terminates contracts under the provisions of Article 52(c) ET in a number lower than the thresholds indicated, and without new causes justifying such action, these new terminations will be considered to have been carried out evading the law, and will be declared null.

In cases where, as a result of an "employment regulation plan" the employment relationship of employees is terminated, the compensation shall be, in cases of agreement between the parties, the one agreed upon, and, in all cases, at least twenty days' salary per year of service, with periods of less than one year being prorated by months, with a maximum of twelve-monthly payments.

Final Provision 3 of Royal Decree 608/2023, of 11 July, which implements the RED mechanism, adds to Royal Decree 1483/2012, which regulates collective redundancy procedure, an Additional Provision 6 on the "obligation of prior notification in cases of closure" of one or more work centres either due to definitive cessation of activity or due to the dismissal of 50 or more employees, establishing new rules:

a) The company must notify both the competent labour authority in terms of territory and the Ministry of Labour.

b) This notification must be carried out by electronic means.

c) This notification must be carried out at least with 6 months' advance notice (until the start of the consultation period). If this is not possible, it will be carried out as soon as it is known and justifying why the 6-month period was not respected.

d) A copy of the notification shall be sent to the most representative trade union organisations and to the most representative organisations in the sector, both at national level and in the Autonomous Communities where the affected centre or centres are located.

5.1. Causes

a) Economic causes occur when the results of the company show a negative economic situation:

- by the existence of current or expected losses.
- by a persistent decrease in the level of ordinary income or sales. The decrease is persistent if for three consecutive quarters the level of ordinary income or sales in each quarter is lower than in the same quarter of the previous year.

b) Technical causes occur when there are changes, among others, in the means or instruments of production.

c) Organisational causes occur when there are changes, among others, in the area of personnel working systems and methods or in the way production is organised.

d) Productive causes occur when there are changes, among others, in the demand for the products or services that the company intends to place on the market.

5.2. Procedure

It follows the general rules established in Article 51 ET and in Royal Decree 1483/2012, of 29 October, which approves the Regulations on collective redundancy procedures and on the suspension of contracts and reduction of working hours.

The procedure shall be applicable regardless of the number of employees in the company and the number of employees affected.

5.2.1. Initiation

It shall be initiated by notifying the competent labour authority and simultaneously opening a consultation period with the legal representatives of the employees, the duration of which varies according to the size of the company (15 or 30 days). Numerous documents must be submitted to the labour authority, which vary according to the alleged cause. The Labour and Social Security Inspectorate is introduced as a guarantor in the process. Final Provision 3 of Law 3/2023 on Employment states that this organism must check the details of the communication, verify the development of the consultation period, rule on the causes specified in the communication and verify that the documentation submitted is in line with that required according to the alleged cause.

5.2.2. Company notification

The notification of initiation shall be accompanied by all the documentation necessary to prove the reasons alleged for the procedure:

- Explanatory memorandum of the reasons for the proceedings.
- If the cause of the procedure is of an economic nature: all the documentation that may be useful to justify the cause, and particularly all the economic documentation of the last two financial years, as well as the provisional accounts at the initiation of the procedure, signed by the administrators or representatives of the applicant company. Likewise, in the event of claiming a persistent decrease in the level of income or sales, the employer must provide all the necessary documentation to prove that such decrease has occurred during at least the last three consecutive quarters immediately prior to the date of the notification of the commencement of the collective redundancy procedure, in relation to the same quarters of the immediately preceding year.
- When the applicant company is part of a group of companies, extensive information on the company is also required.
- If the cause of the procedure is of a technical nature, the technical reports accrediting, where applicable, the concurrence of technical causes derived from changes, among others, in the means and instruments of production.
- If the cause of the procedure is of an organisational nature, the technical reports accrediting, where appropriate, the concurrence of organisational

causes derived from changes, among others, in work systems and methods.

- If the cause of the procedure is of a productive nature, the technical reports accrediting, where appropriate, the concurrence of productive causes derived from changes, among others, in the demand for the products and services that the company intends to place on the market.
- Number and professional classification of the employees to be affected, as well as the employees habitually employed during the last year. When the collective redundancy affects more than one work centre, this information shall be disaggregated by centre and, where appropriate, province and Autonomous Community.
- Written request for the report referred to in Article 64.5(a) and (b) ET to the employees' legal representatives prior to the execution of the employment regulation measures proposed by the employer.
- Information on the composition of the different employees' representations existing in the company, on work centres without legal employees' representation and, where appropriate, the minutes relating to the attribution of representation to the negotiating committee referred to in Article 27 of Royal Decree 1483/2012.
- Copy of the communication sent to the employees or their representatives by the company management of its intention to initiate the collective redundancy procedure.
- Representatives of the employees who will be part of the negotiating committee or, where applicable, the lack of such a committee.
- In companies that carry out a collective redundancy affecting more than fifty employees, an external re-employment plan.
- Copy of the communication to the employees' representatives of the beginning of the consultation period and written request for their report.
- Period foreseen for the implementation of the dismissals.
- Criteria for selecting those affected.

If the company's communication does not meet all the requirements, the labour authority may issue recommendations and warnings to the parties so that they may proceed to rectify the situation.

5.2.3. Negotiating committee

The consultation shall be carried out in a single special negotiating committee, although, if there are several work centres, it shall be limited to the work centres affected by the procedure.

The negotiating committee shall be composed of a maximum of thirteen members representing each of the parties.

The employees' representative committee must be constituted prior to the employer's notification of the opening of the consultation period.

To this end, the management of the company must inform the employees or their representatives in a reliable manner of its intention to initiate the procedure. The maximum period for setting up the representative committee shall be 7 days from the date of the aforementioned communication, or 15 days when one of the work centres affected by the procedure does not have legal employees' representatives.

Once the maximum period for the constitution of the representative committee has expired, the company management may formally notify the employees' representatives and the labour authority of the start of the consultation period. Lack of constitution of the representative committee shall not prevent the consultation period from beginning and running, and its constitution after the start of the consultation period shall not, under any circumstances, lead to an extension of the duration of the consultation period.

The intervention as interlocutors of the employees with the management of the company shall correspond:

a) To the trade union sections when they so decide, provided that they have majority representation on the works committees or personnel delegates of the centres affected, in which case they shall represent all the employees affected.

b) In the absence of this:

   - If the procedure concerns a single work centre:

     it corresponds to the works committee or to the personnel delegates. If there is no legal representation of the employees, the employees may choose either to assign their representation:

     - to an 'ad hoc' committee of a maximum of three members composed of employees from

the company itself and democratically elected by them or

- to a committee of an equal number of members appointed, according to their representativeness, by the most representative trade unions in the sector to which the company belongs, and which are entitled to form part of the negotiating committee of the collective bargaining agreement applicable to the company.
- If the procedure affects more than one work centre:
  - the intervention as interlocutors will correspond either to the "intercentre" committee, if it has this function in the collective agreement that created it, or
  - to a special representative committee that is formed on the basis of complicated rules that cover all the variables relating to whether or not the centres have employees' representatives (Article 41 ET).

5.2.4. Consultation period

It shall last no longer than 30 calendar days or 15 calendar days in the case of companies with fewer than 50 employees. This period may be understood to have ended whatever the time elapsed in the event that the parties reach an agreement and, in any case, when the parties so state because they understand that it is not possible to reach an agreement.

During the consultation period, the parties shall negotiate in good faith with a view to reaching an agreement. Such agreement shall require the favourable vote of the majority of the employees´ legal representatives or, where appropriate, of the majority of the members of the employees' representative committee, provided that, in both cases, they represent the majority of the employees at the work centres affected by the collective redundancy.

The employer and the employees' representatives may agree at any time to replace the consultation period with the mediation or arbitration procedure, which must be carried out within the maximum duration indicated for this period.

The labour authority shall forward the employer's communication to the unemployment benefits management entity and shall request a mandatory report from the Labour and Social Security Inspectorate on the details of this communication and on the development of the consultation period. The report must be issued within a non-extendable period of fifteen days from the notification to the labour authority of the end of the consultation period and shall be incorporated into the procedure. The labour authority shall ensure the effectiveness of the consultation period and may, where appropriate, issue warnings and recommendations to the parties, which shall not, under any circumstances, paralyse or suspend the procedure.

If an agreement is reached during the consultation period, it shall be presumed that the justifying causes have been met and it may only be challenged before the competent jurisdiction for the existence of fraud, malice, coercion or abuse of rights in its conclusion.

5.2.5. Communication of the decision

At the end of the consultation period, the employer shall notify the labour authority the result of the consultation period, within a maximum period of 15 days from the date of the last meeting of said period.

- If an agreement has been reached, the employer shall submit a full copy of the agreement.
- Otherwise, the employer shall send the employees' representatives and the labour authority the final decision on the collective redundancy and the conditions adopted.

Once the decision has been communicated to the employees' representatives, the employer shall notify the dismissals individually to the employees affected under the terms established in Article 53.1 ET. In any case, at least 30 days must have elapsed between the date of the communication of the opening of the consultation period to the labour authority and the effective date of the dismissals.

The employees' legal representatives shall have priority of permanence in the company. Through a collective agreement or an agreement reached during the consultation period, priorities may be established in favour of other groups, such as employees with family responsibilities, employees over a certain age or people with disabilities.

5.2.6. Appeal against the employer's decision

The employer's decision may be appealed by the labour authority when it considers that the agreement regarding

the dismissals has been reached through fraud, malice, coercion or abuse of rights, as well as when the entity managing the unemployment benefit has reported that the agreement could have the purpose of improperly obtaining these benefits for the employees affected due to the non-existence of the cause motivating the legal situation of unemployment.

Moreover, the employees affected by the dismissals may also appeal by means of the individual action provided for in Articles 120 to 123 LRJS.

Lastly, the employees' representatives may appeal the company's decision of collective redundancy before the labour courts utilizing the collective action provided for in Article 124 LRJS. However, the initiation of the lawsuit by the employees' representatives shall paralyse the processing of the individual lawsuits initiated, until the resolution of the lawsuit.

5.2.7. Contributions to the Treasury for the dismissal of 50-year-old employees or older

Companies that carry out a collective redundancy involving employees of 50 years of age or older must make a financial contribution to the Treasury to finance the costs that such dismissal may produce in the public social protection system, provided that the following circumstances are met:

- The dismissals are carried out by companies with more than 100 employees or by companies which are part of groups of companies employing that number of employees.
- The percentage of dismissed employees aged 50 or over out of the total number of dismissed employees is higher than the percentage of employees aged 50 or over out of the total number of employees in the company (this calculation will include all employees whose contracts have been terminated at the initiative of the company for other reasons not inherent to the employee or expiration of the period agreed upon, which occurred in the previous three years).
- Even when the causes of Article 51 ET are met, the companies or the group of companies must have had profits in the 2 previous fiscal years or have obtained profits in at least 2 consecutive fiscal years (in an interval of 5 years, 1 before and 4 after).

5.2.8. Accompanying social measures and other corporate obligations (for companies not subject to insolvency proceedings)

- Accompanying social measures

Consultation with the employees' legal representatives must at least cover the possibilities of avoiding or reducing the collective redundancy and mitigating its consequences through the use of accompanying social measures, such as re-employment measures or training or retraining measures to improve the employability of those affected.

The company that carries out a collective redundancy affecting more than 50 employees must offer the affected employees an external re-employment plan through authorised outplacement companies. This plan, designed for a minimum period of six months, must include measures of:

- training and occupational guidance,
- personalised assistance to the employee concerned
- and active job search.

The cost of preparation and implementation of this plan shall in no case be paid by the employees. Failure to comply with the obligation established in this section or with the accompanying social measures assumed by the employer may lead to a claim for compliance by the employees, in addition to the administrative responsibilities that may be applicable for non-compliance. The Public Employment Service will verify compliance with this obligation and, where appropriate, will require the company to comply with it.

- Dismissal of employees over 55 years of age

In the case of collective redundancies involving employees aged fifty-five or over, there will be an obligation to pay contributions to finance a "special agreement". This is an agreement signed voluntarily by employees with the Social Security Treasury in order to generate, maintain or extend their rights to Social Security benefits. In these cases, the companies are obliged to pay social security contributions provided that the employee is below the age at which he is eligible for early retirement.

5.2.9. Companies involved in insolvency proceedings

The Spanish Insolvency Act establishes that collective redundancies, once insolvency proceedings have been declared, will be processed before the insolvency judge in accordance with the rules set out in the aforementioned Act.

In the event that the company is declared bankrupt before the labour authority receives notification of the company's decision to dismiss, suspend employment contracts or reduce working hours, the labour authority will proceed to close the proceedings, transferring them to the insolvency judge.

6. Termination of the contract due to force majeure (Article 51.7 ET)

The existence of force majeure, as a cause for the termination of employment contracts, must be established by the labour authority, regardless of the number of employees affected, following the procedure described below.

The procedure will be initiated by means of a request from the company, accompanied by the necessary evidence, and simultaneous communication to the legal representatives of the employees, who will have the status of interested parties in the procedure.

The competent labour authority shall request a mandatory report from the Labour and Social Security Inspectorate and shall carry out or request as many other actions or reports as it deems necessary. According to Article 33.3 of Royal Decree 1483/2012, in the event that facts, allegations and evidence other than those provided by the company in its request are included in the procedure, the company and the legal representatives of the employees will be given the appropriate hearing, which must be held within one day.

The decision of the labour authority will be issued, after the necessary actions and reports, within five days of the request and must be limited, where appropriate, to establishing the existence of the force majeure alleged by the company. The decision on the termination of the contracts will be taken by the company and will take effect from the date of the event causing the force majeure. The company will have to inform the employees' representatives and the labour authority of this decision.

The severance pay will be twenty days' salary per year of service, with periods of less than one year being prorated by months, with a maximum of twelve monthly payments.

The labour authority that establishes the force majeure may agree that all or part of the compensation corresponding to the employees affected by the termination of their contracts be paid by the FOGASA, without prejudice to the Fund's right to reclaim compensation from the employer.

Obviously, employees and their legal representatives will be able to appeal against the employer's decisions on the termination of contracts or on measures to reduce working hours and suspend contracts that affect them.

Collective Labour Law

Concept of labour law

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Contents

1. Work under the regulation of Labour Law

Despite its name, Labour Law does not deal with all forms of work in the productive system, nor covers all persons who work in exchange for economic consideration. The work object of Labour Law is exclusively salaried work, also known as subordinate labour or dependent work.

Therefore, for Labour Law to deal with a service provision, it must comply with certain characteristic elements, which are defined in the ET, which is the fundamental legal regulation governing labour relations between employees and employers in Spain.

Article 1.1 ET contains the elements that determine the work object of Labour Law. This article delimits its scope of application, indicating that this rule will apply to those "employees who voluntarily provide their paid services for the account of others and within the scope of organisation and management of another person, whether natural or legal, known as an employer or entrepreneur". Therefore, the personal nature of the work, its voluntary nature, the fact that it is carried out for the account of others, and in exchange for a salary, as well as under the power of management and organisation of others, is what will determine whether or not we are dealing with a salaried employment relationship. Therefore, Labour Law will exclude from its scope of application any work provision that lacks any of these elements, as is the case of self-employment or freelance work, which is governed by a different regulation, the LETA.

The ET not only provides us with the characteristic elements that must be present in an employment relationship for it to be considered salaried work, but also, Article 1.3 ET establishes a list of relationships that are expressly excluded. On the other hand, Article 2 lists a series of relationships, known as special relationships, which will have a specific regulation, different to that established in the ET, although they are considered to be salaried employment relationships, but special ones.

All these aspects will be dealt with in the following sections.

1.1. Characteristic notes on work that is the subject of Labour Law

A) Personal work

Although the ET does not expressly state that the work subject to Labour Law must be personal, this element is characteristic of a salaried employment relationship,

and its presence or absence helps to determine whether or not we are dealing with an employment relationship.

The personal labour element indicates two things. The first is that salaried work can only be performed by a natural person. Therefore, those cases in which the services are performed by a legal person are excluded from the scope of the application of Labour Law. The second is that the commitment acquired through an employment relationship is a very personal one, and the substitution of the employee's person in the employment relationship is not permitted, unless there is authorisation from the employer or entrepreneur.

B) Voluntary or free work

Voluntariness is an element that must be present in a salaried employment relationship, as established in Article 1.1 ET. Voluntariness is determined by the employee's acceptance of the work offered by the employer. Therefore, the obligation to work is the consequence of a contract that arises from the consent freely given by the employee. This means that all personal services that are compulsory, and in which the consent or voluntariness of the employee is not required, fall outside the regulation of Labour Law.

Some of the compulsory personal benefits that would not be covered by Labour Law due to the lack of this element are: a) the social duties required in cases of serious risk, catastrophe, public calamity or health crisis (Article 30.4 CE); b) the personal services of convicts in the penitentiary establishment; c) the obligation to assume the duties of president or members of polling stations; d) the exercise of jury duties; e) civil protection services in cases of public emergencies, earthquakes, fires, floods; f) compulsory military service or the social substitution benefit being.

C) Employment

The fact of being an employee is one of the most characteristic elements of the employment relationship of salaried work. In fact, salaried work is also referred to as subordinate employment.

The note of "ajenity" or "otherness" can be explained from different perspectives. The main one would be the existence of **alienage in the fruits or the result of the work**, the fruits being understood as the exploitation and economic utilities generated by the work. Therefore, there is alienage when the ownership of the fruit of the work belongs to another person, natural or legal, other than the person who carries out the work. For the transfer of the good or service produced to take place, a specific act doesn't need to be carried out, since the transfer of the product or the utility of the work is produced originally and automatically, this being established in the employment contract itself.

A second perspective is that of **risk-sharing.** This means that the employee does not participate financially in the profits or losses arising from the operation and that the uncertainty arising from the operation of the business is borne by the employer. Therefore, the absence of liability for non-payment and guaranteed remuneration is an indication of employment.

Thirdly, we talk about the **third-party nature of the work tools,** to refer to the fact that the instruments or tools that are necessary to carry out the work do not usually belong to the employee, but rather to the employer, who also owns the fruits of the work and bears the risks inherent to the productive organisation.

Finally, the ajenity can also be detected in the **market**, since the product of labour does not pass directly from the employee to the market, but through the employer or entrepreneur, who takes all decisions in this area. Therefore, the adoption by the employer, and not by the employee, of decisions concerning market relations or relations with the public, such as the fixing of prices or tariffs, selection of customers, or indication of persons to be served, are indications that we are facing a subordinate employment relationship.

D) Dependent work

The ET defines dependence as the provision of services within the scope of organisation and management of another natural or legal person, known as an employer or entrepreneur (Article 1.1 ET). Dependence, together with the fact of being an employee of another person, are the most characteristic features of the work covered by Labour Law.

The concept of dependence has become more flexible over time, which is why nowadays we speak of dependence and not of absolute subordination, making it possible to extend the consideration of salaried work to services in which this element is very attenuated.

Indeed, the extent of dependence will differ depending on the type of work performed, the place where the service is provided and the employee's qualifications. In fact, attendance at the employer's place of work or the employer's designated place of work, or working hours, are no longer definitive indications of a

salaried employment relationship. The development of technology and the spread of teleworking have led to a significant relaxation of these indications. Nor is technical dependence required in all cases, in the sense of having to strictly indicate to the employee how his work is to be carried out, with the following of certain standardising guidelines and the subsequent control of the work entrusted being sufficient. The relaxation of the dependency requirement has made it possible for highly qualified professions, or so-called "liberal" professions, as well as work carried out on digital platforms, to be considered salaried employees.

In short, the inclusion of the employee in the organisational sphere of the company, or integration in the governing and disciplinary circle of the employer, are sufficient to appreciate the note of dependence.

E) Paid work

The exchange between the provision of services and financial remuneration must be present in an employment relationship. Financial remuneration as payment for work is not exclusive to the employment relationship, but when it occurs under an employment contract it is called a wage, and therefore the work that is the subject of Labour Law is called labour wage.

The legal concept of salary is regulated in Article 26.1 ET, and although the most common salary of an employee usually contains a fixed and periodic part, its regulation in Article 26.1 ET allows it to be calculated and paid in multiple ways, including commissions and remuneration for every action.

Labour Law only deals with productive work, so the main purpose of the person who performs it must be to obtain the means of life and subsistence, to obtain a profit or economic consideration, although this does not exclude that there may be other additional purposes.

1.2. Presumption of employment and "bogus self-employed"

Although we have defined and delimited the characteristic elements of salaried work, in practice it is up to the social courts to adapt the different features of salaried work to the current reality and to determine whether or not these elements are present in an employment relationship.

Sometimes, determining whether or not we are dealing with an employment relationship is not without difficulty. For this reason, the courts use the indicative method, which consists of looking for signs or indications that show that the work is carried out in compliance with these elements, regardless of the name given to the employment relationship.

Sometimes an attempt is made to disguise a salaried employment relationship by passing it off as a self-employed relationship. The misuse of civil or commercial contracts, with the intention of avoiding the application of Labour Law, is not marginal. For this reason, case law has shown that it is not the name given to the contract by the parties that is decisive, but the true nature of the link between them.

Article 8.1 ET establishes the presumption of employment, stating that the employment contract: "shall be presumed to exist between anyone who provides a service on behalf of and within the scope of the organisation and management of another and the person who receives it in exchange for remuneration from the former". This presumption of employment is of great practical importance and will allow the courts to analyse the legal nature of a relationship regardless of the name given to it by the contracting parties.

As we will see in this subject, Labour Law has the purpose of protecting and compensating for the original imbalance between employee and employer in the employment relationship. This presumption of employment reinforces these aims by preventing, or at least making it difficult for the superiority of the employer to exclude the employee from a more protective regime such as Labour Law.

The so-called "false self-employed" is a figure that is present in our system of labour relations. It is a factual reality, in which a salaried employee who is registered as self-employed, and who is therefore formally a non-dependent employee, fulfils all the characteristics of an employee or salaried employee. Companies sometimes resort to these practices to avoid paying Social Security contributions, as well as to avoid other labour responsibilities and costs associated with employment contracts. It is in cases such as these that the presumption of employment can play an important role.

However, the scope that the Courts have given to this presumption of employment has not always been the same, but we can draw certain conclusions that judicial doctrine has given to the presumption of employment. Namely: a) the employment contract exists, even if it

has not been expressed either in words or in writing; b) the existence of the presumption of employment implies, in forensic practice, that the burden of proof in employment proceedings lies with the party alleging the non-existence of a contract, or the employment nature of the contract; and c) when the case analysed by the Courts has not been entirely clear, the existence of the presumption of employment has tipped the balance in favour of the application of the employment regulations.

As we have already shown, the line between paid work and self-employment is often blurred. The blurring of this boundary is the result of a combination of different factors that have to do with the transformation of forms of work and their relationship with advances in technology that have led to the emergence of new jobs, such as working through digital platforms, or new ways of doing work, such as the development of teleworking.

In this context, Law 12/2021 introduces a presumption of employment in the field of digital delivery platforms. It does so through a new twenty-third additional provision, with the following wording: "By application of the provisions of Article 8.1, the activity of persons who provide paid services consisting of the delivery or distribution of any consumer product or merchandise, by employers who exercise business powers of organisation, management and control directly, indirectly or implicitly, by means of algorithmic management of the service or working conditions, through a digital platform, is presumed to be included within the scope of this law. This presumption does not affect the provisions of article 1.3 of this regulation". This presumption of employment implies that the burden of proof in the case of work on platforms will fall on the employer, who will have to prove that the employees are not salaried employees because they do not comply with the elements, or characteristics, of labour legislation.

1.3. Relationships that are excluded from regulation by Labour Law

As we have already pointed out, the ET not only provides us with a positive delimitation of the work that is the object of Labour Law in Article 1.1, but also provides us with a list of relationships that are expressly excluded from this legal discipline in Article 1.3. Many of the exclusions that appear in this list are because the elements that characterize salaried work do not concur, but other exclusions are constitutive and are since the legislator has decided not to consider them to be salaried work. This is the case of civil servants and transport employees with administrative authorisation.

A) Civil servants and statutory personnel of the public health service

The first relationship that Article 1.3(a) excludes from the scope regulated by the ET is the service relationship of civil servants or staff governed by administrative or statutory rules. In this case, the exclusion is because Article 103.3 CE has assigned them their own regulation, a statute for civil servants (LEBEP) that is different from the ET. However, it is possible to work for the public administration and have an employment relationship, as the exclusion only affects civil servants.

On the other hand, personnel governed by administrative rules (in those cases where the law requires an administrative contract) and personnel governed by statutory rules (such as Social Security health personnel, whose relationship is governed by Law 55/2003, 16 December) would also be excluded from the scope of application of Labour Law.

B) Compulsory personal benefits

The exclusion in Article 1.3(b) ET of compulsory personal benefits is since they lack a fundamental requirement for considering a relationship to be an employment or salaried relationship, which is none other than voluntariness.

These types of benefits are not very common nowadays, but we can find some examples of them in Article 30.4 CE, which establishes that "the law may regulate the duties of citizens in cases of serious risk, catastrophe or public calamity". On the other hand, the obligation to assume the posts of president or members of polling stations, or exercise the functions of a jury, constitutes another example of obligatory personal services not regulated by the ET.

C) The managing directors or members of the administrative bodies of the companies

The directors or members of the administrative bodies of the companies are excluded from the labour regulation according to Article 1.3(c) ET. This exclusion is because in these cases the requirement of dependence is missing, as it is precisely the directors and administrators of the companies who direct and organise the company.

This exclusion from the scope of Labour Law is restricted only to those whose activity "is limited, purely and simply, to the mere performance of the position of director or member of the administrative bodies in companies that have the legal form of a company and provided that their

activity in the company only involves the performance of tasks inherent to such a position". Dependence is not the only element that may be missing in these relationships, but some cases also lack dependence, in those cases in which the directors or administrators own a significant number of shares in the company.

D) Friendly, benevolent or neighbourly work

Article 1.3(d) ET excludes friendly, benevolent or neighbourly work due to the absence of remuneration or onerousness in these relationships. The purpose of the provision of these services is not to obtain financial compensation, and therefore the performance of productive work, but rather to provide help, altruistic collaboration or social commitment.

E) Family work

Article 1.3(e) ET states that family work is excluded from the scope regulated by the Employees' Statute unless it can be demonstrated that those who carry it out are employees. Therefore, a "iuris tantum" presumption of non-employment in the case of family work is being established.

For its part, the same article defines what is to be understood by family work for these purposes. Thus, for this exclusion to come into play, a series of requirements must be met. Namely: 1) the employer must be a natural person or a community of property, as legal entities cannot be related; 2) the family members must live with the employer; and 3) there must be a specific degree of kinship with the employer, as the ET establishes that this exclusion affects the spouse, descendants, ascendants and other relatives by blood or marriage, up to and including the second degree and, where appropriate, by adoption.

The reason for the exclusion of family work is that this type of work is provided for the benefit of the family community, and does not have the necessary external nature to be considered as an employment relationship.

On the other hand, it should be borne in mind that, although the ET excludes family work, the LETA includes them, establishing in Article 1 that work carried out regularly by family members -in the sense defined in Article 1.3(e) ET- of self-employed employees will be within its scope of application, provided that they do not have the status of salaried employees. However, the Tenth Additional Provision of the LETA allows children under the age of 30 or over the age of 30 with special difficulties to be hired as employees, even if they live together with their parents/employers. But in these cases, there is no right to unemployment benefits.

F) Agents and self-employed traders

Also excluded from the scope of application of the ET are persons who intervene in commercial transactions on behalf of one or more employers, provided that they assume the risk and risk of the same (Article 3.1(f) ET). The lack of dependency and dependence in these relationships would justify this exclusion.

However, employment legislation will apply to persons who takes part in commercial transactions on behalf of one or more entrepreneurs without assuming the risk of those transactions. In this case, they will have a special employment relationship as will be seen in the following section, or a common employment relationship, when the activity described is carried out on the company's premises, on behalf of the person promoting or arranging the transactions, having their workplace there and subject to the company's working hours.

G) Authorised carriers with own vehicle

Article 3.1(g) ET excludes from its scope of application authorised carriers with their own vehicle.

For this exclusion to come into play, several requirements must be met. These are: 1) having a commercial public service vehicle, i.e. offered to the market with the possibility of negotiating any transport; 2) ownership or power of disposal over the vehicle; 3) administrative authorisation or transport card, which is required when the vehicle is over 2 tonnes.

For its part, the Eleventh Additional Provision LETA considers transport employees, to whom we have just referred, to be economically dependent self-employed employees (TRADE) when they are economically dependent on a client because they receive at least 75% of their income from him and do not have employees or contract or subcontract their activity to third parties.

1.4. Special employment relationships

Article 2 ET lists a series of relationships, which it describes as special. These are salaried employment relationships, but they present notable differences concerning ordinary employment relationships, which is why they will have a specific regulation, different from the ET. In fact, the ET will not regulate them, unless, in its specific rules, there is an express reference to the Statute, as a supplementary law.

Article 2 ET provides for up to 9 special relationships. The uniqueness of the place where the work is carried out, the particularities of the employer, the attenuation of the note of dependence, or the weight that training has in the employment relationship, justifies in many cases their consideration as a special relationship. We are going to describe the essential elements of these relationships, as well as the regulations that govern them.

A) Senior management staff (Royal Decree 1382/1985 of 1 August 1985 regulating the special employment relationship of senior management staff, hereinafter DAD)

According to Article 1.2 DAD, senior management personnel are considered to be "employees who exercise powers inherent to the legal ownership of the company, and relating to the general objectives of the company, with autonomy and full responsibility, limited only by the criteria and direct instructions issued by the person or the higher governing and administrative bodies of the entity that respectively occupies that ownership".

As we can see, these are employees in whom some of the characteristic features of salaried work will be very difficult to observe, as they are employees who make fundamental or strategic decisions in the management of the business activity, because they have powers inherent to the legal ownership of the company. Although they work in a dependent capacity, this note is very attenuated, as they receive direct orders from the owner of the company, not from intermediate bodies; and in their definition, it is established that they act "with autonomy and full responsibility", adjectives that do not fit very well with the note of dependence.

Their position in the company, which is often closer to the interests of the employers than to those of the employees, means that they are often excluded from the scope of application of collective agreements.

B) Staff working in the family home (RD 1620/2011, 14 November)

The special employment relationship of family home staff is that which is entered into between the owner of the family home and the natural person who undertakes to provide services as a dependent and on behalf of the owner in this area.

Domestic work refers to the services or activities provided for the family home. Domestic work, according to Article 1.4 of RD 1620/2011, 14 November, refers to "the management or care of the household as a whole or of some of its parts, the care or attention of the members of the family or of the persons who form part of the domestic or family environment".

This relationship must be between two natural persons. The employer will be the owner of the family home, and the employee will be a natural person who performs domestic work in the family home. The area where the work is carried out is very special, and this will justify that it is considered a relationship of a special nature.

C) Prisoners in penitentiary institutions and minors in internment centres (RD 782/2001, 6 July and Law 53/2002, 30 December)

Work is a fundamental element for inmates serving a prison sentence. Although it can take different forms, being carried out inside and outside the prison, it can also constitute a special relationship.

The special employment relationship of inmates in penitentiary institutions shall be that existing between the Autonomous Penitentiary Work and Employment Training Body (depending on the Autonomous Communities there may be an equivalent autonomous body), and the inmates who carry out productive work activities for others or in collaboration with natural or legal persons from outside the penitentiary centres.

When productive work is carried out by juvenile offenders in detention centres, this relationship shall also be considered to be of a special nature.

Once again, the singularity of the place where the services are provided justifies that this relationship is considered to be of a special nature (Law 53/2002, of 30 December).

D) Professional sportsmen and women (Royal Decree 1006/1985 of 26 June 1985, regulating the special employment relationship of professional sportsmen and sportswomen)

Article 2.1(d) RD 1006/1985 considers the employment relationship of professional sportspersons to be a special employment relationship. For these purposes, professional sportspersons are considered to be those who dedicate themselves to the practice of sport on behalf of and within the scope of the organisation and management of a club or sports entity, on a regular basis and in exchange for remuneration. According to the courts, trainers and coaches are also considered to be included in this special employment relationship.

Collective bargaining is of great importance in this special relationship, to which several provisions of the DDP refer, and it is therefore essential to consult the applicable collective agreement, depending on the sport in question.

E) Performers in public entertainment (RD 1435/1985, 1 August)

The special employment relationship of artists in public performances is understood to be that established between an organiser of public performances or entrepreneur and those who voluntarily engage in the provision of artistic activity on behalf of and within the scope of the organisation and management of the latter, in exchange for remuneration.

Although there is no precise definition of what an artistic activity is, it would include the representation, interpretation, reading, reciting, singing, dancing, etc. To be considered as a special relationship, it makes no difference whether the activity takes place directly in front of an audience or whether it has been recorded for later broadcasting. However, artistic performances in private venues are not included in this special relationship, as the activity must take place within the framework of a public performance.

F) Agents and dependent commercial operators (RD 1438/1985, 1 August)

A special employment relationship is that of persons who take part in commercial operations on behalf of one or more entrepreneurs, without assuming the risk of the latter. For this type of special employment relationship to exist, a series of requirements must be met: a) the services must be performed by a natural person; b) the operations on behalf of another must be carried out personally; and c) the employee must not assume the risk and risk of the operations he/she carries out.

It should be remembered that when the agent assumes the risk of the business, this relationship is excluded from employment law, as established in Article 1.3(f) ET. On the other hand, if commercial operations are promoted or arranged on the company's premises and are subject to the company's working hours, these employees will have a common employment relationship with the company, to which the ET will apply.

G) Disabled persons working in special employment centres (RD 1368/1985, 17 July)

The special employment relationship established in Article 2.1(g) ET, regulated in RD 1368/1985 is between special employment centres that operate as employers (regulated by RD 2273/1985), and disabled employees who, having productive capacity, have a reduction in their faculties equal to or greater than 33% in relation to employees of the same qualification or professional category. This special relationship will be maintained even when the employee is assigned to a "collaborating company" by a "labour enclave" contract.

Special employment centres are companies whose raison d'être is to provide people with different disabilities with the possibility of carrying out productive and paid work, appropriate to their characteristics, and which facilitates their integration into the ordinary labour market. In this special relationship, productive and paid work is carried out, but this work is aimed at favouring the personal and social adaptation of the person with disabilities, and their subsequent integration into the ordinary labour market.

It will not be a special relationship but a common relationship when disabled persons work for ordinary companies.

H) Resident health graduates (RD 1146/2006, 6 October)

This special relationship applies to the training and practical service activity of healthcare graduates, to obtain specific training developed in accredited public or private centres.

This relationship will be strongly influenced by the training objectives that will condition the development of the working relationship.

I) Lawyers in professional offices (Royal Decree 1331/2006, 17 November)

Although lawyers usually practise their profession as freelancers or self-employed, there is nothing to prevent them from working for a company or even for a law firm, either individually or collectively, in exchange for a salary. It is in the latter case -when the salaried services are provided for an individual or collective law firm- that the employment relationship is considered to be of a special nature and is subject to the corresponding special regulations. If the lawyer works on a salaried

basis for a company, the relationship will be an ordinary employment relationship and will be covered by the ET.

2. Concept and nature of Labour Law

The emergence of Labour Law as an autonomous legal discipline is a relatively recent phenomenon in history. It was not until the liberal and industrial revolution of the 19th century that the necessary conditions for its emergence were created. During this period, far-reaching economic, social and political transformations took place which profoundly altered labour structures and the relationship between employers and employees.

Mass industrialisation brought with it the growth of cities, the expansion of factories and a new working class, while liberal ideas promoted changes in legislation and in conceptions of the role of the state in the economy and society. These transformations generated a series of labour and social problems ("social question") that required a specific legal response, thus marking the birth of Labour Law. This new branch of law will develop to address issues such as the regulation of working conditions, the protection of employees' rights and the mediation of labour disputes, establishing a regulatory framework that seeks to balance labour relations in a context of growing industrialisation and social change.

Although the conditioning factors for the birth of Labour Law are usually placed historically in the 19th century, Labour Law as a specialised sector within the legal system did not emerge until the first decades of the 20th century. XIX century, Labour Law as a specialised sector within the legal system did not emerge until the first decades of the XX century, and since then it has undergone a continuous process of evolution and adaptation to the new characteristics of the economic and social system.

2.1. Concept of Labour Law

In order to elaborate a definition, or concept of Labour Law, we have to approach the object or sector of reality that it is responsible for regulating. In this sense, Labour Law is a branch of the legal system that regulates the relations between employers and employees, but this definition would not be complete. Although the main object of this legal discipline is salaried work, from a certain historical moment onwards, the object of regulation is broadened and also focuses on the set of rules, institutions, practices and processes that regulate the professional representations of both employees and employers, as well as the interrelationships that exist between them and also the relations that they maintain with the State within the scope of labour relations.

In short, the reality regulated by Labour Law will not only be the regulation of work as an individual, but also the collective relations between the representatives of employers and employees, as well as their relations with the State.

In short, Labour Law approaches social or industrial conflict in a global and cross-cutting manner.

2.2. Nature of Labour Law

When we speak of the nature of Labour Law, we are referring to the fundamental characteristics that define its essence and its mode of operation within the legal system. Part of the nature of Labour Law refers to the specific sector of social reality that this branch of law is responsible for regulating. We have dealt with this in the previous section when we dealt with the definition of this legal discipline.

Also, part of the nature of Labour Law are the values and legal principles that guide and underpin this branch of the legal system. In the case of Labour Law, one of the main purposes or values on which Labour Law is based includes the protection of the employee or protective purpose. This purpose is present at the beginning of this branch of the legal system and is undoubtedly the most characteristic feature of its initial period. The protection of health, and personal privacy, as well as the protection of the dignity of the persons who provide a service and who commit themselves personally, are fundamental aspects of this protective purpose, which are still present in Labour Law.

For its part, the search for equity or compensatory purposes is also an aim of Labour Law. The one who offers work is usually in a position of economic superiority over the one who demands it, which gives him or her greater bargaining power. One of the distinctive features of Labour Law is its focus on employee protection, recognising the inherent inequality in the employment relationship between employer and employee. This protective approach is relatively new in the history of law, differing from other areas of law that have traditionally been more neutral as to the parties involved in the relationship. Thus, balancing or compensating for the contractual weakness of the employee in the employment relationship is also a characteristic feature of this discipline.

Finally, the search for Social Justice and social peace is one of the main functions of Labour Law. The essence of this discipline is to grant equal opportunities to all citizens and to assume in an organised way the attention of those needs that cannot be taken care of by themselves. On the other hand, the search for a balance between such opposing interests as the social and economic ones contributes to social peace, and to channelling the conflict of interests between employees and employers. Labour Law has incorporated several social rights and benefits that are fundamental to the modern welfare state. These include the minimum wage, maximum working hours, weekly rest, paid holidays, occupational safety and health, and social security. These rights are the result of a long social struggle and have been incorporated into modern labour legislation.

When we talk about the nature of Labour Law, we may also be referring to whether this discipline has a public or private nature. In this sense, we can say that Labour Law is characterised by its mixed nature, as it contains elements of both public and private law. This duality is reflected in its purpose and in the mechanisms it employs to regulate labour relations.

As we have already pointed out, Labour Law must be considered a hybrid branch of the legal system. Labour Law integrates principles and rules of private law, as we can see in the regulation of the contractual relationship between employer and employee, in which both agree on working conditions, rights and obligations. Although the employment contract is regulated, there is a certain freedom for the parties to agree on specific working conditions within the established legal framework.

On the other hand, the public law aspects are related to the fact that many labour provisions are mandatory, which means that they cannot be modified by agreement between the parties if they aim to diminish the rights of the employee. On the other hand, the State plays an active role in the regulation and supervision of labour relations, establishing laws, inspecting compliance and resolving disputes through specialised judicial and administrative bodies.

3. Characteristics and content of Labour Law

3.1. Characteristics of Labour Law

Labour Law is a recent legal discipline. In Spain, it was not until the end of the 19th century (in England, the first labour laws were enacted at the end of the 18th century) that the first labour legislation appeared. But we have to wait until the beginning of the 20th century before we can speak of a body of rules, which responds to its own principles, which we will later identify as Labour Law. Before that time, labour relations were mainly governed by Civil Law and there was no specific legislation to protect employees.

Labour Law is constantly adapting to political, social and economic changes. This makes it a modern law that is constantly evolving. Proof of this are the continuous labour reforms that have as their main objective the creation of employment, and more recently an attempt to adapt to the development of technology, in the field of labour relations. For example, in recent decades there has been a significant development in the regulation of remote working (teleworking), and digital work platforms. This capacity to adapt and constantly evolve is a characteristic of its modernity.

Labour Law is modern not only because of its recent historical evolution and its protective approach but also because of its expansive nature and its capacity to adapt to the new realities of the world of work. We are dealing with an expansive law, since it was initially conceived to protect the most vulnerable (women and children in industrial work), later it was called Employees' Law because its regulations were restricted, generally and exclusively, to industrial work. Finally, this right has been extended to cover the entire working class, who work on a personal, voluntary, dependent, paid and salaried basis, guaranteeing them essential rights and benefits. Today, some advocate that Labour Law should apply to all human labour, regardless of whether it is performed independently or as an employee.

The incorporation of international standards, such as those established by the ILO, has contributed to the modernisation and expansion of Labour Law. These norms seek to establish global minimum standards for the protection of employees, promoting social justice worldwide. In addition, modern Labour Law promotes social dialogue and the participation of employees in decision-making that affects their working conditions. Collective bargaining and the formation of trade unions are essential mechanisms for the democratisation of industrial relations.

3.2. Content of Labour Law

Labour Law is a branch of the legal system characterised by its breadth and complexity. Its content covers a wide range of rules and principles that regulate labour relations, providing a legal framework to protect

employees and balance the relationship between employers and employees. To facilitate its study and understanding, it is useful to divide Labour Law into different areas, each with its characteristics and objectives. Below are some of the most common and useful divisions for the analysis of this legal discipline:

A) Individual Labour Law: this mainly comprises the study of the rules governing the individual employment relationship and the contract that gives rise to it. However, it also focuses on how it develops in the relationship between the employee and the employer, on the provision of the work itself, and on the vicissitudes that may occur throughout the employment relationship. The modalities, elements, form, requirements and duration of the employment contract form part of the content of individual Labour Law, as well as the conditions of work and employment that refer to the working day, salary, leave, causes of suspension and termination of the employment relationship.

The ET contains the fundamental regulation of this individual right. In fact, Title I ET is entitled "The individual employment relationship".

B) Collective Labour Law: mainly regulates the relations between the professional representations of both employees (trade unions) and employers (employers' associations). This area also includes regulations on employees' representatives in the company, collective bargaining, collective agreements, and collective conflict measures, such as the right to strike. Collective Labor Law also covers the relations between professional representatives and the public authorities for lobbying or participation in social policy: social dialogue, social concertation and institutional participation. The purpose of this area of Labour Law is to promote and protect the collective rights of employees, facilitating their organisation and the defence of their common interests.

The fundamental regulation of this collective right is laid down in various pieces of legislation. Namely, for trade unions, the LOLS, while for employers' associations the LAS.

With regard to employee representation in the company, it is specifically Title II ET, "On the rights of collective representation and assembly of employees in the company", which regulates the unitary representation, of a non-union nature made up of staff delegates and work councils. The Spanish system establishes a double channel of representation which is not mutually exclusive. This double representative channel is made up of trade union representation, of a trade union nature and regulated in the LOLS, made up of trade union sections and trade union delegates, and unitary representation, which is not of a trade union nature and is made up of staff delegates and work councils.

The regulation of collective bargaining and collective agreements is contained in Title III ET, "Collective bargaining and collective agreements". The regulation of the right to strike is contained in the RDLRT, regulated by the interpretation given by the Constitutional Court in STC 11/1981, 8 April.

C) Administrative Labour Law: this regulates the powers of the Administration in labour matters. The Labour Administration is entrusted with different functions, among which is the sanctioning function, in view of its duty to monitor compliance with labour or Social Security regulations, the main role of which rests with the Labour Inspectorate (Royal Decree 138/2000, 4 February), which approves the Regulations on the Organisation and Functioning of the Labour and Social Security Inspectorate. This sanctioning function is also set out in the LISOS. For its part, it is also entrusted with registration functions, about the collective bargaining procedure (Article 89.1 ET), or in trade union matters, to the deposit of trade union statutes (Article 4 LOLS).

D) Labour Procedural Law: Labour Procedural Law deals with judicial procedures for the resolution of labour disputes. It tries to guarantee the right to effective judicial protection, through the Social Jurisdiction. The Social Jurisdiction is the jurisdictional order specifically responsible for hearing labour disputes that are resolved through this specific procedure, which presents important peculiarities with respect to the civil process, essentially governed by the principles of orality, immediacy, concentration, speed and gratuity.

The basic legislation governing labour proceedings is the LRJS.

F) Employment Law: this is a set of regulations that covers various aspects related to obtaining, promoting, maintaining and quality of employment. Its content includes all those measures that protect the employment of Spanish employees against foreign employees; those related to the selection and placement of employees; measures to promote employment; and the establishment of a series of measures aimed at protecting the unemployed and the training of employees.

G) Social Security Law: this is a set of regulations aimed at protecting employees against social risks and contingencies, such as illness, unemployment, invalidity, old age, family responsibilities and unemployment. This protection mechanism was initially intended solely for the protection of salaried employees against work-related risks, but this model has evolved into a protective system that is tending towards universalisation. Although, due to this universal character, it can be considered as a set of rules distinct and separate from Labour Law, there is undoubtedly an intimate connection between Social Security Law and Labour Law.

F) The Prevention of Occupational Risks: this branch of the Labour Law system includes the regulations aimed at protecting the life and physical integrity of the employee, for which purpose it establishes health and safety measures in the workplace, contained fundamentally in LPRL.

Historical Formation of Labor Law

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Contents

1. Historical forms of appropriation of other people's work

The appropriation of other people's labor has taken various forms throughout history, each reflecting the social and economic structures of its time. From slavery and feudalism to modern wage labor, these forms have had profound implications for the lives of employees and the structure of societies. The evolution of these forms has also been influenced by social and political struggles for labor rights and social justice.

Throughout history, there have been various forms of appropriation of other people's work, which reflect the economic, social, and political structures of different times and cultures.

Below are some of the main historical forms of appropriation of other people's work:

1. Slavery, this form of appropriation of another's labor where individuals (slaves) are considered the property of others (masters) and are forced to work without receiving compensation or with minimal compensation, under coercion and without freedom. It has existed in numerous civilizations, including ancient Greece and Rome, in Mesoamerican cultures, in precolonial Africa, and in the Americas during European colonization. For example, in ancient Greece and Rome slaves performed a variety of jobs, from housework to work in mines and agriculture.

2. Serfdom and Feudalism

This is a form of appropriation of other people's labor that developed in medieval Europe under the feudal system. Serfs were tied to the land they cultivated and had to work for the feudal lord, receiving in return protection and the right to cultivate plots for their own sustenance. Unlike slaves, serfs were not the property of the lord, but they had limited freedoms and rights.

For example, in the European feudal system, serfs worked on the feudal lord's lands, performing agricultural tasks and other tasks necessary for the feudal economy.

3. Colonization and Forced Labor

During the colonial era, many European powers-imposed systems of forced labor on indigenous populations and slaves brought from Africa to exploit natural and agricultural resources. These systems were often justified by racist ideologies and the pursuit of economic benefits.

4. Wage Labor and Industrial Capitalism

With the Industrial Revolution, wage labor emerged as the predominant form of appropriation of other people's labor. Employees sold their labor power for wages, while factory owners (capitalists) appropriated the value produced by surplus labor. For example, employees in factories during the Industrial Revolution

often worked in precarious conditions, with long hours and low wages.

5. Indented Work

This involves a contract by which a person agrees to work for an employer for a specific period in exchange for transportation, accommodation, and sometimes a salary or freedom at the end of the contract. It was common in the British and American colonies in the 17th and 18th centuries. At this time, many Chinese and Indians were taken to work on plantations in the Caribbean, Africa, and other colonies under indentured labor contracts.

6. Peonage

This is a system where employees are tied to their employers by debts they cannot pay, forcing them to work under coercive conditions. This was common in Latin America and other post-colonial regions where laborers worked on agricultural estates and were often trapped. in a cycle of perpetual debt to the landowners.

2. Conditions for the birth of Labor Law

Labor Law emerged as a response to the challenges and abuses that accompanied the Industrial Revolution. It developed through employees' struggle, state intervention and the evolution of social doctrines that sought to balance labor relations and protect employees. Throughout the 19th and 20th centuries, this field of law has continued to evolve and adapt to the new realities of the labor market, always with the goal of improving working conditions and promoting social justice in the workplace.

This specific branch of law has its origins in the context of the Industrial Revolution. This period, which began in the second half of the 18th century and extended through the 19th century, brought with it significant changes in working conditions, social structure, and labor relations.

Below is an overview of the key factors and developments that led to the birth of Labor Law:

1. Industrial Revolution

This marked the transition from agrarian economies to industrialized and urban economies, with the emergence of factories and the use of machinery. Employees faced long work hours (often 12 to 16 hours a day), low wages, unsanitary conditions, and lack of job security.

2. Labor Movements and Trade Unionism

In response to working conditions and fear of mechanization, movements such as Luddism emerged, where employees destroyed machinery. Over time, employees began to organize into unions and guilds to defend their rights and improve their working conditions.

3. Early Labor Legislation

In the United Kingdom, the first labor laws known as the "Factory Acts" were enacted in the early 19th century. These laws sought to regulate working hours, especially for women and children, and improve safety and hygiene conditions in factories. In other countries such as France, this law prohibited associations of employees and employers, reflecting distrust of labor movements. However, later, in the 19th century, the need for labor regulation began to be recognized.

4. Social and Political Doctrines

Despite Christianity's promotion of human dignity, it was notable that Karl Marx and other socialist thinkers took a leading role in beginning to criticize labor exploitation under capitalism, advocating for the protection of employees and the improvement of their conditions.

5. International Development

Founded in 1919, the ILO has been crucial in promoting international labor standards, advocating for basic labor rights such as freedom of association, collective bargaining, and the elimination of forced and child labor.

3. Evolution of Labor Law in Spain

In Spain, Labor Law has been structured around some highly relevant regulatory milestones that have marked its evolution. The following regulatory texts will be succinctly detailed below: Benot Law of 1873, Dato Law of 1900, the Spanish Republican Constitution of 1931, the Employment Contract Law of 1944, the Collective Agreements Law of 1958, the Labor Relations Law of 1976, the RDL 17/1977 of March 4 on labor relations, and finally the EC of 1978.

1º The Law of 1873 or "Benot" Law

It was the first Labor Law, one of the least fulfilled in the history of Spain. The widespread non-compliance with the law of 1873 was officially included in subsequent

legislative texts, something rare. For example, the explanatory memorandum of the Royal Decree of December 10, 1893, which created the Social Reform Commission, stated that "the law of July 24, 1873 (...) has been ignored by everyone". Few laws have been as poorly enforced in the history of Spain as Eduardo Benot's law on child labor.

Among the various causes that affected this non-compliance, we must speak of one, ignored, which has to do with the development of the law.

In its articles, the law established that numerous issues of utmost importance should be subject to more complete regulation by each of the cantons that made up the republican government structure. The political situation of the First Republic played against the law.

Part of the articles of the Benot Law were included, expanded or completed in subsequent laws, mainly by the Law of July 28, 1878, on the dangerous work of children, which prohibited the work of children and young people under sixteen years of age in public performances and risky professions, and the Regulation of the work of women and children, Law of March 3, 1900, which expressly set the minimum age to access work at ten years, developed by Eduardo Dato.

2º The "Dato" Law

The Work Accident Law of 1900 was predicted to be useless; however, years after its approval, the Work Accident Law of January 30, 1900 – the Dato Law – has been considered "the first provision that "It is issued in Spain regulating work accidents, creating insurance for them and adopting, as opposed to the doctrine of fault, which until then prevailed, the doctrine of professional risk".

"Not only is it the first Social Security norm, but one of the first important ones of Labor Law in our country that implied the acceptance of the theory of "professional risk", [...] [the transformation] of reality social and, finally, [a great] influence in the construction of the basic concepts of Labor Law."

3º The Republican Constitution of 1931

The Constitution of 1931 was one of the first to have a social character and nature, for the first time in Spanish constitutional history, since "it deals expressly and in detail with salaried work" (Montoya Melgar, 2009, p. 276).

In line with the classic formula of the Weimar Constitution, in whose Article 157, it was established that "work is under the special protection of the Reich", our Constitution of 1931 does so in a more marked way, defining the State itself in its famous Article 1 as a "Democratic Republic of employees of all kinds".

Furthermore, this social nature is also notably evidenced in its Weimarian-influenced Article 46, where it was stated that: "Work, in its various forms, is a social obligation, and will enjoy the protection of the laws".

The protection that the Constitution and, even more, the Republic, had to provide to work was, in addition, the subject of a detailed specification that obliged the legislator to carry out a very profound social reform project aimed at "ensuring to every employee the necessary conditions for a dignified existence" through regulation in social legislation.

This was designed for "cases of insurance for illness, accidents, forced unemployment, old age, disability, and death; the work of women and young people and especially maternity protection; the working day and the minimum and family wage and paid annual vacations".

It also established cooperation institutions, as well as the economic-legal relationship of the factors that make up production; the participation of employees in the management, administration and profits of companies, and everything that affects the defense of employees.

4º The Labor Contract Law of 1944

During the Franco´s regime, a series of measures appeared aimed at expanding Social Security in matters such as family protection, for example, the family allowance of 1938, old-age insurance (a new work accident insurance regime was unified and regulated in 1956), or illness by the law of December 14, 1942.

The labor magistracy also appeared and the mixed juries and industrial courts that were operating during the Second Republic were suppressed.

We highlight the employment contract law of 1944 where much of the regulatory material of its 1931 namesake is recast in its first book.

On the other hand, the labor regulations law of October 16, 1942, or also called labor ordinances constitute the most characteristic feature of Franco's Labor Law. The Minister of Labor, through a ministerial order, promulgated labor regulations in different sectors or

branches of production, such as construction, hospitality, the textile sector, road transportation, among others. These regulations barely had higher standards to which they were subject and had to undergo any serious control mechanism.

5º The Collective Agreements Law of 1958 and its evolution

The economic evolution that Spain is experiencing thanks to American economic aid and the Government policy formed in 1951 that had a manifest technical superiority over the precedents and a more liberal program, although not entirely coherent, to bring about major changes in the economy leading to prosperity.

In this sense, as a consequence of this economic change, the union organization achieved great notoriety, which gives them greater flexibility.

In 1953, the company juries that had been created 6 years earlier were regulated and in 1957 the first union elections were held.

Although official unionism controlled the internal life of the company, at this historical stage, it would do so much more than in the past. On April 24, 1958, collective agreements were recognized by law.

6º The Industrial Relations Act of 1976

This norm was created in the Francisco Cortes, and had technical defects, presenting itself as insufficient and with a series of characteristic notes such as ephemeral duration. It was not in force for even four years and was always highly discussed. And its exclusive rule: the labor relations law referred only to individual labor relations.

It also had a substitutive nature since it was the norm that replaced the labor contract law of 1944 despite offering a certain regulatory insufficiency, regulating neither negotiation nor collective conflicts.

7º RDL 17/1977 of March 4 on labor relations

It regulated aspects of both individual labor relations and collective bargaining, strikes and conflicts.

It develops a new cause for termination due to objective circumstances such as ineptitude and lack of adaptation, absenteeism, and the need to amortize a job due to economic circumstances.

In relation to the strike, RDL 17/1977 of March 4 was declared partially unconstitutional by the ruling of the Constitutional Court of April 8, 1981.

Lockouts and collective conflicts remain in force in relation to strikes, but it is not a strike law that develops Article 28.2 CE since this is subsequent to the aforementioned norm.

8ª Initiation of the regulation of Freedom of Association

It began in the pre-constitutional stage in a process parallel to that of the political transition.

The change in the union system has been called the "dismantling of the union organization" operation.

In this process, an attempt was made to achieve the establishment of a regime of union freedom and plurality and the following events can be distinguished:

- Law 19/1977 on Trade Union Association that recognized the right of employers and employees to form professional associations.
- RDL 31/1977 of June 2 that eliminates mandatory membership in vertical unionism.
- RD 3149/1977 of December 6, which eliminated the corporate organization.
- Convention 87 –on Freedom of Association.
- ILO Convention 98 –on the Right to Organize and Collective Bargaining– ratified by Spain on April 13, 1977, since these conventions were drawn up in 1948.

  Ratification of the international covenants on civil and political rights and on economic, social, and cultural rights, both ratified on April 13, 1977.

They all agreed in recognizing the principles of freedom of association of founding the union and of affiliation to them, the right to establish federations and confederations and join them, as well as the creation of the institutional administration of socio-professional services also called the AISSS - to which the personnel and assets of the union organization were assigned as a first step for their subsequent transfer to the State Administration and other public entities.

9º Labor Law in the 1978 Constitution and post-constitutional labor regulations

From a historical perspective, the Spanish Constitution of 1978 is influenced by similar texts that were in force in

Europe at the time, especially in Germany and Italy. After the approval of the 1978 Constitution, President Suárez made the decision to dissolve the Cortes. The elections of March 1979 were much more unpredictable than those of 1977. On this occasion, the political party called Unión de Centro Democrático, although it decreased in votes, achieved 3 more seats while the political party named Partido Socialista Obrero Español added 3 more seats. The democratic coalition suffered a spectacular catastrophe and the extreme right obtained one seat.

The Spanish Communist Party rose but slightly, which seemed to make impossible any displacement of the Partido Socialista Obrero Español from its hegemony on the Left wing. The victory of Unión de Centro Democrático was reaffirmed after the drafting of the constitutional text.

While the second vote was taking place for the election of Suárez's successor, Colonel Tejero with a group of civil guards occupied the Congress. In essence, the coup plotters took advantage of a propitious opportunity to established their purposes. Suárez's successor, Calvo Sotelo, was suggested by himself.

This one had a different origin and personal traits from those of Suárez but it could have been a complementary version of centrism. Calvo Sotelo was not capable of leadership similar to that of Suárez nor of promoting the configuration of a party, remaining in apparent passivity when faced with the option of agreeing with another political force, whatever it might be. The elections of October 1982 can rightly be considered the end of the transition.

These elections resulted in the victory of the Partido Socialista Obrero Español, which consolidated the Spanish democracy. Many authors claim that from this moment on, great advances began in other areas such as the economy, looking to the future construction of the state of autonomies and the full normalization of the foreign policy.

After this historical introduction and from a normative point of view, when talking about Labor Law in the CE, we must start from the economic and social model of the Constitution in Article 1.1, which states:

"Spain is constituted as a social and democratic state of law." In this sense, our Constitution cannot be defined either as a socialist Constitution since Article 38 enshrines the freedom of enterprise within the framework of the market economy, nor as a liberal Constitution since state intervention is recognized in its Article 9.2., but far from authoritarian because there is a pluralistic conception of society.

In our "Magna Carta" or Great Charter, as the Constitution is called in Spain, there are a series of normative precepts on which the current Spanish labor law is based, such as:

Article 10: The conception of social peace as the foundation of that peace now recognizes the dignity of the person, their rights, the free development of personality, respect for the law and the rights of others.

Article 7: The consideration of unions and professional associations as a shaping factor of the State, being elevated to the rank of basic institutions along with political parties and the Armed Forces.

Articles 28.1 and 28.2:

Both are fundamental rights, art 28.1 CE states the right to unionize in its paragraph which includes positive and negative freedom of association and is comprehensive of the right to found unions and the right to join or disaffiliate and the possibility of forming Confederations and union organizations, including international ones, as well as joining them.

In this sense, Article 28.1 must be related to Article 7 CE. Article 28.2 is dedicated to the right to strike.

There are other so-called non-specific constitutional rights, also of a fundamental nature, which acquire a labor-related dimension and are included in the Second Section, Title I, Chapter II, First Section of the EC, such rights are:

- Right to equality and non-discrimination of Article 14
- Ideological freedom, one of whose powers is the reservation of one's own ideology, religion or belief, and the right to religious freedom of Article 16
- Right to honor and personal privacy and own image Article 18. 1
- Right to freedom of expression Article 20(a), and the right to communicate truthful information Article 20(d).
- Association rights, Article 22.
- Right to effective judicial protection Article 24.

- Right not to be sanctioned for actions or omissions that at the time of their occurrence do not constitute a crime or administrative infraction.
- Right to education - Article 27-.

Along with these are the citizen or non-fundamental rights regulated in the Second Section Title I Chapter II CE are included:

- The right to work and the duty to work.
- The rights to free choice of profession or trade
- The right to work is the constitutional support point of the principle of stability in employment that is manifested in numerous legal rules, including those that establish a "causal dismissal regime," understood as a requirement for sufficient justification for dismissal upon promotion. through work to a sufficient and non-discriminated remuneration It serves as a basis for the institution of the interprofessional minimum wage regulated in Article 27 ET with reference to Article 35.1 CE, also establishing that the law will regulate a Employees' Statute -Article 35.2 CE-.

In this same group we must include the right to collective labor bargaining, between the representatives of employees and employers, Article 37.1 and that of employees and employers to adopt collective conflict measures -Article 37.2-.

The third chapter includes the guiding principles of socio-labor policy, a series of them configured as a commitment of public powers that in many cases constitute a clear connection with labor matters, we can mention the maintenance of a public Social Security regime for all employees. citizens, which guarantees sufficient social assistance and benefits in situations of need, especially in cases of unemployment, -Article 41 CE-.

On the other hand, this chapter includes the safeguarding of the economic and social rights of Spanish employees abroad, directing the State's policy towards their return (Article 42). References to Articles 43.1, 43.3, 49 and 50 on health, disabled people and old age may be added.

Article 129 CE regulates the participation in Social Security in the company and in the Promotion of cooperative societies. These are actions entrusted to public powers and we are not faced with rights.

10º Collective work relationships

Collective labor rights appear in the Constitution located in different places and with diverse legislative treatment.

Next, we are going to study Labor Law in post-constitutional labor regulations.

As it currently appears, the structure of the labor system is as follows:

The development of the Constitution in matters of labor relations began with the fulfillment of the mandate of the content of Article 35.2 CE that expressly states "the law will regulate a Workers´Statute " -this Statute was law 8/1980 of 10 of March-.

The term ET was a new term in our system. What does it refer to?

The origin of the expression in the Spanish Constitution must be sought in an Italian law of 1970, the so-called law 300/70 on "rules on the protection of the freedom and dignity of employees, of freedom and union activity in places of work." work and placement standards" – was what was called the "Statuto dei Laboratori".

In the transition stage, the Spanish labor laws looked to Italy as a reference for the model of democratic labor relations and that is where the term arose.

The problem arose when giving content to the Employees' Statute provided for in Article 35 of the Spanish Constitution, which is why several regulatory options were presented:

The same thing as its Italian namesake could be regulated, that is, guarantees of employees' rights and freedoms, union representation and placement rules.

This Idea did not prosper since union freedom in Spain had to be regulated by Organic Law:

- Regulating the rights listed in Article 35.1 CE were insufficient regulating all aspects was problematic due to the different range of rights
- Finally, the government developed the employees' statute that contained 3 titles

  First title- The employment contract

  Second title- Unitary representation

  Third title- The collective bargaining

Sources and application of Labour Law

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Contents

1. International standards

It is essential to highlight the fact that, as far as international regulations are concerned, we are immersed in an increasingly internationalised and globalised framework of labour relations. Labour law and its protective or protective character do not escape from all this. Labour relations are becoming more and more international, but also transnational in nature. This is also reflected in their regulation. The labour regulations of our legal system are, to a large extent, the result of protective action of international origin. Therefore, it is important to bear in mind the system of sources of labour law to which we are subject, since we are immersed in an international framework in which both legislation and international conventions and the jurisprudential decisions of the different courts of justice have an impact on our domestic law (each in its own right). Within the sources of labour law, in addition to national legislation, we have international social legislation which, once officially published in Spain in the Official State Gazette (BOE), forms part of our legal system, as stated in Article 96.1 CE: "*Validly concluded international treaties, once officially published in Spain, shall form part of the internal legal system*".

Within international social standards we find the following general classification:

1.- Norms emanating from the Council of Europe

a) The European Social Charter (Turin 18/10/1961). In force in Spain since 05/06/1980 after its ratification in the BOE of 26/06/1980. However, currently in force is the European Social Charter (revised), made in Strasbourg on 3 May 1996 (BOE no. 139, of 11/06/2021). It is a standard interpreted by the European Committee of Social Rights and has legal force when it is invoked before the courts.

b) The European Convention on Human Rights (ECHR), which is interpreted by the European Court of Human Rights (ECtHR) in Strasbourg, whose pronouncements may be admitted as contrast judgments in the framework of an appeal for the unification of doctrine before the Supreme Court (SC).

2.- Norms emanating from the United Nations (including the ILO)

a) The Universal Declaration of Human Rights (1948). This document marks an important milestone in the history of human rights. Drawn up by representatives from all regions of the world with different legal and cultural backgrounds. The Declaration was proclaimed by the United Nations General Assembly

in Paris on 10 December 1948 in its Resolution 217 A (III) as a common ideal for all peoples and nations.

b) The International Covenant on Civil and Political Rights. This is a comprehensive multilateral treaty that recognises civil and political rights. It establishes mechanisms for their protection and guarantee. It was adopted by the United Nations General Assembly of the United Nations through Resolution 2200 A (XXI) of December 16, 1966.

c) The International Covenant on Economic, Social and Cultural Rights (New York, 19/12/1966). It includes many social rights, becoming more important since the ratification of the Optional Protocol to the Covenant which empowers the Committee on Economic, Social and Cultural Rights to receive monitoring functions on its correct implementation.

d) The United Nations Convention on the Rights of Persons with Disabilities. Its purpose is to promote, protect and ensure the full and equal enjoyment of all their rights and fundamental freedoms and to promote respect for their inherent dignity (Instrument of ratification of the Convention on the Rights of Persons with Disabilities, done in New York on 13-12-06). Assembly by Resolution 2200 A (XXI) of 16 December 1966.

3.- The Conventions and Recommendations of the International Labour Organisation

The ILO is a specialised agency of the United Nations. It is the only "*tripartite*" agency of the UN. It brings together governments, employers and employees from 187 member states. It deals with labour and industrial relations issues in order to set labour standards, formulate policies and develop programmes promoting decent work for all (women and men). The standard coming from the ILO mainly aims at the recognition of basic rights or the establishment of minimum standards for working conditions. International labour standards were developed to form a comprehensive system of labour and social policy instruments. Only the Conventions ratified by our country are binding on States and even in labour relations between individuals. The Recommendations, on the other hand, are guiding texts which, without being binding, can act as interpretative or clarifying criteria for the Conventions themselves.

The Conventions are classified as fundamental, governance (priority) and technical. Within the list of instruments by theme and status we can highlight the following: 1. Freedom of association, collective bargaining and labour relations, 2. Forced labour, 3. Elimination of child labour and protection of children and young persons, 4. Equality of opportunity and treatment, 5. Wages, 11. Working time, 12. Occupational safety and health, 13. Social security, 14. Social policy, 16. Migrant employees, 17. HIV and AIDS, 18. Seafarers, 19. Fishers, 20. Dock employees, 21. Indigenous and tribal peoples, 22. Specific categories of employees and 23. Conventions on final articles.

In principle, the ILO standard prevails over the national standard, insofar as it cannot be amended by the latter. Its most common function is that of an interpretative element or supplementary law, which is why the first recourse is usually to domestic standards (state or agreed) that expressly deal with the relevant subject matter. The ILO standard, moreover, usually includes trend lines, not mandatory mandates, taking into account national conditions and practices. However, if a Convention has been ratified by Spain, but domestic legislation has not been adapted to it, this normative instrument can be directly invoked by the interested parties before the courts of justice.

4.- International agreements (bilateral or multilateral)

We refer to the international, bilateral or multilateral agreements signed by Spain with other States in the field of labour relations. These are treaties between States that are normally concluded for the recognition or maintenance - on the basis of reciprocity - of basic labour and social security rights for their respective nationals. Currently, based on the provisions of the CE in Chapter Three of Title III (Arts. 93 to 96), relating to International Treaties, the regulation of the State's activity in the area of International Treaties and other Agreements is regulated in Law 25/2014, of 27 November, on Treaties and other International Agreements.

This law regulates the three types of International Agreements existing in Spanish practice:

a) Treaties, which can only be signed by the State as a subject of international law, although the Autonomous Communities (CC.AA.) may participate in their conclusion (Articles 49 and 50 of Law 25/2014). International treaties are directly applicable unless they are conditional upon the approval of the relevant laws or regulatory provisions. They take precedence over any domestic law, except for the Constitution, which is the supreme law of our legal system (Articles 30.1 and 32 of Law 25/2014).

b) International Administrative Agreements, which implement or specify the Treaties, their content being of a technical nature. These agreements may be signed by the Autonomous Regions within the framework of the powers granted to them by the Treaties (Article 52 of Law 25/2014).

c) Non-administrative International Agreements, which are those that contain declarations of intent or establish commitments of action of political, technical or logistical content and do not constitute a source of international obligations, and may be signed by any subject of public law with the power to do so, including the Autonomous Communities (Article 53 of Law 25/2014).

It is important to highlight the fact that within the European Union (EU), multilateral conventions are also often concluded between Member States (especially in economic matters and in the field of security and internal border control). From an employment point of view, the agreement on the free movement of persons between the European Community and its Member States, on the one hand, and the Swiss Confederation, on the other hand, signed in Luxembourg on 21 June 1999, is the one that establishes the greatest equality with EU citizens.

Other international human rights instruments that may contain similar provisions include: the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the International Convention on the Protection of the Rights of All Migrant Employees and Members of Their Families (1990), the Declaration on the Rights of Persons Belonging to National or Ethnic Minorities, religious and linguistic minorities (1992), the Durban Declaration and Programme of Action (2001), the Declaration on the Right to Development (1986) and the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (1999).

The importance of the interpretation of international norms is reflected in Article 10.2 CE, which states that, "*The norms relating to the fundamental rights and freedoms recognised by the Constitution shall be interpreted in accordance with the Universal Declaration of Human Rights and the international treaties and agreements on the same subjects ratified by Spain*". This has had a notorious impact on our labour law and on the decisions of the courts of justice.

2. European Social Law

The EU is a political community under the rule of law constituted as a sui generis international organisation created to promote and host the integration and common governance of the states and peoples of Europe. We are dealing with a supranational organisation of harmonising law. The integration of Spain into what was then known as the European Communities took place via Organic Law 10/1985, of 2 August 1985, on Authorisation for the Accession of Spain to the European Communities (on 12 June 1985, the Treaty of Accession of Spain and Portugal was signed, which came into force in our country on 1 January 1986).

The growing impact of EU Social Law as a supranational and autonomous (as well as harmonising) legal system is of great importance. Many national rules relating to labour and social security law and occupational health and safety have their origin in this regulation. EU rules are divided into primary law (founding treaties) and secondary law (regulations and directives, in general). EU law provides guidelines for the harmonisation of national laws, as well as rules of direct application in matters of EU competence. They are interpreted by the Court of Justice of the EU (CJEU) through its judgments (SSTJUE). The EU is a legal system governed by a series of values and principles derived from the Treaties and the acquis communautaire as a whole. The guiding principles of EU law are: autonomy (since it constitutes a legal system that is separate and autonomous from international law and from the domestic legal systems of the Member States into whose legal systems it is integrated without losing its specific characteristics), unity (which aims to achieve the goals of European integration, for which the work of the CJEU in interpreting EU law is essential), complexity and diversity (reflected in the system of sources).

In such a way that the normative sources in the Union Law are divided into:

a) Original (or primary) law, consisting essentially of the constituent rules and their amendments. Primary law is made up of the constituent or founding treaties, the reform treaties, the supplementary treaties and the accession treaties, and is the supreme law in the hierarchy of EU law. The fundamental characteristic of primary law is its superior hierarchy, its binding

nature and its direct application (it does not require transposition).

b) Secondary (or secondary) law, which consists of the normative provisions of the institutions of the Union which have the power to enact or adopt them in accordance with the provisions of the Treaties themselves and which are binding on the Member States. It is appropriate to say that all law not covered by the constituent rules is secondary law. The fundamental characteristic of this law is its effectiveness, which can be vertical (concerning relations between Member States and citizens) and horizontal (concerning relations between individuals). Secondary law is the following:

   - Regulations: rules of a general nature or scope that are fully effective. They are binding in their entirety and directly applicable in each Member State without the need for transposition.
   - Directives: with a scope that can be general or specific. It obliges only the achievement of a specific objective within a certain period of time (generally three years), leaving it up to the Member States to choose the specific transposition rule that will achieve the results sought in the Directives.
   - Decisions: these are rules that are binding in their entirety, but with a scope that may be general or specific - to one or more Member States, or to natural or legal persons.
   - Interinstitutional Agreements: provided for the organisation of cooperation between the European Parliament, the Council and the Commission.
   - Non-binding acts (also known as *soft law* techniques): recommendations, opinions and programmes.

The relationship between EU law and national laws is not determined by hierarchical criteria, but by criteria of competence. The principle of attribution of competences is currently regulated in Article 5 of the Treaty on European Union (TEU) and Article 7 of the Treaty on the Functioning of the European Union (TFEU), in such a way that the EU can only make use of the competences attributed to it to pursue its objectives and within the limits of these competences, leaving the competences not attributed to it in the hands of the Member States. As mentioned above, Spain joined the EU by means of the Treaty annexed to the Single European Act with effect from 1 January 1986. These effects of EU law also derive from the general clause of Article 93 of the EC, which allows an organic law to authorise the conclusion of treaties "*whereby the exercise of powers deriving from the Constitution is transferred to an international organisation or institution*". The primacy and direct effect of Community norms has been underlined by Spanish jurisprudence. On the one hand, direct effect means that Community rules do not need to be reflected in domestic law, but are directly applicable as soon as they are published in the Official Journal of the EU (but only in the case of Community Regulations; Directives have to be transposed). EU rules are an immediate source of rights and obligations for those to whom they apply, whether Member States or individuals.

3. Specialities of the sources of Labour Law

Labour law generally regulates the relationship between employees and employers with its own principles that are different from the rules of civil law from which it originally derives. It is a tuitive or protective law for employees that can be described as compensatory or equalising, as it aims to correct the material inequalities existing in the relationship between employees and employers by means of rules that establish unequal treatment to the benefit of the former, since the weaker party in the employment relationship is the employee.

Labour law establishes channels for employees' participation in determining their living conditions in the company. Thus, without abandoning its role of protection, this law then extends to the recognition and regulation of such collective rights through collective bargaining and the binding force of collective agreements (as set out in Article 37 CE). The content of current labour law has been extended to cover different matters which have been grouped into the following blocks: individual labour law (employment contract, working conditions, prevention of occupational risks, vicissitudes of the employment relationship, etc.), collective labour law, regulating in this field the system of labour relations (unitary or trade union representation, collective bargaining, employee participation in the company, systems of pressure and labour dispute resolution, etc.), procedural law (LRJS) and labour administration.

Within the specialities of the sources of labour law, it is important to bear in mind the system of sources of labour law to which we are subject, given that we are immersed in an international framework in which legislation, international conventions and case law rulings all have an impact on our domestic law (each in its own right). We can therefore distinguish between

state sources (Constitution, Law and Regulations) and non-state sources. Within the latter, we find supranational (ILO, EU law) and international sources (agreed international law, bilateral and multilateral treaties) and also professional sources. The latter include collective agreements (recognised by Article 37 CE and regulated in Title III ET, Articles 82 to 92) and labour, local or professional custom that arises spontaneously, without the intervention of State institutions or bodies in its elaboration (included in Article 3.1(d) ET).

4. Collective bargaining as a source of Labour Law

In contrast to other branches of law, new legal sources appear in Labour Law. In the material sense of sources, the power of employees' and employers' representatives to create labour standards through collective bargaining is the result. In the formal sense of source, collective agreements are the result of such bargaining. The collective agreement (C.C.) is the main peculiarity of the system of sources of Labour Law. It is drawn up by the addressees of the standard themselves (representatives of the employees and employers or employers' associations to which the law recognises such competence). The CE recognises, as a fundamental right, the right to organise freely and the right to strike in Article 28, which is directly related to the right to collective bargaining, to the binding force of collective agreements and to the right to adopt collective conflict measures (Article 37). In accordance with Article 37.1 CE and Articles 3(b) and 82 ET, the C.C. is a source of law. This is stated in Article 82.1 ET: "*Collective agreements, as the result of bargaining carried out by the representatives of employees and employers, are the expression of the agreement freely adopted by them by virtue of their collective autonomy*". Through it, employees and employers "*regulate working conditions and productivity. They may also regulate labour peace through the obligations agreed*" (Article 82.2 ET). In such a way that they are a source of obligations for both employers and employees "*included within their scope of application and during the entire time they are in force*" (Article 82.3 ET).

The role of the collective bargaining agreement is to regulate relations between employees and their employer, but it also regulates relations between the collective organisations representing them. The collective bargaining agreement therefore aims at a balanced exchange of agreements and quid pro quos, affecting non-signatory third parties, regulating working conditions and productivity within its scope of negotiation and binding on all employers and employees within its scope of application. The collective bargaining agreement is an agreed standard based on the principle of collective autonomy, which presupposes a capacity to organise and create rules to regulate the corresponding legal relations. The collective bargaining agreement is the result of a negotiation process between two parties (labour and management), and therefore does not come from State bodies with regulatory capacity. Although it may have a general, intersectoral or interprofessional scope, the functional scope of the agreement is the company and the sector of activity, with a different geographical or territorial scope (provincial, regional or national). The collective bargaining agreement is usually a temporary regulation that is valid for several years, although it requires periodic revision to adapt it (especially in wage matters) to the changing circumstances of the labour law. There is no reservation of matters in favour of the C.C., but there are aspects that must be established in it (professional classification, salaries, working time, etc.). It is subject to the law by the principle of hierarchy, but its relationship with state regulations is also governed by the principle of competence, as set out in Article 3 ET.

The collective bargaining agreement can be statutory or non-statutory. The statutory collective bargaining agreement is governed by the rules of Title III ET (Articles 82 to 92). The statutory agreement is the most common in our labour relations system. Only these agreements are a source of law, with two types of effectiveness: a) Regulatory effectiveness: they are a source of law, and b) General effectiveness: i.e. they apply erga omnes, as they are binding on all employees and employers included within the scope of application of the agreement (regardless of whether or not they are affiliated to the organisations signing the agreement). The statutory collective bargaining agreement has normative value and general effectiveness in its functional and territorial scope, and is applicable to all employees and employers included in the scope of application in question (company, sector, etc.). It has mandatory and mandatory effects for all employment contracts within its scope of application, with neither the employment contract nor the individual agreement having the power to exclude the application of the C.C. Collective bargaining agreements are negotiated in bargaining units in accordance with the rules of Article 83 ET, with the scope of application agreed upon by the parties. The most representative trade union organizations and business associations (at the national or Autonomous Community level) may establish, by means of Interprofessional Agreements, clauses on the structure of collective bargaining, establishing, where appropriate, the rules for resolving conflicts of

competition between agreements of different scope in accordance with the rules of Article 84 ET. These clauses may also be agreed upon in sectoral collective bargaining agreements -at the state or autonomous community level- by those trade unions and employers' associations that have the necessary legal standing, in accordance with the provisions of the ET. Such employees' and employers' organizations may draw up agreements on specific matters. These agreements, as well as the Interprofessional Agreements, will have the treatment that the ET grants to collective bargaining agreements.

Pursuant to Article 85 ET, in compliance with the laws based on the principle of hierarchy of norms, collective bargaining agreements may regulate matters of an economic, labor and union nature and, in general, any other matters affecting employment conditions and the scope of relations between employees and their representative organizations and the employer and business associations, including procedures for resolving discrepancies arising from the consultation periods provided for in Articles 40 (geographic mobility), 41 (substantial modifications to working conditions), 47 (reduction of working hours or suspension of the contract for economic, technical, organizational or production reasons arising from force majeure) and 51 (collective dismissals). The arbitration awards that, for these purposes, may be issued will have the same effectiveness and processing as the agreements in the consultation period, being subject to challenge in the same terms as the awards issued for the resolution of disputes arising from the application of the agreements. Different types of clauses may be introduced in the C.C.: a) Regulatory: which creates rights and obligations for the parties and whose function is to regulate the individual and collective relations of the parties affected by the agreement, b) Obligatory or conventional: which create rights and obligations only for the parties signing the agreement (such as, for example, the labor peace clause or the appointment of the Joint Commission of the C.C.). Without prejudice to the freedom of the parties to determine the content of collective bargaining agreements, in the negotiation of such agreements there will be, in any case, the duty to negotiate measures aimed at promoting equal treatment and opportunities between women and men in the workplace or, where appropriate, equality plans with the scope and content provided for in Chapter III of Title IV of Organic Law 3/2007, of March 22, for the effective equality of women and men. Collective bargaining may articulate procedures for information and monitoring of objective dismissals, in the corresponding area. Likewise, without prejudice to the freedom of contracting recognized to the parties, collective bargaining will articulate the duty to negotiate equality plans in companies with more than two hundred and fifty employees.

Collective bargaining agreements must express as a minimum content the following: a) The determination of the parties that enter into them (entitled parties), b) The personal scope (the employees to whom they apply), functional scope (determines the productive units affected -company/s, production sector, fringe or interprofessional agreements-), territorial or geographical scope (local, regional, provincial, Autonomous Community or national) and temporal scope (duration and validity), c) The procedures for effectively resolving any discrepancies that may arise for the non-application of the working conditions referred to in Article 82.3 ET, adapting, where appropriate, the procedures established in this respect in the Interprofessional Agreements at the state or autonomous community level in accordance with the provisions of said article, d) The form and conditions for termination of the agreement, as well as the minimum term for said termination, e) The appointment of a Joint Committee representing the negotiating parties to hear those matters established in the Law and any others attributed to it, and the establishment of the procedures and deadlines for action by this committee, including the submission of any discrepancies arising therein to the non-judicial dispute resolution systems established by means of the Interprofessional Agreements at state or autonomous community level provided for in Article 83 ET.

According to Article 86, it is up to the negotiating parties to establish the duration of the collective bargaining agreements, and different periods of validity may be agreed for each subject or homogeneous group of subjects within the same agreement. Unless otherwise agreed, collective bargaining agreements will be extended from year to year unless expressly denounced by the parties (ultra-activity). The term of a collective bargaining agreement, once it has been denounced and the agreed duration has expired, will be in accordance with the terms established in the agreement itself. During the negotiations for the renewal of a collective bargaining agreement, in the absence of an agreement, it will remain in force, although the contractual clauses waiving the right to strike during the term of an agreement will lapse as from the date of its termination. If one year has elapsed since the termination of the collective bargaining agreement without a new agreement having been agreed, the parties must

submit to the mediation procedures regulated in the Interprofessional Agreements at state level (the ASAC) or regional level (the SERCLA in the case of the Autonomous Community of Andalusia) provided for in Article 83, in order to effectively resolve the existing discrepancies. Likewise, provided there is an express agreement, the parties will submit to the arbitration procedures regulated by said Interprofessional Agreements, in which case the arbitration award will have the same legal effectiveness as the collective bargaining agreements. When the negotiation process has elapsed without reaching an agreement, the C.C. will remain in force. It is important to emphasize that the agreement that succeeds a previous one repeals the latter in its entirety, except for those aspects that are expressly maintained.

The rules governing standing to negotiate collective bargaining agreements are set forth in Article 87 ET. In representation of the employees, the company's works council, the personnel delegates, if any, or the union sections, if any, which together account for the majority of the members of the council, will be entitled to negotiate in company agreements and agreements of a lower scope. The intervention in the negotiation shall correspond to the union sections when they so agree, provided that they represent the majority of the members of the works council or among the personnel delegates. In the case of agreements for a group of companies, as well as in agreements affecting a plurality of companies linked by organizational or productive reasons and identified by name in their scope of application, the legitimacy to negotiate on behalf of the employees will be that established for the negotiation of sectoral agreements. In agreements aimed at a group of employees with a specific professional profile (fringe agreements), the trade union sections that have been designated by a majority of their representatives by means of a personal, free, direct and secret ballot will be entitled to negotiate. In sectoral agreements, the following will be entitled to negotiate on behalf of the employees: a) The trade unions considered the most representative at the state level, as well as, in their respective areas, the trade union organizations affiliated, federated or confederated to them, b) The trade unions considered the most representative at the Autonomous Community level with respect to those agreements which are not considered the most representative at the Autonomous Community level, and c) The trade unions considered the most representative at the Autonomous Community level with respect to those agreements which are not considered the most representative at the Autonomous Community level. AA. with respect to agreements that do not go beyond that territorial scope, as well as, in their respective areas, the trade union organizations affiliated, federated or confederated to them, and c) The trade unions that have at least ten percent of the members of the works councils or personnel delegates in the geographical and functional area to which the agreement refers.

In representation of the employers, the following shall be authorized to negotiate: a) In company or lower level agreements, the employer himself, b) In company group agreements and in those affecting a plurality of companies linked for organizational or productive reasons and nominatively identified in their scope of application, the representation of such companies and c) In sectoral collective agreements, the business associations which, within the geographical and functional scope of the agreement, account for ten percent of the employers, and provided that they employ the same percentage of the employees affected, as well as those business associations which, within said scope, employ fifteen percent of the employees affected. In those sectors in which there are no business associations that are sufficiently representative, the statewide business associations that represent ten percent or more of the companies or employees at state level, as well as the business associations of the Autonomous Communities that represent at least fifteen percent of the companies or employees, will be authorized to negotiate the corresponding sector collective bargaining agreements. Likewise, the unions of the Autonomous Communities that are considered to be the most representative in accordance with Article 7.1 LOLS, on Freedom of Association, and the business associations of the Autonomous Communities that meet the requirements set forth in the sixth additional provision of the TE will have standing in state-level agreements. Therefore, any trade union, trade union federation or confederation, and any business association that meets the requirement of standing, will have the right to form part of the negotiating committee.

According to Article 92 ET, the criteria for adherence to and extension of a collective bargaining agreement are as follows. In the respective bargaining units, the parties entitled to negotiate may adhere, by mutual agreement, to the entirety of a collective labor agreement in force, provided that they are not affected by another one (absence of a collective standard), notifying the competent labor authority for registration purposes. The Ministry of Employment and Social Security, or the corresponding body of the Autonomous Communities with competence in the matter, may extend, with the

effects provided for in Article 82.3 ET, the provisions of a collective labor agreement in force to a number of companies and employees or to a sector or subsector of activity, due to the prejudice derived for them from the impossibility of subscribing a collective labor agreement in such area, due to the absence of parties entitled to do so. On the other hand, the decision to extend a collective bargaining agreement will always be adopted at the request of a party and through the procedure established in Royal Decree 718/2005, of June 20, which approves the procedure for the extension of collective bargaining agreements, the duration of which may not exceed three months, and the absence of an express resolution within the established term will have the effect of rejecting the request. Those entitled to initiate the extension procedure are those entitled to promote collective bargaining in the relevant area pursuant to Articles 87.2 and 3 ET. Thanks to the extension, the labor authority can decide to apply the provisions of a collective labor agreement to a specific area where there is either no collective labor agreement or where there are no valid bargaining partners in accordance with the provisions of the ET.

Article 84 ET establishes the rules governing the concurrence of collective bargaining agreements, so that a collective labor agreement, during its term, may not be affected by the provisions of agreements of a different scope unless otherwise agreed, negotiated in accordance with the provisions of Articles 83.2 and 84 ET. The regulation of the conditions established in a company agreement will have priority of application with respect to the state, regional or lower-level sectoral agreement in the following matters: a) The payment or compensation of overtime and the specific remuneration of shift work, b) The schedule and distribution of working time, the regime of shift work and the annual planning of vacations, c) The adaptation to the scope of the company of the professional classification system of the employees, d) The adaptation of the aspects of the contracting modalities attributed by this law to the company agreements, e) The measures to favor co-responsibility and the conciliation between work, family and personal life, f) Those others provided for in the collective agreements and conventions referred to in Article 83.2 ET. Collective bargaining agreements for a group of companies or a plurality of companies linked by organizational or productive reasons and identified by name will have the same priority of application in these matters. The Interprofessional Agreements and state or autonomous community sectoral collective bargaining agreements may not have the priority of application provided for in this section. Within the scope of an Autonomous Community, trade unions and business associations that meet the legal standing requirements may negotiate collective bargaining agreements and Interprofessional Agreements of the Autonomous Communities, which will have priority of application over any other sectoral agreement or state-level agreement, provided that such agreements and arrangements obtain the support of the majorities required to form the negotiating committee in the corresponding bargaining unit and their regulation is more favorable for employees than that set forth in the state-level agreements or arrangements. Provincial collective bargaining agreements may have the same priority of application when this is provided for in the Interprofessional Agreements signed at regional level and provided that their regulation is more favorable for employees than that set forth in the state agreements. In these cases, the probationary period, hiring modalities, professional classification, maximum annual working hours, disciplinary regime, minimum occupational risk prevention standards and geographic mobility will be considered non-negotiable matters.

Finally, the extra-statutory collective bargaining agreement is the one negotiated outside the ET. The rules of Title III are not followed in their negotiation. Although these agreements are lawful, their degree of applicability is less, since they have limited effectiveness, binding and binding only on the employees and employers directly represented in the negotiation and on the employees affiliated to the corresponding union or business association. Therefore, they have no normative value, but merely contractual value for the signatory parties, who will be responsible for incorporating them into the corresponding employment contracts of their members. In addition to the foregoing, company agreements (with a limited, specific or very specific purpose) and other agreements or pacts (company instructions or company agreements) may also be entered into.

5. Requirements for the applicability of the rules

The requirements for the applicability of the rules in the Spanish legal system are regulated by Cód.Civ. Article 1 establishes that the sources of the Spanish legal system are the law, custom and the general principles of law, with those provisions that contradict another of higher rank (normative hierarchy) being invalid. Custom must be proven, and will only apply in the absence of law. As regards the general principles of law, these shall apply in the absence of law or custom, "*without prejudice to their character of informing the legal system*". International treaties will not be directly applicable until

they are published in the Official Gazette, at which time they will become part of our legal system. The function of the jurisprudence is to complement the legal system, "*with the doctrine that, in a reiterated manner, the Supreme Court establishes when interpreting and applying the law, the custom and the general principles of law*". Article 2 Cód.Civ. settles that the laws will enter into force twenty days after their complete publication in the BOE, unless otherwise provided (*vacatio legis*). As regards the repeal of laws, they are only repealed by subsequent laws, having the scope expressly provided for and always extending to all that which, in the new law and on the same subject matter, is incompatible with the previous one. However, by the mere repeal of a law, the laws repealed by it do not become effective again. Section 3 establishes the non-retroactivity of laws, unless they provide otherwise, in accordance with what the CE establishes in Article 9.3 on the non-retroactivity of non-favorable punitive provisions or provisions restricting individual rights.

It is also worth noting the provisions of Article 3 Cód. Civ. in relation to the interpretation of the rules. It will be carried out "*according to the proper meaning of their words, in relation to the context, the historical and legislative background, and the social reality of the time in which they are to be applied, taking into account fundamentally the spirit and purpose of the rules*", and equity must be considered in the application of the rules, "*although the resolutions of the Courts may only rely exclusively on it when the law expressly permits it*". With regard to the analogical application of the rules, Article 4 Cód.Civ. establishes that "*The analogical application of the rules will be applicable when they do not contemplate a specific case, but regulate another similar case among which there is identity of reason*", not applying to cases or at times other than those expressly included in the "*criminal laws, the exceptional and those of temporary scope*", applying the provisions of the Cód.Civ. "*as supplementary in matters governed by other laws*". Finally, Article 6 Cód.Civ. establishes that ignorance of the laws does not excuse from their compliance. The error of law will produce only those effects that the laws determine. The voluntary exclusion of the applicable law and the waiver of the rights recognized therein will only be valid when they do not contravene the public interest or public order or harm third parties. Acts contrary to mandatory and prohibitive rules are null and void, unless a different effect is established therein for the case of contravention. And acts carried out under the protection of the text of a rule that pursue a result prohibited by the legal system, or contrary to it, will be considered to have been carried out in fraud of law and will not prevent the due application of the rule that had been sought to be circumvented.

6. Concurrence of sources

In Labor Law, the concurrence of the different sources we have been describing entails an added complexity for its practical application, since the solutions to the specific problems that may arise within the employment relationship require taking into account, for the solution of conflicts, rules of international origin and rules issued by the EU that come into play with national regulations, with collective bargaining agreements or with the individual agreements of the employees reflected in the employment contract. Knowing which legal regime is applicable to a given employment relationship requires taking into account a series of principles:

1.- The principle of hierarchy of norms

This principle is directly connected to the concept of supremacy, the Constitution being the supreme rule of the Spanish legal system. This is established in Article 9.1 CE: "*Citizens and public authorities are subject to the Constitution and the rest of the legal system*". This principle is also guaranteed in paragraph 3 of the same Article 1. This does not prevent, on occasions, the primacy of EU law as an autonomous legal system with respect to the competences attributed to the EU by the Spanish State. Thus, the CE is at the top of our legal system. International treaties and agreements are below it. They are followed in order of precedence by laws, regulations and collective bargaining agreements and company pacts. In this sense, the collective bargaining system presupposes the prevalence of collective autonomy over the individual autonomy of the employees concerned with respect to a matter established in collective bargaining agreements. However, this does not preclude that, within the employment contract, individual autonomy may also be expressed by improving what is established in the collective bargaining agreement, provided that it does not imply the waiver of rights or violate the law or the right to collective bargaining. It is followed in hierarchical order by local and professional uses and customs, general principles of law and case law, which complements the legal system "*with the doctrine that, in a reiterated manner, is reestablished by the Supreme Court when interpreting the law, custom and general principles of law*" (Article 1.6 CE). The principle of hierarchy of norms implies, therefore, that lower-ranking norms must be subject to what is regulated in higher-ranking norms, and any norm that violates this principle is illegal.

2.- The principle of temporal prevalence of rules

As the labor legal system is very dynamic and changing, it often happens that a later regulation of the same hierarchical rank repeals a previous one, thus producing a succession of regulations and the preference in the application of the last regulation approved over the previous one. Reforms to the legal system do not violate the principle of legal certainty established in Article 9.3 CE. But the reform must be produced by means of the appropriate normative rank and publicized in the BOE (principle of publicity of the norms). But it is not only the approval of regulations that can alter previous legislation; the same applies to collective bargaining agreements. The approval of a new agreement may alter the material content of the previous one. In any case, the regulatory succession must not incur in the prohibited retroactivity that would affect the legal effects already produced or consolidated under the protection of a rule previously in force, violating fundamental rights.

3.- The principle of the most favorable norm

From this principle derives the fact that the conflict between two or more labor standards (state or agreed) is resolved by applying the most favorable for the employee. The determination of the most favorable is made by assessing the quantifiable concepts as a whole and on an annual basis. This is stated in paragraph 3 of Article 3 ET: "*Conflicts arising between the provisions of two or more labor laws, both state and agreed, which must in any case respect the minimum necessary legal requirements, will be resolved by applying the most favorable for the employee, assessed as a whole, and on an annual basis, with respect to the quantifiable concepts*". This is a subsidiary principle of the two previous ones (hierarchy and temporal prevalence), since its application is subject to the concurrence of two requirements: equal rank between the rules compared and their simultaneous validity. This principle cannot contravene other principles such as the hierarchy of norms, nor can it contravene rules of absolute labor law.

4.- The principle of the most beneficial condition

This principle deals with a benefit that can be either individual, plural or collective, which implies an improvement over what is provided for both legally and conventionally. Thus it can happen with a unilateral and voluntary concession of the employer that is incorporated - by the habituality, regularity and persistence in time - to the employment contract, in such a way that it cannot be suppressed or reduced unilaterally by the employer. The most beneficial condition must have been acquired and enjoyed by virtue of its consolidation by means of a will that does not generate doubts on the part of the employer. That is to say, it must have been incorporated into the employment contract by virtue of an act of will of a concession or recognition of a right arising from an express or tacit agreement of wills and which, moreover, is maintained over time. The tacit recognition of the most beneficial condition is the best mechanism to prove its existence. The occasional granting of an improvement that is not continuous over time cannot be considered as a more beneficial condition; it must be the result of a permanent issue and reiterated over the years. This condition remains in force as long as the parties do not agree otherwise or as long as it is not compensated by virtue of a subsequent, legal or collectively agreed rule that is more favorable (absorption and compensation, contained in Article 26.5 ET). Therefore, the employer cannot unilaterally remove such condition without incurring in a substantial modification of the working conditions (Article 41 ET).

7. Principles of applicability of labour standards

Within the employment relationship, the system of sources is established by Article 3 ET. Thus, the rights and obligations concerning the employment relationship are regulated, in hierarchical order, by means of: Firstly, by the legal provisions of the State. Secondly, by the regulatory provisions. It should be borne in mind in this regard that the basic competences in labor matters, as set forth in Article 149 CE, correspond to the State (149.1.7 labor legislation, 149.1.17 basic legislation and the economic regime of the Social Security, without prejudice, in both cases, to their execution by the Autonomous Regions). Thirdly, by collective bargaining agreements. Fourthly, by the will of the parties, provided that it has been expressed in the employment contract, provided that the object is lawful, since it is forbidden to establish in the same less favorable working conditions or contrary to the Law or the applicable collective labor agreement. Lastly, local and professional customs and practices shall apply. Article 2.2 ET establishes the principle of hierarchy of norms. Firstly, the Law and, secondly, the implementing regulations, which may not "*establish working conditions different from those established by the laws to be implemented*".

The conflict inherent in the concurrence of sources is resolved by Article 3.3 with an interpretation that "*shall in all cases respect the minimums of necessary law*", being resolved by applying the rule most favorable to the employee "*as a whole, and in annual computation, with*

respect to the quantifiable concepts". As regards customs and practices, these, according to paragraph 4 of the same article, shall only be applied in the "*absence of legal, conventional or contractual provisions, unless they are expressly accepted or referred to*". Finally, the principle of non-availability of the rights of employees is included in section 5 of Article 3 ET. All of the above is connected with the provisions of Article 9 CE which, in section 1, establishes that "*Citizens and public authorities are subject to the Constitution and the rest of the legal system*", with the Constitution guaranteeing "*the principle of legality, the hierarchy of norms, the publicity of rules, the non-retroactivity of non-favorable punitive provisions or provisions restricting individual rights, legal certainty, responsibility and the prohibition of arbitrariness of public authorities*".

Thus, the hierarchical order of application of the complex system of regulatory sources of Spanish labor law is as follows:

1º) CE (supreme rule of the legal system).

2º) International treaties and conventions (in accordance with the provisions of arts. 93-96 CE).

3º) Legal provisions of a basic nature: Organic Laws, Ordinary Laws (they have the same legal rank, except that the former regulate matters related to Fundamental Rights), Royal Legislative Decrees and Royal Decree-Laws. The Autonomous Regions, on the basis of the distribution of powers established in Articles 148 and 149 CE, will only have powers to develop state labor legislation by means of Laws (which are developed according to the criterion of competence). In the case of Local Entities, the provisions of the specific local regulations (Law 7/1985, of April 2, 1985, Regulating the Bases of the Local Regime) will apply.

4º) Regulatory provisions: Royal Decrees and Ministerial Orders in the case of the State. The Autonomous Regions, based on the distribution of competences established in Articles 148 and 149 CE, will only have competences for the development of the state labor regulations (Decrees and Orders of the Regional Ministries). In the case of Local Entities, the provisions of the specific regulations (Ordinances or Regulations) shall apply.

5º) Collective bargaining agreements (the result of collective autonomy): statutory, extra-statutory, company agreements and other agreements and pacts.

6º) Employment contract (and individual agreements reflected therein).

7º) Local and professional customs and usages: labor customs and usages and company usages, company instructions and company regulations.

8º) General principles of law (legality, hierarchy of norms, etc.).

9º) Jurisprudence of the Court of Justice of the European Union, of the European Court of Human Rights, of the Constitutional Court and of the Supreme Court (in accordance with the provisions of Article 1.6 Cód.Civ.).

8. Principle of non-waiver of rights

Article 3.5 ET establishes this general principle of Labor law, such that, "*Employees may not validly dispose, before or after their acquisition, of the rights they have recognized by legal provisions of necessary law. Nor may they validly dispose of rights recognized as unavailable by collective bargaining agreement*". The provision establishes a prohibition that tries to avoid the non-application of labor regulations by means of the waiver of the rights recognized by law and collective bargaining agreements to the employee. Neither before nor after the acquisition of labor rights may the rights recognized by provisions of necessary law contained in rules with legal rank or rights recognized as unavailable by collective bargaining agreements be validly disposed of. On the other hand, the waiver of rights established in the individual employment contract that exceed those established in the Law or in the Collective Bargaining Agreement may be provided for and recognized as valid. The employer may not establish less favorable conditions or conditions contrary to the legal provisions and collective bargaining agreements in agreement with the employee. Any waiver agreements or agreements contrary to mandatory regulations, public order or that are detrimental to third parties, as established in Article 6.2 Cód.Civ., will be null and void. Only those rights that can be waived within the limits and guarantees established by law will be available.

9. Pro-operator principle

This general principle of Labor Law comes from the Latin locution "*in dubio pro operario*", which can be translated as follows: "*in case of doubt, in favor of the employee*". It has enjoyed great importance in the past since, traditionally, it has been framed within the tuitive or protective nature of Labor Law. It is a principle that operates in cases of interpretation of the rules, which implies that, in cases where the meaning of a labor rule is not clearly discernible according to ordinary

interpretative criteria, the interpretation most favorable to the employee and his interests must prevail. This is set forth in paragraph 3 of Article 3 ET: "*Conflicts arising between the precepts of two or more labor laws, both state and agreed, which must in any case respect the minimum legal requirements, will be resolved by applying what is most favorable to the employee, considered as a whole, and on an annual basis, with respect to the quantifiable concepts*". We find ourselves, therefore, before a general principle of law of an exegetical and hermeneutic nature that orders the interpretation of the law in favor of the employee in cases of doubt or normative conflict.

Collective autonomy and collective subjects

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Contents

1. Collective autonomy: origin, meaning and ownership

After the First Industrial Revolution and the birth of the figure of the liberal capitalist State, the economic unit of basic production became the company, basically in the industrial sector.

In these industries, a large mass of employees is employed with quite deplorable working and living conditions, which leads to the creation of labour organizations whose objective is to defend the interests of these employees against the business class.

These organizations went through three historical stages that range from their prohibition, through tolerance to, finally, recognizing their right to defend the interests of their members.

It is in this last stage when we can locate the origin of collective autonomy, since it is when it is considered that collective action is the only instrument available to employees as individuals to effectively confront the so-called labour market and be able to face it equally of conditions for businessmen.

Therefore, it is from that moment on that the autonomy of individual willpower that is specified in the employment contract is replaced by the force of collective autonomy when setting working conditions through the figure of the collective agreement, also making possible the adoption of pressure or conflict measures to assert their rights in conflict situations.

On the part of the employees, the ownership of collective autonomy is held by the unions in general and the unitary representation of the employees in the particular scope of each company.

On the part of the companies, we have the business associations as holders of it.

Below we will analyse in depth each of the parties entitled to the right of collective autonomy.

Laborum Ediciones

2. Labor union

2.1. Concept and characters

According to STC 94/1995, the union can be defined as *"A union is a permanent association for the representation and defence of the socio-economic interests of salaried employees, in a dialectical position of counter-power with respect to employers or other public or private individuals."*.

From this definition, the following characteristics emerge:

- They are a permanent and autonomous association.
- Made up of salaried employees (Article 7 CE) and similar employees.
- to defend their collective professional or class, economic, social interests.
- through specific means of action, such as:
  - collective bargaining of working conditions
  - collective conflict or self-imposed
  - Participation, control and representation, this reflects an extension of their functions, indicating the transit of oppositional unionism to control and participation.
- They are private associations, since the collective interest they protect is private, but they have a special legal regime.
- Its ability to influence depends:
  - Of its real representativeness.
  - Of its power of mobilization.

2.2. Constitution procedure

The procedure for establishing a union is developed in both Article 4 of the LOLS as in Article 5 of the R.D. 416/2015, of May 29, on deposit of statutes of union and business organizations (RDDE).

According to Article 4 LOLS, Unions established under this Law, to acquire legal personality and full capacity to act, must deposit, through their promoters or leaders, their statutes in the public office established for this purpose.

The RDDE indicates that a minimum of three promoters will be necessary and that, along with the deposit request, the following documentation must be included:

a) Founding act, which must contain:

1. Name and surname of the promoters of the union, address and tax identification number. In the case of legal entities, the name or company name must be included along with the identifying information of their representatives.
2. The name of the union, including its initials or acronym, if applicable, which must coincide with that which appears in the text of the statutes.
3. Place and date of preparation of the minutes, which must be signed either digitally or on all its pages by the promoters, or by the representatives in the case of legal entities.
4. The designation of the members of the provisional governing bodies that represent the organization.

b) The approved statutes, which must be signed either digitally or on all their pages by the promoters, or by the representatives in the case of legal entities, must contain at least (Articles 4.2 LOLS and 5.2(b) RDDE):

1. The name of the organization, including its initials or acronym, that may not coincide or lead to confusion with another legally registered one.
2. The address and territorial and functional scope of action of the union.
3. The representation, government and administration bodies and their operation, as well as the system of elective provision of their positions, which must comply with democratic principles.
4. The requirements and procedures for the acquisition and loss of membership status,
5. The regime for modifying the statutes, merger and dissolution of the union, as well as, in the latter case, the destination of the assets of the association that does not distort the non-profit nature of the union and business organizations.
6. The economic regime of the organization that establishes the nature, origin and destination of its resources, as well as the means that allow members to know the economic situation.
7. The inclusion among the purposes of the labour objectives that identify them, being typical

means of action, among others, collective labour negotiation, the presentation of collective labour conflicts, social dialogue and institutional participation in public administration bodies.

The public office will have within ten days, the publicity of the deposit, or the request to its promoters, only once, so that within the maximum period of another ten days they correct the defects observed (Article 4.3 LOLS).

After this period, the public office will order the advertisement or reject the deposit by means of a resolution exclusively based on the lack of any of the minimum requirements already mentioned (Article 4.3 LOLS).

The public office will publicize the deposit on its notice board, in the BOE and, where applicable, in the corresponding BO, indicating at least the name, the territorial and functional scope, the identification of the promoters and signatories of the union constitution document (Article 4.4 LOLS)

The insertion in the respective "Bulletins" will be arranged by the public office within a period of ten days and will be free of charge (Article 4.4 LOLS).

Any person will be empowered to examine the deposited statutes, and the office must also provide anyone who requests it with an authenticated copy of the same (Article 4.5 LOLS).

Both the Public Authority and those who prove a direct, personal and legitimate interest may promote before the Judicial Authority the declaration of non-conformity with the law of any statutes that have been the subject of deposit and publication (Article 4.6 LOLS).

The union will acquire legal personality and full capacity to act after twenty business days from the deposit of the statutes (Article 4.7 LOLS).

To conclude this section, we indicate that this procedure for depositing and publicizing the statutes will also be used in the event that there is a statutory modification of already constituted union organizations.

2.3. Internal and external structure

In relation to the structure of unions, we must consider that the international standards ratified by Spain recognize their freedom of organization and operation.

Within these norms we can highlight Conventions 87, 98 and 151 of the OIT as well as the International Covenant on Economic, Social and Cultural Rights.

Despite this freedom of organization and operation, Article 7 CE, conditions it by indicating that "*the internal structure and functioning of the unions must be democratic*."

This constitutional requirement focuses on four aspects:

a) The participation of members, in an effective manner, in the transcendental decisions of the union, such as mergers, integrations, suspension or dissolution, modification of the statutes, linking to a federation or confederation, disassociation from it, and all actions related to the approval of annual accounts, preparation of the economic budget, the acquisition or disposal of real estate, etc.

b) The right to passive suffrage, that is, the possibility of members to present themselves as candidates in the elections to fill the governing or management bodies based on what is established in their statutes.

c) The right to active suffrage, consisting of the participation of members in the election of the people who occupy the governing and management bodies.

d) That the eventual dismissal from the position or position held is carried out in such a way that both the position of the dismissed person and those represented are guaranteed.

In addition to this constitutional requirement, unions are also obliged to publish information related to the functions carried out, the regulations that apply to them, including the statutes and their implementing regulations, and their organizational structure, which must include "*an updated organizational chart that identifies those responsible for the different bodies and their profile and professional career*" (Article 6.1 of Law 19/2013, of December 9, on transparency, access to public information and good governance).

2.4. Capacity and responsibility

As mentioned above, unions will acquire their legal personality and full capacity to act once their statutes have been published (Article 4.1 LOLS).

This capacity to act, according to Article 38 Cód.Civ. allows them to "*acquire and possess property of all kinds*

as well as contract and exercise civil and criminal actions, in accordance with the laws and rules of their constitution", which implies that they will have the following faculties:

a) Contractual capacity to be the holder of rights and obligations.

b) Procedural capacity to be a main party in lawsuits of all kinds and act as an adjuvant in the legally provided terms.

c) Patrimonial capacity, fundamentally referring to the possibility of acquiring and managing one's own assets.

d) Ability to act as a union at the level of collective relations.

The body or person to whom the exercise of these powers corresponds will be determined by what is indicated in the statute of each of the organizations.

Within the recognition of the capacities that unions acquire, our legislation does not make any reference to the possibility of them engaging in commercial activities for profit.

Once the capacities acquired by recognized unions have been determined, it must be taken into account that their actions are subject to responsibility and must distinguish between the responsibility of their bodies and the responsibility of the union for individual actions of its members or employees.

Firstly, regarding the responsibility of its bodies, Article 5.1 LOLS links it to the acts or agreements adopted by the statutory bodies "*in the sphere of their powers*" and therefore does not generate liability if the act carried out or the agreement adopted is outside of said powers. In this case, the responsibility would fall on the members of the statutory bodies who participated in the event or voted in favour of the agreement. Likewise, even if these are actions within the sphere of its powers, the union would be excluded from liability in the event that the procedure established in the statutes to adopt the agreement or carry out the act had not been followed.

In second place, the Article 5.2 LOLS, indicates that unions will be responsible for the individual acts of their members when these occur "*in the regular exercise of their representative functions or it is proven that said members were acting on behalf of the union*", that is to say that the action has been decided or promoted by the organization and that the members act on behalf of or mandated by it.

This responsibility is also extended if the acts are carried out by other subjects, even if they are not affiliated, as long as the previous conditions are met.

As examples of acts for which the union must be responsible, we have:

a) Actions that deviate from the exercise of the rights of activity that constitute the content of freedom of association, such as calling for demonstrations without prior communication to the government authority or that are expressly prohibited, calling for a strike that is illegal or abusive, breach of the duty to negotiate a statutory collective agreement, etc.

b) Conduct that harms the freedom of association, whether of its own members, of other union associations and their members, or of employees who have made use of the freedom of negative affiliation, that is, their right not to join any union.

c) Non-compliance with labour and social security obligations as a result of the labour relations maintained by the union with the employees at its service, such as unfair or void dismissals, non-payment of salary, non-compliance with risk prevention regulations. labour, non-compliance with duties regarding Social Security.

d) Decisions that involve labour subcontracting or illicit transfers of labour, or the conclusion of provision contracts with temporary employment companies and the use of employees assigned as a result of that conclusion.

e) Non-compliance of civil or commercial contracts and, in general, obligations subject to common law.

In addition to responsibility for its own acts, the union will also respond, as employer, for damages caused to third parties by employees at its service.

As has been seen, the responsibility of unions can be civil, governmental, administrative, labour and even criminal, the latter in the terms included in Article 31.bis.5 CP after the modification included by LO 7/2012 of December 27, which modifies Organic Law 10/1995, of November 23, of the Penal Code on transparency and the fight against tax and Social Security fraud.

2.5. Most representative union: determination and rights

The plurality of existing unions in Spain and their dispersion and atomization represents a difficulty when it comes to finding a valid interlocutor, which makes it necessary to establish a mechanism that prevents the representative action of unions from losing effectiveness and jeopardizing the interests from the employees.

One possibility is the celebration of pacts or agreements between the different unions committing to a general or specific unity of action.

On the other hand, there is also a legally established mechanism called the Principle of Representativeness, which consists of attributing to certain unions a special representative capacity compared to the rest of the unions.

Union representativeness could be defined, therefore, as the recognition of certain unions - to the exclusion of others - of a higher capacity for action and participation, which entails the representation of employees in general, beyond affiliation. However, it is necessary to avoid discrimination and injury to freedom of association of unprivileged unions, that is why two conditions must be taken into account:

a) Respect for the essential content of freedom of association for all unions.

b) The choice of criteria that cannot be subjective or arbitrary, but rational, objective, justified, measurable...

Based on these conditions we find different possible criteria: the affiliation, the territorial implantation, the support of the employees in electoral processes, the historical trajectory of the union (more debatable)

In our system, the results of the elections that are held to elect the employees' unitary representatives are fundamentally served. This demands, as it happens, a legal regulation that guarantees the democracy of the electoral process and the public control of the results.

From there, it also attends to a criterion of communication of the representativeness of the large organizations that hold it (confederations) to which they are part of them.

To determine which are the most representative unions, we must take into account two selection criteria:

a) the main criterion of the electoral audience, we must clarify that it is the number of representatives obtained both in the companies and in the public administration, that is computed, not of votes (evidently both are related, but it is possible that one union obtains more representatives with fewer votes than another, and vice versa).

b) and a complementary criterion based on "Irradiation", which derives from the integration of a union into an already more representative organization (even if the integrated union does not achieve sufficient electoral results by itself).

Based on these criteria we find three different degrees in terms of the representativeness of the unions:

1. Most representative unions at the state level (Article 6.2 (a) and (b) LOLS)

   Those who obtain 10% or more of the unitary representatives both in private companies and in public administration, in said field.

   In practice, only the Trade Union Confederation of Employees' Commissions (CCOO) and the Trade Union Confederation General Union of Employees of Spain (UGT) manage to reach the necessary audience to be recognized as majority at the state level, since, at the end of 2023, CCOO had 35% of the total representatives and UGT had 32%, and, at a great distance, we found USO (4%), CSI-CSIF -majority in the public sector- (3.7%), ELA- STV (3.1%), FETICO (2.2%), etc.

   By "irradiation", affiliates, federated or confederated to a more representative union organization at the state level, according to the previous paragraph. However, their representativeness is limited to the territorial or functional scope that corresponds to them (STC 98/1985).

2. Most representative unions at the Autonomous Community level (Article 7.1 LOLS)

   Those who obtain at least 15% of the unitary representatives (companies and Adm. P.) in this area, with a minimum of 1,500 representatives, provided they are not federated or confederated with state-level organizations.

   By "irradiation" the affiliates, federated or confederated to a more representative union

organization at Autonomous Community level, according to the previous paragraph. As in the previous case, the representativeness of these "irradiated" organizations must be circumscribed to their scope.

3. Trade unions sufficiently representative in their specific functional and territorial scope (Article 7.2 LOLS)

   Those who in this area obtain 10% or more of the unitary representatives, this implies that a union can have the status of being sufficiently representative in as many functional and territorial areas as the expressed electoral audience reaches.

The rights of the most representative unions are included in Article 6.3 LOLS and are as follows:

a) Institutional representation before the Public Administrations or other entities and organisms of a state nature that have it planned.

b) Collective bargaining under the terms provided in the ET, that is, collective bargaining by statute of general effectiveness.

c) Participate as interlocutors in determining the working conditions of Public Administrations ("collective bargaining" in the Administration).

d) Participation in extrajudicial systems for the resolution of labour disputes.

e) Promotion of elections to unitary representatives.

f) Obtaining temporary assignments of the use of public buildings.

g) Any other representative function that is established (for example, the appointment of electoral arbitrators, Article 76.3 ET).

In principle powers a) and f) are exclusive of the most representative unions at the state or autonomous community level. The rest can also be exercised by sufficiently representative trade unions in a specific area. However, the TC has relaxed the radical distinction through several ways:

a) The most representative unions by irradiation exercise their powers in the corresponding field (STC 98/1985).

b) In terms of institutional representation in specific areas, all representative unions of any level have been recognized.

c) Based on the introduction of the proportionality criterion, the enjoyment of those faculties that can be quantified has been extended to other unions and therefore attributed proportionally to the representative percentage of each one. This is the case with:

   - participation in extrajudicial conflict resolution systems,
   - the temporary assignment of the use of public heritage buildings (STC 183/1992), or
   - the obtaining of subsidies from the Public Administrations (STC 20/1985).

2.6. Union financing and accumulated union assets

We have already commented that, as legal entities, unions have full capacity to act, which implies, in addition to the possibility of acquiring and possessing assets of all kinds, that they must have assets for their operation and to be able to fulfil their own purposes. They are established in Article 7 CE.

In Article 4.2(e) LOLS, it is established that the statutes must necessarily include "*the economic regime of the organization*." More specifically, it is indicated that the statutes must establish "*the character, origin and destination of its resources, as well as the means that allow members to know the economic situation*." Therefore, it is the union that determines the resources that make up the organization's finances and must establish their origin and destination.

The origin of the resources is varied, with the first and original source of financing being the membership fee, with both the amount and the periodicity of the same being established in the statutes, as well as the effects of non-payment. Regarding the fee, the LOLS recognizes two systems to make it effective, apart from the possibility of being paid directly through the charge to the employee's account, the first would be collection directly from the affiliated employees in their workplace as long as it is not disturbs the normal activity of the company and the second would be the possibility of the employer deducting the union fee from the salaries of the affiliated employees and its subsequent payment by bank transfer to the union.

Apart from this financing system, the union can have a series of income from different sources and justifications, which may derive from donations, legacies or income and fruits of the union's assets, as well as those legally established that are specified in the canon. of collective bargaining, public aid and subsidies and tax benefits.

The collective bargaining fee or solidarity fee for negotiation is a fee to be collected by the company, mandatory for all employees affected by the agreement, whether or not they were affiliated with the negotiating unions, although at first it was considered illegal, the Article 11.1 LOLS establishes that "*collective agreements may establish clauses by which the employees included in their scope of application financially attend to the management of the unions represented in the negotiating commission, setting an economic fee and regulating the modalities of their payment. In any case, the individual will of the employee will be respected, which must be expressed in writing in the form and within the deadlines determined in collective bargaining*."

Apart from these two financing systems directly related to employees' contributions, unions have other economic resources derived from union assets, with respect to which we must distinguish between accumulated union assets and historical union assets.

The Accumulated Union Patrimony is made up of properties whose ownership corresponds to the General Administration of the State and which, in accordance with the provisions of Law 4/1986, of January 8, on the Transfer of Assets of the Accumulated Union Patrimony, and its Regulations, are given free of charge to trade union and business organizations so that they can satisfy their operational and organizational needs recognized by the legal system.

This patrimony comes from the set of assets, rights and obligations of patrimonial content of the Spanish Trade Union Organization (OSE) from the Franco era, which also included the private patrimony of the unions existing before that era. This accumulated assets were mainly invested in properties transferred to the Institutional Administration of Socio-Professional Services (AISS), created to carry out the necessary operations in the liquidation process of the OSE.

Part of the assets of the ISSA were assigned or transferred to other entities, especially the CCAA, and the surplus was integrated into the State Assets and was renamed Accumulated Union Assets (PSA).

Historical Union Heritage has always been understood as the set of assets and rights that, by virtue of the Law of Political Responsibilities of February 9, 1939, were seized from existing union organizations and that are excluded from the PSA according to Disp. Adic. 4th.1 LPSA in its original wording.

These assets and rights must be restored in full ownership to those unions duly registered in their name on behalf of the State or, where appropriate, to those unions that prove to be their legitimate successors. Given the difficulties in the return of these assets and rights, Disp. Adic. 4th LPSA establishes that the State will pecuniarily compensate its value, calculated as the normal market value of those assets and rights upon the entry into force of the LPSA itself if they had not been seized, which will be set in each case by the Council of Ministers.

Subsequently, the R.D.L. 13/2005, of October 28, modified Disp. Addict. 4th LPSA, including among other modifications the need to make a request by the beneficiaries before January 31, 2006, as well as that in the case of pecuniary compensation with the normal market value, the legal interest of the money from the entry into force of the LPSA until the last day of the month prior to the one in which the compensation is agreed. In addition, movable property located within the real estate would also be included, which would be valued at three percent of the compensation value of the latter.

After the inclusion of the deadline for the PSH application, the process for returning it ended on February 29, 2008.

The administrative acts of management, transfer, alteration and revocation relating to the assets and rights of the Accumulated Union Assets, as well as the Historical Union Assets, without prejudice to the powers attributed to other higher and directive bodies of the Ministry, correspond to the Undersecretariat of Labor. and Social Economy, through its Chief Officer's Office.

Finally, we have to refer to public financing through aid and subsidies organized by the different Public Administrations for the most varied purposes, which may include training activities or projects co-financed by the European Social Fund.

3. Business associations

3.1. Concept, characters and constitutional foundation

As their name indicates, they are associations of employers to defend their interests in collective labour relations in opposition to union organizations.

The Article 7 of the CE grants business associations the same constitutional relevance and institutional function, as well as the guarantee of free creation and activity as unions, however they do not have the same type of recognition in the CE as they do, since they are not object of a specific fundamental right, as occurs with the constitution, affiliation and activity of unions.

Employers are not holders of the right to freedom of association, so their right to establish business associations, to join them or not, as well as the freedom of activity and operation derive from the general right of association recognized in Article 22.1 CE and does not have its own article as occurs with unions and Article 28.1 CE.

This different constitutional location does not mean that there is a different degree of protection since in both cases it is the protection granted by Article 53.1 and 2 CE for any of the fundamental rights and public freedoms.

In addition to this coverage in the general law of associations, business associations have specific regulation, prior to the CE, contained in LAS, which in its beginnings was common for business associations and unions and which, after the entry into force of the LOLS, remained in force only for the former. For matters not provided for in the LAS, Organic Law 1/2002, of March 22, regulating the Right of Association, is applied in a supplementary manner.

Full ownership of the right regulated by the LAS is held by natural or legal persons who have the status of labour employers for employing employed employees, so self-employed employees who do not have subordinate employees at their service would not be owners. genuine and could only choose to join one of the associations and join or not to the activities they program, on the contrary the rest of full owners will have, in addition to the possibility of joining business associations and following their activities, the possibility of participating in its constitution.

Regarding entrepreneurs, legal entities may be under both private law and public law in the case of companies with public participation, whether state, regional or local.

3.2. Constitution procedure

The LAS had the regulatory development provided by the R.D. 873/1977, of April 22, on the deposit of the statutes of the organizations that were established under the Law. This regulatory regulation continued to be applicable to business associations until its repeal by the RDDE already mentioned in the procedure section. of constitution of the unions, which at the beginning also shared the provisions of R.D. 873/1977 until the entry into force of the LOLS.

As seen in section 2.2., the procedure for establishing a business association is developed in Article 5 RDDE and it is the same as that described for unions, although some sections are added that are exclusive for business associations.

In section 2.b) of Article 5(a) point 8) is added, which indicates that in the content of the statutes in the case of business associations, the system of certification of the associates must appear as a guarantee for them.

A section c) is also added in the case of business associations, when their promoters are representatives of a legal entity, they must prove such representation in accordance with the provisions of sections b) and c) of Article 18 RDDE, that is, by granting of power of attorney or sufficient representation and subsequent verification by the competent public office, by any means accepted by the legal system. Said office may require at any time the accreditation of said representation and the registration in the Electronic Registry of Powers of Attorney.

Finally, section d), which is common to unions and business associations, includes the obligation to attach a document that includes the consent of the subjects entitled to request the deposit or, failing that, provide the documentation that accredit as such.

3.3. Most representative business associations: determination and rights

As in the case of unions, we find a high number of business associations, so a legal selection of some associations is necessary based on an acceptable criterion of representativeness.

The most notable thing regarding the representativeness of business associations is that the measurement criterion is different depending on the powers conferred; secondly, that such powers deal with institutional representation, the temporary transfer of the use of public real estate and statutory collective bargaining; Lastly, the result produced by the measurement leads to the identification of at least three types of representative business associations. The result of all this is the following:

a) For the purposes of institutional representation before public administrations or public organizations and for the temporary transfer of the use of public real estate, Disp. Addict. Sixth of the ET distinguishes between the most representative business associations at the state and autonomous community levels, these being the only ones to which these powers are guaranteed.

   The measurement criterion takes into account the number of associated companies and the number of employees employed by them, with at least 10% of the companies and employees being necessary to be considered more representative at the state level and at least 15% of the companies and employees to be considered more representative at the regional level and must also meet the requirement of not being integrated into federations or confederations at the state level.

   In both cases, the employees to be taken into account are only those bound by an employment contract, therefore neither self-employed employees nor working members of cooperatives are taken into account. Regarding the self-employed, they must be counted as part of the associated companies.

   In none of the cases is there a provision for representativeness by irradiation as was the case in the case of unions.

   In both cases, the employees to be taken into account are only those bound by an employment contract, therefore neither self-employed employees nor working members of cooperatives are taken into account. Regarding the self-employed, they must be counted as part of the associated companies.

   In none of the cases is there a provision for representativeness by irradiation as was the case in the case of unions.

b) In addition to the most representative associations at the state and regional level, we have what we can call associations with representativeness limited to a certain geographical or functional area, which can only operate for the purposes of intervention in the negotiation processes of statutory sectoral collective agreements.

   To be considered within this group, they must have associated employers who, in the geographic and functional scope, employ at least 15 percent of the affected employees, or with at least 10% of the companies and provided that said employers employ at least 10% of the affected employees.

   If none of the limited representative agreements exist, the negotiation of these collective agreements will be carried out with state-level business associations that have at least 10% of the companies or employees in that area; or with regional business associations that have 15% or more of the companies or employees.

c) Representative business associations, provided that their scope is equal to or broader than that of the conflict, may appear and be taken as a party in the processes of challenging administrative acts in labour and social security matters, excluding those referring to benefits. Likewise, they may appear as a party in the declaratory processes of collective conflicts.

   As a final reflection regarding the representativeness of business associations, we must highlight that, although the method seems totally objective, it has the difficulty or material impossibility of the reliability of the measurement result, since there are no secure systems for determining the number of associated entrepreneurs and the number of employees they employ, as there are no official records that can offer reliable data.

Freedom of association of employees

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Contents

1. Concept and manifestations of freedom of association

Currently, the right to freedom of association is regulated, mainly, in Articles 7 and 28.1 CE, however, none of the precepts specify the concept of freedom of association, so we can define it as a fundamental right with a complex content due to two factors:

a) The diversity of faculties it comprises, which are divided into two groups:

   1. Those that are assigned to the so-called essential content of freedom of association and that make up the minimum unavailable core of the right, that must be recognized for every union regardless of its representativeness. Constitute an insurmountable limit for the legislative activity of development and they come directly from Article 28.1 CE and the interpretations of TC.

   2. Those that form the so-called additional content of freedom of association, which are derived from norms such as laws, collective agreements, pacts, etc. It is distributed differently among the unions since the most representative correspond to more rights than to the less representative ones.

   Another important difference between both types of content is that the essential is regulated by Organic Law and has special protection under the TC, while the additional is regulated by ordinary law and its protection is ordinary.

b) The distribution of ownership of said powers where we find two new groups again:

   1. Those that are specific to the employees individually considered, in this case being powers that are part of the individual content of union freedom.

   2. Those whose recipient is the union itself and which make up the group of powers of the collective content of freedom of association.

In both groups we find faculties of both essential and additional content.

Finally, we must bear in mind that powers or rights can be presented in both a positive or active aspect and a negative or passive aspect.

2. Individual level of freedom of association

2.1. Entitlement

Article 28.1 CE establishes that "*everyone has the right to unionize freely*", this precept is qualified in the first place by the CE itself since it includes the provision that there are groups that are excluded from this right, such as the members of the armed forces. or armed institutes and other bodies subject to military discipline, in addition to Article 127.1 CE imposes the exclusion of practicing judges, magistrates and prosecutors and, secondly, by Article 1 LOLS in which express reference is made to "all employees".

Based on this regulation, three categories can be differentiated: Included, Partially assimilated and Excluded and/or with Limitations to the development of freedom of association.

a) Included

According to Article 1.1 LOLS, all employees have the right to organize freely and in Article 1.2 LOLS specifies that Employees are considered: Those who are subject of a labour relationship and those that are of an administrative or statutory relationship at the service of Public Administrations.

However, it must be taken into account that the equality between employed employees and civil servants is not complete for the purposes of freedom of association. For example, in matters of protection of freedom of association, Article 3.1(c) of the LRJS expressly excludes from the knowledge of the social order the demands that relate to freedom of association and the right to strike of public officials, as well as personnel in the service of the State, local Corporations and Entities. autonomous public entities when said relationship is regulated by administrative or statutory regulations.

Within the group of employees subject to an employment relationship we find two groups that may require a certain qualification:

1. Minor employees, that is, those between 16 years of age, the minimum age to work, and 18 years of age, which indicates the age of majority. These employees must be recognized with the right to join in accordance with Convention No. 87 of the OIT.

2. Foreign employees since LO 4/2000 of Immigration limits the right, excluding the right to form unions. Subsequently, LO 8/2000, of December 22, introduced the condition of needing to obtain prior authorization to stay or reside. Finally, various rulings of the TC declared unconstitutional Article 11 of LO 4/2000, admitting the freedom of association of foreign employees, whether or not they are regularly administratively in Spain.

b) Partially assimilated

Collected in the Article 3.1 LOLS.

1. Autonomous, without employees at your service.

2. Not active:

   - Retirees.
   - Disability Pensioners.
   - Unemployed.

They have the right to join employees' unions but cannot form their own unions to defend their specific interests, although they can constitute non-union associations.

c) Excluded and with limitations to the development of freedom of association

1. Public employees:

   - Armed Forces and Military Armed Institutes (Articles 28.1 CE and 1.3 LOLS). They cannot form or belong to unions; but they can constitute non-union professional associations as stated in Organic Law 9/2011, of July 27, on the rights and duties of members of the Armed Forces)
   - The Civil Guard can establish non-union professional associations (Articles 11 and 36 L.O. 11/2007, of October 22, regulating the rights and duties of members of the Civil Guard).
   - Judges, magistrates and prosecutors in office, (Articles 127.1 CE and 1.4 LOLS): They cannot belong to or form trade unions, but they can non-union professional associations (Article

401 LOPJ, Articles 54 and 59 Organic Statute of the Public Prosecutor's Office; Agreement of the CGPJ of February 28, 2011 (Regulation 1/2011 of professional judicial associations).

- Bodies and Security Forces (Article 1.5 LOLS): They are governed by their specific, more restrictive regulations (LO 2/1986): they can only constitute national unions; they cannot federate with others that are not police officers; they lack the right to strike.
- The regional and local police refer to their own regulations, which are often sent back to the national police, but sometimes allow affiliation with any union.
- Officials in general have possible "peculiarities" (Article 28.1 CE). These peculiarities are limited to union activity: representation, collective bargaining and collective disputes (LEBEP).

2. Other groups.

- Penitentiary in penitentiary institutions (Article 34 General Penitentiary Law). They are only allowed the individual defence of rights; therefore, they cannot exercise collective action.
- Non-official civilian personnel in military establishments (Ad. Disp. 3ª LOLS; Ad. Disp. RD 2205/1980). They have freedom of association recognized but can not exercise it within military barracks or establishments in order to respect the principle of political and union neutrality.

2.2. Content

The rights that make up the content of freedom of association at the individual level are included in Article 2.1 LOLS, and are as follows:

a) The right to form unions without prior authorization, as well as the right to suspend or terminate them, by democratic procedures.

b) The right of the employee to join the union of his election with the sole condition of observing the statutes of the same, to be separated from the one that was affiliated, no one can be forced to join a union.

1. Positive side recognized against public authorities, employers and the unions themselves.
2. Negative side prevents union security clauses or that condition employment and allows free separation as well as the loss of affiliate status by the union.

c) The right of members to freely choose their representatives within each union: The requirement of internal democracy is already contained in the Constitution (Article 7) and is reiterated in the LOLS (Article 2.1(a), taking into account the electivity of the charges its most direct expression (Article 4.2(c) LOLS).

d) The right to trade union activity: Not explicitly included in Article 28.1 CE, but incorporated by the Constitutional Court as an essential part of freedom of association.

This right includes:

1. Develop actions for the defense and promotion of labor interests.

2. Participate in the activities called and promoted by the union.

   Taking into account the Ad. Disp. 3ª LOLS that limits the union action within the military precincts, and with the requirement of obedience and compliance with the decisions and resolutions adopted by the union.

   At this point it was raised whether the protection or protection extended only to the members or all the participants, and the TC indicated that the protection levels should be for all since there was a public, external projection of said action.

3. Freedom of assembly within the company.

   Regulated in Article 8.1(b) LOLS, which establishes that there must be a prior notification, which must be made outside working hours and without disturbing the activity of the company.

4. Freedom of union information, in its two positive aspects or Active and negative or Passive.

   - Active: right to give opinions and to disseminate union information. Article 8.1(b) LOLS
   - Passive: right to receive information from the union. Article 8.1(c) LOLS

For the effective realization of this right to information, a series of obligations are established for entrepreneurs:

- Make a mail account available to the union.
- Deliver the correspondence from the union to the employees.

5. Right to collect union dues,

   The collection can be made by the employer by agreement with the union, discounting it from the payroll of the employee who previously has given his agreement, and transferring it later to the union.

   This right is complemented by the one that indicates that union dues cannot be subject to seizure.

3. Collective plan of freedom of association

3.1. Entitlement

As has already been mentioned, the concept of collective freedom of association is made up of all the rights that correspond to legally constituted unions, in the exercise of their constitutional function of defending the interests of the employees.

This definition clearly excludes business associations from the ownership of this freedom of association.

Returning to the unions, we have to take into account the degree of representativeness they present since depending on it they will be holders of a greater or lesser number of rights.

As already mentioned in the previous chapter, we can find more representative Unions at the State and Autonomous Community level, either because they directly comply with the electoral hearing requirements required in each case or because they are affiliated, federated or confederated to one of the above. and more representative unions in a specific territorial and functional area.

3.2. Content

The content of freedom of association from a collective point of view is regulated in the Constitution in a limited way, since Article 28.1 only contemplates the right of unions to form confederations and found international trade union organizations or join them. For this reason, it is the LOLS and, at certain times and circumstances, the TC itself, who have had to unify the rights that can be attributed to union organizations in the exercise of freedom of association.

The set of rights recognized to union organizations in the exercise of freedom of association are the following:

a) Freedom of Organization, in a democratic manner and with respect for the CE and the laws.

   It is based on the principle of self-organizational autonomy, in full freedom, of the unions against the public powers and employers. The protection against their interference is insisted on (Article 13 LOLS).

b) Freedom of Regulation, that is, the right to draft its statutes and regulations, to organize its internal administration and its activities and to formulate its program of action, based on the minimum content that appears in Article 4.2 LOLS.

c) Freedom of Federation, includes the right to establish federations, confederations and international organizations, as well as affiliate with them and / or withdraw from them.

   In order to correctly understand representativity and its irradiation, in the next topic, it is essential to attend to this network of complex organizations (organizations of organizations) that constitute unions.

d) Freedom of Suspension and Dissolution, includes the right not to be suspended or dissolved except by a final decision of the Judicial Authority based on serious breach of the laws.

   The union is protected from any type of preventive action by the Administration, reserving this to the Judicial Authority and only in cases of serious illegality. It is what is known as Forced Suspension.

   It also includes the right to dissolution or voluntary suspension adopted by the members of the trade union organization following the democratic mechanisms of its Statutes.

e) Freedom of union action. It is not expressly included in Article 28.1 CE but the TC has included it, consists of the right to trade union activity in the company or outside it, which will include, in any case:

1. the right to collective bargaining, that it is part of the essential content of freedom of association

2. to the exercise of the right to strike, which consists of the possibility that unions have of calling strikes as a valid instrument in the defense of their interests

3. to the approach of individual and collective conflicts which is part of the minimum and unavailable core without which the right to freedom of association itself would not be recognizable.

4. to the presentation of candidatures for the election of representatives in companies and Public Administrations.

   This right is part of the additional content of freedom of association and can be exercised from both an individual and collective point of view.

   Its regulation is double since for the representation of employed employees it is regulated in the ET and in the case of representative bodies in the public administration it is regulated in the administrative regulations, mainly in Law 9/1987, of 12 June of representative bodies, determination of working conditions and participation of personnel at the service of Public Administrations.

5. to union meeting. In accordance with Article 8.1(b) LOLS, employees affiliated with a union may, within the company or workplace, hold meetings, with prior notification to the employer, outside working hours and without disturbing the normal activity of the company.

Although we had already mentioned this right in the section on individual freedom of association, we refer to it again since the TC has understood that, although ownership of this right corresponds individually to employees affiliated with a union, its exercise is collective, with both the union sections and the delegates being entitled to call the meeting.

4. Violation of freedom of association

As will be seen in the following section, the right to freedom of association enjoys special protection measures with the sole purpose of achieving its ownership and effective exercise, to the extent that any discrimination in employment and in working conditions, whether due to membership or not to a union, or due to participation in union activities.

Freedom of association can be harmed by acts caused by various subjects such as: the employer, business associations, Public Administrations, or in general, any other person, entity or public or private corporation; and both the employee and the union organization can be affected by these injuries.

Anti-union conduct is characterized by producing a result that is harmful to the right to freedom of association and not by the intention of the subject who carries it out.

Freedom of association can generally be harmed by:

a) Laws, since they can limit the essential content of the same or establish discrimination between unions.

b) Decisions of the Public Administration, for example by preventing or limiting the right of unions to meet or by limiting the exercise of the right to strike.

c) Decisions of the employer or business organizations, such as preventing the right of assembly.

d) Union actions denying a membership application or expelling a member arbitrarily

4.1. The violation of freedom of association by the employer or employer organization

The violation of freedom of association by these subjects can be specified in two types of acts:

a) Acts of discrimination in relation to employment or working conditions that are favourable or adverse depending on the membership or not of a union, its agreements or the general exercise of union activities.

b) Acts of interference in the constitution, operation or administration of the employees' organization and, specifically, measures consisting of promoting the constitution of unions controlled or dominated by the employer or the business organization, what is known as "yellow union".

Finally, within this section we can include anti-union conduct that can occur in the field of collective bargaining, specifically related to the opening of negotiations and the constitution of the negotiating committee.

4.2. The violation of freedom of association by public authorities

The interference of Public Administrations in the union sphere with respect to the criteria of representativeness is frequent, since there may be favoured treatment or privileged financial support for certain unions, or in general, unjustified differences in treatment between union organizations.

4.3. The violation of freedom of association by unions

Possible anti-union conduct caused by unions can be specified in the so-called union security clauses included in collective bargaining and that threaten the negative freedom of association of employees.

The most common union security clauses are:

a) The closed workshop, which consists of the obligation assumed by the employer to only hire employees who are affiliated with the union with which an agreement has been made.

b) The unionized workshop, consisting of the obligation of the employees of a company to join the agreeing union, within a certain period of time, because otherwise they may be fired.

c) Preferential employment in which there is a commitment on the part of the employer to give priority in hiring to employees who are members of the agreeing union.

d) Maintenance of membership, with this clause the employer will proceed to dismiss employees who disaffiliate from the agreeing union.

e) Reservation of advantages provided for in the collective agreement for employees affiliated to the agreeing union.

5. Protection of freedom of association

The protection of anti-union conduct takes place at both the judicial and administrative levels.

It occurs in the same areas as the protection of any of the fundamental rights that correspond to employees, such as the right to strike, which is why it has the guarantee of the reserve of organic law for its development. In addition to this guarantee, we will to analyse the protection offered by the TC by the supranational jurisdictional and non-jurisdictional channels, by the ordinary courts, and, finally, the administrative protection.

5.1. By the Constitutional Court

In addition to the constitutional guarantee already mentioned, Article 53.2 CE offers superior and privileged jurisdictional protection that includes the possibility that those affected by anti-union conduct can seek protection against them before the ordinary courts through a procedure based on the principles of preference and summary and also before the TC through appeal of protection once the ordinary courts are completed.

These protections are not only regarding the essential content of freedom of association but also in relation to the powers that form part of the additional content.

In the event that the violation occurs due to laws or regulatory provisions, the possibility of initiating a procedure for declaring unconstitutionality through an appeal for unconstitutionality or the question of unconstitutionality promoted by judges or courts opens up.

5.2. Through supranational jurisdictional and non-jurisdictional channels

Once the internal remedies have been exhausted, including the appeal for protection, the possibility of claiming protection from the European Court of Human Rights for violation of Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Outside the European Union we find the non-jurisdictional channels of both the ILO and the Council of Europe through which claims for violations of freedom of association can be addressed.

5.3. By ordinary courts

Given that the infringement of the rights of freedom of association can occur due to actions of the employer, employer associations, public administrations or any other person, entity or public or private corporation, we must analyze how protection occurs in the social jurisdictional order, contentious-administrative and criminal.

a) By the Social jurisdictional order

Protection must be invoked within this jurisdictional order when the claims exercised are promoted within the social branch of Law. Within union matters we can point out as part of this type of claims the following:

1. Those aimed at obtaining protection of the right to freedom of association against conduct by the employer or third parties linked to him, when the alleged violation has a direct connection with the provision of services.
2. Those originated by controversies between two or more unions or between them and business associations, provided that the dispute concerns issues within the jurisdiction of the social jurisdictional order.
3. Those that deal with the constitution and recognition of the legal personality of unions, challenges to their statutes and their modification.
4. Those that deal with the specific legal regime of unions, both legal and statutory, and affect their internal functioning and relations with their members or non-members.
5. If they deal with the responsibility of unions or business associations for violation of norms of the social branch of Law.
6. Those arising from unitary representation elections for both employees and public officials.
7. Those derived from the challenge, due to violation of freedom of association, of collective agreements, agreements or pacts, or arbitration awards or mediation agreements of equivalent effectiveness to that of the previous ones.
8. Those that deal with the adjustment to freedom of association of the application and interpretation of a state standard, collective agreement, pacts or company agreements or business decisions of a collective nature.

b) By the Contentious-Administrative jurisdictional order

When the anti-union conduct affects civil servants and similar employees or the injury to union freedom comes from a general provision of lower rank than the law or from legislative decrees that exceed the limits of the delegation, protection falls to the contentious-administrative jurisdictional order. Being the processing through the special procedure for the protection of the fundamental rights of the person.

c) By the Criminal jurisdictional order

Protection is requested in the Criminal jurisdictional Order When Anti-Union Conduct Is Classified As A Crime.

This Jurisdiction Can Be Reached By Referral Of The Actions Carried Out By The Labor Courts Or By Those Of The Contentious-Administrative Order, Or By the communication made to the competent criminal jurisdiction body or to the Public Prosecutor's Office by the labor authority when it detects an illicit situation. criminal in anti-union conduct that is the subject of an administrative sanctioning file of which he was aware.

As an example, we can highlight the conduct of those who, through deception or abuse of a situation of necessity, prevented or limited the exercise of freedom of association.

5.4. Administrative guardianship

The employer's anti-union conduct generates administrative liability when it meets the elements that help us classify it as administrative infractions classified in the LISOS. To do so, it must fit into one of the serious or very serious labor infractions classified in ArticleS 7 and 8 LISOS.

Employee representation bodies

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Contents

1. Introduction

This unit has a very obvious practical aspect. In relation to the previous topics, we can say that in this topic we will address the way in which the right to freedom of association is manifested within each company and in the ordinary course of labor relations. Specifically, we will see how it happens through unitary representation or legal representation of employees, on the one hand, and through union representation, on the other. Both representations should not be confused, the first being oriented towards the unified representation of all employees to act as a valid interlocutor of the employer, while the second represents a channel for the protection and vindication of the interests of each union. In this topic we will try to differentiate the basic regime of each of these representations, as well as the process and requirements necessary for their constitution, the functions that each of them assume and the guarantees or prerogatives that protect their exercise as a concrete manifestation of the right fundamental to freedom of association.

The objectives of this topic can therefore be summarized as follows:

- Clearly distinguish the unitary representation of employees and the unitary representation in the company.
- Know the process and requirements necessary for the constitution of each of these representations.
- Know their respective functions and prerogatives.
- Assume the notorious importance that both representations acquire, especially the unitary one, in the ordinary management of labor relations.

In this topic we will approach the different manifestations of employee representation in the company, taking into account the different purposes that can be pursued

with each form of representation. The one to which the regulations attribute more prominent functions is the legal representation of employees in the company or unitary representation. This is presented as the representatives chosen by and among the employees of the workplace to act as an interlocutor with the employer and to protect the interests of the entire workforce. These employee representatives do not have to have a specific union affiliation. Among the different functions attributed to it by the regulations, those of negotiation and also those of consultation stand out, for which the unitary representation must be consulted by the employer before adopting measures of collective scope with labor significance. Although the decision of the employees' representatives is not binding, the omission of this procedure will lead to the nullity of the business decision. We have also learned about union representation in the company, defense of the interests of the union and its members, and representation in matters of safety and health, aimed at supervising and promoting compliance with occupational risk prevention regulations. We will also study the guarantees that assist the exercise of these representation functions, which can now be summarized by affirming the nullity of any retaliation derived from the exercise of them.

2. Employees' representative bodies

With this expression We refer to the mechanism used by the employees of a company or workplace to interact with the employer, making a employee or a small group of them act as interlocutors to defend the interests of the employees against the employer.

Our labor relations model rejects that the management of the company is attributed solely to the employer and proposes that employees be recognized with certain powers in decision-making, that is, that they be present in the management bodies. It is based on the idea of collaboration and cooperation in joint bodies. Three different levels of participation can be distinguished:

a) Regarding information, allowing employees to be aware of the operation of the company and its economic situation.

b) Consultation, taking into consideration the perception of employees regarding certain business decisions that have significance in labor relations.

c) Codecision, to a lesser extent, in which not only the assessment of the employees is heard, but the decision to be adopted by the company requires the will of this.

The representation and participation of employees in the company is articulated through: representation usually called unitary (Title II ET), and union representation (LOLS). In Spain there is a double means of representation of employees in the company: the unitary representatives (personnel delegates and company committees) and the union representatives (union sections and union delegates). The unitary representatives are: the representative bodies through which employees exercise their right to participation, and are regulated in the ET. Its implementation is mandatory in the legally established terms, and its representation reaches all personnel, with the exception of senior management. Union representatives are bodies of union action in the company and their regulation is basically found in the LOLS. Their representation is limited in principle to members of the corresponding union. There can be as many union representations as there are unions established in the company.

Although formally these are independent forms of representation, there is an important connection between them as a result of the high unionization of unitary representations. There is, in short, from this perspective, an identity of people derived from the double function developed by the so-called "union elections."

3. Unitary representation

Having already noted the existence of two types of representation in the company, unitary and union, we are going to begin by referring to the first of them, also called legal representation of employees. It is elected by and among its employees who acts as an interlocutor with employers, assuming consultation, supervision and negotiation functions. There are two unitary representation bodies, depending on the number of employees: the personnel delegates and the works council. To determine what the representation will be, two factors are taken into account:

a) **The work center, understood as the productive unit, with a specific organization, registered with the Labor Administration.**

b) **The number of existing employees in each workplace at the time the elections are called.**

When calculating employees, it must be taken into account that:

a) Permanent, permanent-discontinuous employees and employees with a fixed-term contract of more than 1 year count as 1 employee each.

b) Temporary employees with a contract of less than one year, it is calculated based on the number of days worked in the period of one year prior to the call, according to the following formula: ∑ days worked by each temporary employee the previous year / 200 days this gives us 1 employee for every 200 days worked or fraction.

The limit is that it does not exceed the number of existing temporary employees, that is, the total number of employees computed must be less than or equal to the total number of real employees.

3.1. Personnel delegates (Article 62.1 ET)

They are the unitary representation bodies of the staff in small and medium-sized companies, that is, in those companies or work centers that have more than 10 employees and less than 50 employees. The number of staff delegates that can be elected depends on which be the staff of the company or work center. In companies that have between 11 and 30 employees on their staff, 1 delegate may be elected. In those companies whose workforce ranges from 31 to 49, 3 delegates may be elected. A personnel representative may be elected in companies with 6 to 10 employees if the company's employees decide by majority. That is, in this case there will be no right to call union elections by any legitimate subject if the employees have not previously decided to admit a representative body.

The personnel delegates are a single-person body and as such act jointly, which means that the actions carried out by each of the personnel delegates independently do not bind the rest unless there is power or delegation between them. reliable manner. They have the same powers and guarantees as those expressly established for the works council, so we refer to what is stated in this regard *below.*

3.2. The works councils (Article 63.1 ET)

They are the unitary representative bodies of employees in companies with 50 or more employees. They act in a collegial manner, unlike staff delegates, that is, they act jointly, applying the principle of majority in their actions and in the decisions they adopt. The composition of the works council and the number of members that can be elected, as is the case with personnel delegates, is established based on the company's workforce, and according to the following distribution:

From 50 to 100 employees	5 members on the works council
From 101 to 250 employees	9 members on the works council
From 251 to 500 employees	13 members of the works council
From 501 to 750 employees	17 members of the works council
From 751 to 1000 employees	21 members of the works council
From 1000 employees onwards	2 per thousand
The maximum number of members of the works council is 75.	

3.2.1. Joint works council (Article 63.2 ET)

Its creation is planned under obligation by the ET, for companies That Have Two Or More Work Centers In The Same Province Or Neighboring Municipality, Whose Census In Each Center Does Not Reach 50 Employees, But Does So Jointly.

In The Event That In Some Centers 50 Employees Or More Are Reached And In Others Not, Those Who Do May Have Their Own Works Council, And Among the rest they must form a joint works committee if together they total more than 50 employees.

3.2.2. Intercenter Committee (Article 63 ET)

The constitution of this committee is not mandatory by Law, for it to be established it is necessary that its creation has previously been agreed upon in a collective agreement, and its creation is planned for those companies that, due to having several work centers with 50 or more employees, constitute several company committees. The intercenter committee is added to the works councils as a global representation, that is, it coexists with the works committees as a global representation of all of them. The minimum composition of the intercenter committee will be 13 members who will be designated from among the components of the different company committees, and in its constitution the proportionality of the company committees must be

maintained. The functions or powers of such committees will be those expressly granted to them in the collective agreement in which their creation is agreed.

As we observed, there are several differences between the joint works committee and the inter-center committee, but the main one is the obligation to establish it when the requirements for it are met. While the first of these bodies is a legal imposition, the second is optional for the parties.

3.2.3. European Works Council

Directive 2009/38/EC, of May 6, on the establishment of a European works council or a procedure for information and consultation of employees in companies and groups of companies with a community dimension, aims to address specific problems of the internationalization of the economy and markets, providing information and consultation mechanisms in the field of companies and groups of companies with a "community dimension". For these purposes, it establishes a tax representation mechanism in companies with a community dimension. It is understood that a company will have that condition:

a) When they employ 1,000 or more employees in the Member States and, in at least two different Member States, they employ 150 or more employees in each of them with a Community dimension»).

b) When it constitutes a group of companies that employ 1,000 or more employees in the Member States, provided that at least two companies in the group are located in different Member States, and that they employ at least 150 employees in the same group ("company group of size community»).

The European Works Council has various powers and rights that include: a) The right to Information: Access relevant information about the company and its activities. b) The right to be consulted: To be consulted on decisions that may significantly affect employees in several Member States. c) The right to Training: Members of the EWC have the right to receive adequate training to perform their functions.

With the establishment of a European works council, the regulations aim for greater cohesion between employees from different countries and a better understanding of business strategies. However, it also faces challenges such as cultural diversity, differences in national labor laws and the need to effectively coordinate representatives from different countries. In practice, European works councils have proven to be an effective instrument for managing communication and labor relations in multinational companies. Cases such as Renault, Siemens and Nokia show how European works councils can influence corporate restructuring and the implementation of transnational policies that affect employees in different countries.

3.2.4. Operation of the works council (Article 66 ET)

It is governed by its Operating Regulations, which must be approved in the 1st session, it is an internal regulation. This Regulation does not bind the employer and must establish the representation and meeting mechanisms of the body. A president, who will be the external representation of the committee, and a secretary must be elected. Being a collegiate body, its decisions must be adopted by at least a simple majority unless the Law or the Internal Regulations require an absolute majority. They must hold meetings regularly at least 1 every two months or at the request of 1/3 of their members or the represented employees.

4. Functions and powers of the unitary representation

As we said in the presentation, the unitary representation of employees is a very prominent agent in the ordinary course of labor relations. The functions it assumes are the following:

1) Inspection or control of labor regulations, Social Security and Occupational Risk Prevention. Here we can distinguish between generic inspection work, in which compliance with labor regulations is monitored. Also another specific one, when it acts on matters on which legislation imposes reinforced monitoring work, such as safety and health at work or equal treatment and opportunities between women and men (Article 64.7º(a)1, 2, 3; Article 33 et seq. LPRL). Finally, unitary representatives may also exercise judicial administrative actions aimed at compliance with labor regulations in the company (Article 64.7º(a).1. and Article 65.1).

2) Consultation: implies a dialogue and exchange of opinions and, where appropriate, the issuance of a prior report that will be mandatory, but not binding.

a) Collective dismissals, suspensions, reductions in working hours, transfer of company facilities, training plans in the company (Article 64.4º(h),(i),(j),(k),(l),(m).

b) Prior hearing on serious or very serious sanctions to representatives (Articles 68(a) and 55.1)

c) Consultation, and possible negotiation and agreement, on substantial modifications, transfers and collective dismissals (Articles 40, 41 and 51)

d) Claim for denial of promotion for higher functions (Article 39.4)

In all these cases, the unitary representation reports must be prepared within 15 days from the opening of the consultation period. The absence of this consultation period, despite not being binding, will result in the nullity of the business decision.

3) Negotiating company or workplace collective agreements. Also negotiating other collective agreements on specific matters. Here is a list of the different areas in which the negotiating function of the unitary representation of employees intervenes:

a) Company collective agreement (Article 87.1 ET). It will be the unitary representation (sometimes also the union representation) that is legitimized to negotiate company agreements at the business level.

b) In determining the professional classification system (Article 22.1 ET)

c) Also regarding the promotion system (Article 24.1 ET)

d) The Employees' Statute refers to the payroll model determined by regulation, unless it has been agreed with the unitary representation of the employees (Article 29.1 ET)

e) The determination of the date of receipt of each of the extra payments (Article 31 ET), determining that one of them will be on Christmas.

f) The irregular distribution of work days or hours must also be negotiated with the employees' representatives (Article 34.2. and 3)

g) And finally, the so-called salary drop or non-application of the agreement and the modification of working conditions that have collective significance (Article 82.3)

4) The unitary representation of employees assumes a very relevant role in matters of conflict, in that they can promote collective conflict measures to demand improvements in working conditions or compliance with labor regulations. Specifically, they can promote:

a) Approach to the administrative and judicial procedure for collective conflict (Article 18.1 RDLRT).

b) Approach to the extrajudicial collective conflict procedure.

c) Strike declaration (Article 3.2 RDLRT).

5) *The unitary representation of employees also assumes the right-function of information on economic aspects of the company, statistics on absenteeism, accidents and occupational diseases, hiring, etc. About how to transfer that information:*

a) *The information must be sufficient to enable the committee to be aware of and consider the issues.*

b) *Quarterly on issues related to the economic situation of the company and the labor contracting, absenteeism and accidents (*Article *64.2º(a), (b), (c), (d) and* Article *18 LPRL).*

c) *Annually, on the application in the company of equal treatment and opportunities between men and women (*Article *64.3).*

d) *Payment of salaries by check or similar (*Article *29.4)*

e) *Inter vivos company*

f) With the appropriate frequency, of the report, balance sheet and other accounting documentation of the company, of the models of contracts and settlements used, of the imposition of sanctions for very serious offenses and of the decisions or measures that may affect the organization of the work or employment (Article 64.4º(e), (f), (g) ET)

g) Likewise, the company must be informed of the parameters, rules and instructions on which the algorithms or artificial intelligence systems are based that affect decision-making that may affect working conditions, access to and maintenance of employment, including profiling (Article 64.4 ET).

6) Finally we find functions of collaboration or participation in the management of the company (Article 64.7 (b), (c), (d) ET).

a) In management of social works in the company,

b) Maintenance and increase of productivity,

c) Environmental sustainability,

d) Conciliation measures

More recently, the obligation has been added by which the employer, after hearing the employees' representatives, will develop an internal policy aimed at employees, including those who occupy management positions, in which they will define the modalities of exercising the right to disconnection. and training and awareness-raising actions for staff on reasonable use of technological tools that avoid the risk of computer fatigue (Article 88 LOPD).

7) Regarding the obligations of the legal or unitary representation of employees, the main one is to inform those represented on all issues that directly or indirectly have or may have an impact on labor relations (Article 64.7º(e) ET). This competence must be combined with the duty of professional secrecy (Article 65.2, 3, 4 and 5 ET), which establishes the possibility for the employer not only to declare certain matters confidential but also to not report industrial, financial or secrets. commercial information whose disclosure could cause serious harm to the company.

5. Guarantees and prerogatives of the unitary representatives of employees

The guarantees and prerogatives enjoyed by the unitary representatives try to guarantee the effective and efficient exercise of the employees' representatives, are essentially the following:

a) Need to carry out a contradictory file for the sanction for serious and very serious offenses. That is, the unitary representative must be heard and be able to make allegations before the company imposes a sanction of this type. In particular, he must be heard before his dismissal for disciplinary reasons is carried out (Articles 68(a) and 55.1 ET). The consequence of failing to comply with this procedure will be the nullity of the business decision that imposes the sanction or dismissal (Article 115.2 LRJS).

b) Permanence priority in cases of transfers, suspensions and collective dismissals for technical, organizational or production reasons. This guarantee does not imply that the unitary representative cannot be dismissed for some of these reasons. What this means is that, in such cases, they will have preference to remain in the company over the rest of the employees, so the employer must justify the reason why the unitary representative is included among the dismissed employees (Article 68(b) ET) This right of permanence also refers to transfers (Article 40.5 ET) and suspensions (Article 47 ET).

c) Not be fired or sanctioned for the exercise of their duties, as well as not suffer discrimination in their work and rest conditions. That is, they may be dismissed for justified reasons, as long as the dismissal does not entail retaliation for the exercise of their representation functions (Article 68(c) ET).

d) Right to free expression of their activity. With the limitation of the duty of secrecy that we will refer to below and that prevents you from disseminating any information that you obtain on the occasion of your duties that may compromise the competitiveness of the company or the personal data of the employees or the employer.

e) Right to a number of hours paid as if they were work for the exercise of their union functions. This is the so-called hourly credit. A certain number of hours is recognized within working hours but dedicated to the work of representation and/or union activities. They are compensated with salary and supplements except those related to the effective performance of a specific job. They are recognized individually, although they can be accumulated in one person (this is what we call union release). They are not cumulative monthly, so the release hours not enjoyed in a given month cannot be enjoyed in the future. Although the distribution of this hourly credit is free for employees, the employer must be notified when they are going to be absent, so that it allows them to organize their human resources. The hours corresponding to each of the members varies depending on the number of company employees according to the following distribution:

Up To 100 Employees	15 Hours/Month
From 101 To 250 Employees	20 Hours/Month
From 251 To 500 Employees	30 Hours/Month
From 501 To 750 Employees	35 Hours/Month
From 751 Onwards	40 Hours/Month

If the union delegate has the status of unitary representative, the hourly credit is not cumulative.

f) Local and notice boards (Article 81 ET). This is the right to adequate premises in which they can carry

out their activities and communicate with employees if the characteristics of the center allow it. It is therefore a right conditional on the company having the availability of that space. This does not imply that it is a discretionary concession of the company, but that it must justify any negative response. In the event of discrepancies, the Labor Authority will be responsible for resolving them, following a report from the Labor Inspection.

g) Freedom of expression and dissemination of information (Article 68(d) ET). The information may be of work or social interest. Its dissemination cannot disturb production. The employer must be notified in advance. It must be compatible with the duty of secrecy.

h) Option for the representative in unfair dismissal (Articles 56.4 ET and 110.2 LRJS). Normally, when a dismissal is declared unfair, it is the employer who has the power to choose between compensating or reinstating the employee. When the dismissed employee is a member of the unitary representation in the company, this choice corresponds to the employee.

i) Execution of reinstatement on its own terms in the event that the employer is reluctant to reincorporate (Articles 282.1(a) and 284(c) LRJS). In the case of ordinary employees, if the company does not reinstate the employee when it should do so, the contractual relationship may be terminated with compensation.

j) Permanence priority When selecting the employees affected by these business decisions, the unitary representatives of the employees will have a better right to remain in the company.

6. The union representation bodies in the company

Union representation is the second channel of representation of employees in the company. It is strictly union in nature and includes: union sections and union delegates. Unlike the legal representation of employees, the union representation or representations present in the company do not defend the interests of all employees, but only of the members of the union to which the corresponding union section belongs. For this reason, as we will see, the choice of these other representations should not be subject to an election by the entire staff. We can define this type of representation as the representation of the union in the company in charge of assuming the defense of the interests of the union organization and its members.

They are regulated in the LOLS, but the Law does not impose their constitution as is the case with unitary representation, but rather it is established at the request of the union or its members.

Union action to defend the economic and professional interests of employees is carried out fundamentally within workplaces and companies. The union section is a subdivision or group within a union that represents employees at a specific company or workplace. Union branches are a way of organizing union members to address issues related to their jobs and working conditions at a more local or specific level.

Thus, employees affiliated with a union, at the level of the company or workplace, can establish union sections and appoint union delegates, who constitute the representation of the unions within the company. The union delegate is an employee elected or appointed by a representative union to represent and defend the interests of employees within a company or workplace. Eligibility and election: Union delegates are elected by the employees themselves through union elections. Representative unions in the company have the right to present candidates for employees to elect.

Likewise, employees affiliated with a union who hold an elective position, whether provincial, regional or state, in one of the most representative union organizations, may intervene in the company or workplace.

The constitution of this type of representation units is a right of unions that have members in the company. It is voluntary and the requirements for its constitution depend on the union's statutes. These statutes will also define the scope of the union sections, which may be the company, one or several work centers, etc. By saying that the constitution of union sections is voluntary, it might seem that the constitution of unitary representation is mandatory. The law is somewhat ambiguous about this, it does not qualify it in any way, as mandatory or voluntary. By indicating that in workplaces with less than 10 employees it is optional, we could think, averse sensu, that when those 10 employees are exceeded it will be mandatory. However, the ordinance does not foresee any negative consequences in the event that employees do not promote elections to form the unitary representation or do not present candidates for it.

6.1. Competencies of union representation

As we have been warning, unlike unitary representation, union representation does not protect the interests of all the company's employees, but only the defense of its affiliated employees. The union section also assumes the representation of the union within the company, through the figure of the union representative.

6.2. Functions

Depending on the degree of representativeness of the union, the section will have more or fewer functions. Specifically, for this attribution of functions, three levels are established within the union sections:

1º) Sections without implementation in the unitary representation bodies.

2º) Sections with implementation in the unitary representation bodies.

3º) Sections of the most representative unions.

Having made this different classification, we focus only on the functions that are common to all union sections in general, regardless of their level of participation:

a) Meetings prior notification to the employer.

b) Collection of fees from its members.

c) Reception and distribution of union information.

d) Presentation of candidacies in the elections for personnel representatives.

e) Raise strikes and collective conflicts (Article 2.2(d) LOLS).

f) Collective bargaining, which will be statutory or non-statutory depending on the representativeness of the union.

6.3. Prerogatives of the union sections

Once again we distinguish according to the level of representativeness of the union and we refer, first of all, to the powers of the union sections without implementation, that is, without presence in the unitary bodies:

a) Right to carry out union activity

b) Right to present candidatures for personnel representatives and members of the works council

c) Exercise of the right to strike and presentation of collective disputes

The union sections of the most representative unions, in addition to the previous powers, have the right to:

a) Promote elections to unitary bodies

b) Use of premises, but only in companies with more than 250 employees

c) Using a bulletin board in the workplace

d) Negotiate collective agreements under the terms of Article 87 ET

Finally, the **union sections with implementation**, that is, those that have a presence in the unitary bodies of the company (either through staff delegates or members of the company committees), in addition to the previous powers, have the right to: Be represented by union delegates.

6.4. The union representative

The union delegate is the representative and spokesperson of the union section in the company. They can be appointed by union sections that meet two requirements:

a) Have a presence on the works committee.

b) That the company or work center has more than 250 employees.

They are democratically elected by and among their members in the company or workplace and must be communicated to the employer. Regarding their prerogatives, if the union delegate is not part of the works council, they will have the following powers:

a) Access to the same information and documentation as the members of the works council.

b) Attend meetings of the works committee with voice but without vote.

c) Be heard before any type of conflict measure that affects affiliated employees is adopted (and especially in cases of sanctions and dismissals).

d) The same guarantees and prerogatives as the members of the works council.

6.5. Union elections

By union elections we refer to the process by which workplace employees elect their unitary representation. We omit the process of electing union representation because, as we have been saying, this depends on the configuration that the unions have wanted to establish in their respective statutes.

Regarding the coverage of vacancies in unitary representation, the first thing we must ask ourselves is who can promote the elections. It must be taken into account that, by default, a company will emerge without legal representation of the employees and it is not the employer who is obliged to establish it. This should only respect the rights of the operators when starting this process. The agents with powers to call elections are (Article 67.1 ET):

a) The most representative unions.

b) Unions with 10% representation in the works council.

c) The Employees' Assembly by majority agreement

The standard is also responsible for setting some formal requirements for the start of the process (Article 67.1 ET), specifically communication to the competent Administrative Authority and to the company within a period of at least 1 month in advance and advertising in the corresponding official channel. If any of the requirements for the promotion of elections are not met, the electoral process will not be valid.

6.5.1. Voters and eligible

The next question that arises in this regard is who can be voters and eligible to fill the vacancies. According to the ET, voters will be those over 16 years of age who have been in the company for 1 month at the time of the call.

On the other hand, those employees who are 18 years old at the time of the call and have been in the company for at least 6 months are eligible (it may be agreed to reduce it to 3 months).

6.5.2. Electoral table

The electoral board is the main agent responsible for promoting and supervising the electoral process in the company. Regarding its constitution, the norm (Article 73 ET) tells us that a table will be established for each college of 250 voting employees or fraction. It will be made up of:

a) The president who will be the most senior employee in the company.

b) Two members who will be the eldest and minor electors, the latter will act as secretary.

None of the components may be a candidate; if so, their substitute will replace them (who will be the next in seniority or age as the case may be). Each candidate may appoint one auditor per table, just as the employer may designate a representative. The board will make public the labor census indicating who are voters and eligible.

It will set the number of representatives and the deadline for the presentation of candidatures. He will receive and announce the candidacies and will indicate the voting date. Finally, it will monitor the entire electoral process, preside over the voting, carry out the counting, draw up the minutes within a period of no more than three calendar days and resolve any claim that may be presented.

6.5.3. Candidacy and electoral system

The subjects entitled to present candidatures for the election of the unitary representation of employees are:

a) Unions, regardless of their representativeness.

b) Coalitions of unions.

c) The employees, endorsing the candidacy with signatures of voters from their center, at least three times the number of positions to be filled.

The candidacy for a works council must contain, at least, as many names as there are positions to be filled.

There are, furthermore, some differences in the electoral process depending on the representative figure that fits in the company, personnel delegate or works council.

The election of the personnel delegate will be done through a single college, in an open list process. The vote will be nominal and the vacancy will be filled through

the majority system. For its part, for the election of the works council, two electoral colleges will be created: one for technicians and administrators and others for specialists and unqualified employees (provided that both categories of employees are present in the company). It will be done through a closed list system and vacancies will be assigned according to the criterion of proportionality between the votes received by the different candidates.

As for voting, it is held at the workplace and during working hours. The vote will be free, secret, personal and direct and the ballots will be deposited in closed ballot boxes.

The counting and attribution of results is carried out by the president reading the ballots aloud. To be eligible for representation, the list must obtain at least 5% of the valid votes. Blank votes are not taken into account. In the event of a tie to fill the last position, the candidate with the most seniority in the company will be assigned.

For the minutes and registration of the results, copies of the minutes will be sent to the employer, the auditors and the elected representatives and the result will be published on the notice boards. The original of the minutes together with the void ballots and the minutes of constitution of the table will be sent in three days to the Labor Authority. In 10 days the registration or correction period will proceed.

Claims can be made by those who have a legitimate interest, including the company. These claims may be based on:

a) In the existence of serious defects that affect the guarantees of the process and that alter its result.

b) In the lack of capacity or legitimacy of the elected candidates.

c) In the discrepancy between the minutes and the development of the electoral process.

d) In the lack of correlation between the number of employees appearing in the election minutes and the number of elected representatives.

6.5.4. Duration of mandate and filling of vacancies

The duration of the election is 4 years, from which time they remain in office until the new representation is established. Representative positions in an assembly that meet the following requirements may be revoked in advance:

a) Called by at least 1/3 of the voters.

b) Summoned for this purpose.

c) The result is obtained by absolute majority.

They cannot be revoked during the negotiation of the collective agreement. Regarding the coverage of vacancies, it will apply when the mandate of a representative ends due to death, retirement, or ceasing to belong to the company. If the vacancy occurs in a position of Personnel delegate, it will be filled by the person next in number of votes according to the electoral record. If a vacancy occurs in a committee member, it will be filled by the next member on the committee's list.

6.6. Representation in matters of occupational risk prevention

Another body representing employees in the company is the one that refers to representation in matters of occupational safety. Within this other channel of representation we find the prevention delegates and the health and safety committee. Their main function is the surveillance and control of safety and hygiene at work.

The rights recognized by the regulations to these specific representative bodies are:

a) To be consulted in advance of the employer's decisions.

b) To participate in issues related to risk prevention at work.

6.6.1. Prevention Delegates

They will be appointed by and among the staff representatives, within the scope of the representative bodies provided for in the regulations. It is a representative of employees appointed or elected in the workplace to address issues related to occupational safety and health. The main function of the prevention delegate is to promote and supervise occupational risk prevention measures, as well as guarantee compliance with health and safety regulations in the workplace. Their number will be determined according to the following scale, depending on the size of the squad:

From 50 to 100 employees	2 Prevention Delegates
From 101 to 500 employees	3 Prevention Delegates
From 501 to 1,000 employees	4 Prevention Delegates
From 1,001 to 2,000 employees	5 Prevention Delegates
From 2,001 to 3,000 employees	6 Prevention Delegates
From 3,001 to 4,000 employees	7 Prevention Delegates
From 4,001 onwards	8 Prevention Delegates

- In companies with up to thirty employees, the Prevention Delegate will be the Personnel Delegate.
- In companies with thirty-one to forty-nine employees there will be a Prevention Delegate who will be elected by and among the Personnel Delegates.

  Delegates may be established in collective agreements, provided that it is guaranteed that the power of appointment corresponds to the staff representatives or the employees themselves.

- They have the same guarantees and powers as the employees' representatives, and also the right to receive resources and specific training from the employer.
- The tasks carried out in terms of prevention fall within the hourly quota.

The Powers of the Prevention Delegates are:

a) Accompany the Labor Inspector technicians on the visits they make to the company to supervise compliance with safety and hygiene measures at work.

b) Have access to information and documentation on working conditions; damage caused to the health of employees; protection and prevention activities; contracts for the provision of works or services.

c) Make visits to workplaces to carry out surveillance and control of the state of working conditions.

d) Propose stoppage of activities in situations of serious and imminent risk.

e) Surveillance in cases of contracts and subcontractors.

f) Request from the employer the adoption of preventive measures and to improve the levels of protection of the safety and health of employees.

6.6.2. Health and safety committee

The Health and Safety Committee is a joint entity, whose main purpose is to carry out regular and scheduled consultations on the company's actions related to the prevention of occupational risks. In companies or work centers with 50 or more employees, a Health and Safety Committee will be established. This committee will be composed of the Prevention Delegates, on the one hand, and the employer and/or its representatives in equal numbers as the Prevention Delegates, on the other hand. It is regulated by the Occupational Risk Prevention Law. Here are some specific characteristics and responsibilities of the Health and Safety Committee. The Health and Safety Committee is made up of representatives of both employees and management or employers.

In the meetings of the Safety and Health Committee, the following will participate with the power to express opinions, but will not have the right to vote:

a) Union delegates

b) Technical prevention managers, whether from the company or outside it

c) Company employees who have special qualifications or information regarding specific issues.

Collective Bargaining

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Contents

1. Introduction

Collective bargaining is a fundamental right firmly enshrined in the Constitution of the International Labour Organisation and reaffirmed in the ILO Declaration on Fundamental Principles and Rights at Work adopted by the ILO in 1998.

Collective bargaining is a fundamental mechanism of social dialogue, through which employers and their organizations and trade unions can agree on certain issues related to working conditions. Generally, collective bargaining is where we find fair wages and adequate working conditions. It is also the basis for good industrial relations.

Issues commonly addressed in bargaining agendas include wages, working time, vocational education and training, occupational safety and health, and equal treatment. However, more and more issues are being included in social dialogue with a view to legally protecting employees through their representatives.

The aim of collective bargaining is to establish a collective agreement regulating the terms and conditions of employment of a given group of employees. The aim is to establish decent and fair conditions.

Collective agreements can also regulate the rights and responsibilities of the parties to the employment relationship, thus ensuring harmonious and productive conditions in industries and workplaces. Moreover, enhancing the inclusiveness of collective bargaining and collective agreements is an essential means of reducing inequality and expanding the scope of labour protection.

Collective bargaining can thus be said to pursue two fundamental objectives:

1. Collective bargaining serves as an instrument for determining the wages and working conditions of those employees to whom an agreement is applied that has

been reached through negotiations between two parties who have acted freely, voluntarily and independently.

2. On the other hand, it makes it possible for employers and employees to define, by agreement, the rules governing their reciprocal relations. This will result in labour relations being as horizontal as possible, especially in view of the leading role of employees' representatives in negotiation.

These two aspects of the bargaining process are closely linked. Collective bargaining takes place between an employer, a group of employers, one or more employers' organizations, on the one hand, and one or more employees' organizations, on the other. It can take place at different levels in such a way that one complements the others, i.e. at a unit within the enterprise, at the enterprise, at the sectoral, regional or national level.

Collective bargaining has advantages for both employees and employers. For employees, collective bargaining, in principle and bearing in mind its purpose, ensures adequate wages and working conditions by giving the "whole" of the workforce "one voice", which benefits them more than when the employment relationship relates to a single individual. It also makes it possible to influence decisions of a personal nature and to achieve a fair distribution of the benefits of technological progress and increased productivity.

For employers, as an element in maintaining social peace, it contributes to the stability of industrial relations that can be disrupted by unresolved tensions in the workplace. Through collective bargaining, employers can also address the adjustments required by modernization and restructuring. Indeed, in many countries, collective bargaining has been one of the main ways in which consensus on flexibility in labour markets has been achieved.

For collective bargaining to function properly, certain legal and structural conditions are required. First, a strong democratic foundation and legal framework are essential to ensure the independence and effective participation of the social partners.

At present, there are several significant pieces of legislation at the international level. Ratification of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) is essential in terms of the legal basis.

We also find many other ILO conventions and recommendations related to collective bargaining that stipulate the principles and rights of employees in certain economic sectors. If it is possible to extend the scope of application of collective agreements, employees who have not been directly involved in the bargaining process can be protected by collective agreements.

However, for collective bargaining to truly deliver, it is essential that appropriate mechanisms (legal, regulatory or standards) are in place that are strong, legitimate, with coherent lines of action to act on an equal footing and facilitate fair and effective bargaining.

In this regard, the ILO offers technical advisory services and cooperation in many countries to enable employees' and employers' organizations to engage in collective bargaining that can benefit both sides.

2. The right to collective bargaining: constitutional recognition

The right to collective bargaining is recognized in Article 37.1 CE, which states that the law shall guarantee the right to collective bargaining between employees' and employers' representatives, as well as the binding force of collective agreements.

Article 37.1 CE refers to collective bargaining as a system or institution, i.e. as a set of rules of action and organization with a view to regulating working conditions.

It should now be added that the identification of the core of the normative imputation of the precept presupposes prior recognition of social groups as centres of organization of legal production.

With Article 37.1 situated, then, in a topographical position after the enshrinement of collective autonomy, the first question we have to ask, and resolve is to know where the power of collective subjects to autonomously regulate the sphere of their interests is constitutionally based.

Society is presented as a mosaic of groups and social formations, each of which, on the one hand, projects its own system of values outwards and, on the other, participates and intervenes in the management of the social order, which appears as the result and synthesis of the process of confrontation of the individual interests that such groups and formations represent and protect. The starting point is undoubtedly Article 7, which must

be considered the most far-reaching provision among those which the constitutional text devotes to what in common terminology are called collective labour relations.

CE expressly recognizes that the action and organization of collective subjects are in a position of conflict with the other social party. For the defence and promotion of their interests, for the management of the social order to which they are called, trade unions assume a dual role: they are both protagonists and antagonists, being characterized as "combative" organizations capable of mobilizing, at least potentially, against the natural opponent: the employer or the business class, even if not only against the latter.

The adherence of our constitutional text to a pluralist model of society does not hide the reality of the class conflict that exists in societies, nor does it support the idea that the social order is based on a balance of power between the different social forces in which an "integrated" society is structured. It was therefore only fair that the public authorities should have the power - and responsibility - to ensure and guarantee the balance of power between the employees - with their representatives - and the employer himself.

The constitutionalizing of social pluralism and employees' conflict entails the legitimization of a power autonomous to the trade union which goes beyond the level of labour relations to insert itself into the constitutional political level as a power concurrent with that of the state to determine the order of social relations, to evaluate their development and to introduce the appropriate qualitative corrections with a view to a real and effective participation of the forces of labour in the management of the productive order and, by extension, of the social order. This means that the phenomenon of self-defence and promotion of class interests, a defining element of trade union subjects, is of course affected by external limits: respect for the democratic constitutional order, but not by internal limits of an objective functional nature.

The constitutional regulation does, however, project areas of indeterminacy and uncertainty on various aspects. The first clause of the provision is a clear example of polysemy or, at least, ambiguity: the expression "right to collective bargaining" can take on different meanings. Specifically, the question we can perhaps raise in this scenario is the following: does Article 37 recognize a genuine right to negotiate conferred on employees' and employers' representatives; or, on the contrary, does it merely entail a possibility to act within a sphere of freedom whose exercise the public authorities cannot hinder? In other words, does our constitutional text recognize a right to negotiate? The first statement in this respect, partly advised by elementary reasons of interpretative prudence and partly motivated by the intrinsic ambiguity of the expression used, is that a categorical and categorical negative answer cannot be deduced from the literal or textual wording of Article 37.1.

In support of the thesis, first, arguments of a semantic nature can be invoked. "Right to collective bargaining" is, on the one hand, an elliptical expression in which the mention of the verb is suppressed, and the allegedly elided verbs do not seem to provide connotations comprising conducts or behaviours of reciprocal and effective availability towards bargaining: the right to resort to, to employ, to use collective bargaining are terms free of imperative imprint. On the other hand, neither is the formula "right to collective bargaining" presented as the active side of the parallel obligation to negotiate.

Secondly - and this is an argument of greater hermeneutic weight - the logical and normative assumptions that articulate the right to negotiate should not be ignored. A general limitation of collective subjects would clash with the broad definition of bargaining agents provided by the constitutional text itself. Thirdly and finally, a systematic (and historical) interpretation of Articles 7 and 37.1 CE shows that the object of the legal guarantee is not "the will to make every reasonable effort to reach an agreement", but collective autonomy understood as the power of social groups to establish precepts endowed with binding normative efficacy.

To conclude, it seems that the aim of the precept is to regulate that complex activity that social antagonists carry out when updating their collective autonomous power. In this sense, the constitutional text contains a true outline of what a collective bargaining system can be, forming the legal framework of the most salient aspects of it: negotiating parties, content of bargaining and effects of the collective agreement on the bargaining parties.

Focusing now on the different types of collective agreements that can take place, all of which are covered by Article 37 CE, we find:

A. Firstly, collective agreements, which are agreements with a broad content. Within these, two types can be distinguished:

a) Statutory collective agreements, i.e. those governed by Title III of the Employees' Statute.

b) Non-statutory collective agreements, i.e. those not regulated by Title III ET.

B. Secondly, collective agreements, which are agreements of a more limited content. Within these, three types can be distinguished:

a) Supra-company collective agreements on specific matters, regulated in Article 83.3 ET.

b) Collective agreements at company or supra-company level, depending on the case: collective agreements that put an end to a strike and collective agreements that put an end to a collective dispute.

c) Company-level collective agreements, in which there are different types of company-level agreements:

- Company collective agreements replacing statutory collective agreements (Articles 22.1, 24.1, 29.1, 29.1, 34.2, 34.3 and 67.1 ET).
- Collective company agreements on wage reductions (Articles 82.3 and 85.3 ET).
- Collective company agreements for substantial modification of working conditions established in a statutory collective agreement or in similar collective agreements (Article 41.2 ET).
- Collective company agreements for substantial modification of collective contractual conditions (Article 41 ET).
- Collective company agreements on mergers or takeovers.

With these considerations in mind, in this Theme we will focus on the study of statutory, extra-statutory collective agreements, framework agreements and company agreements.

3. Statutory collective bargaining agreement

3.1. Applicable regulations

To analyse the statutory collective agreement, we must bear in mind the applicable regulations. In this case, it is advisable to consult the following texts: ET, (Title III), LRJS (Articles 163 to 166); Royal Decree 1362/2012, of 27 September, regulating the National Consultative Commission on Collective Agreements; Royal Decree-Law 28/2018, of 28 December, for the revaluation of public pensions and other urgent measures in social, labour and employment matters; Royal Decree-Law 6/2019, of 1 March, on urgent measures to guarantee equal treatment and opportunities between women and men in employment and occupation; Royal Decree 713/2010, of 28 May, on the registration and deposit of collective bargaining agreements; Royal Decree 901/2020, of 13 October, regulating equality plans and their registration and amending Royal Decree 713/2010, of 28 May, on the registration and deposit of collective bargaining agreements; among others.

3.2. Conceptual aspects

The statutory collective bargaining agreement is considered an agreement signed by the representatives of employees and employers to set working conditions and productivity, subject to the provisions of Title III ET. It may also regulate labour peace through the obligations agreed upon.

Statutory collective agreements have a normative legal effect (Articles 3.3 and 82.3 ET). This implies, firstly, that they are automatically and imperatively applicable to individual employment relationships, which excludes the possibility of an employment contract establishing working conditions contrary to those laid down in the agreement. Secondly, the application of the principle of modernity in the succession of agreements, which means that, unless there is an express maintenance clause in the subsequent collective agreement, the latter repeals the previous one and employment contracts will be governed by the new agreement. And thirdly, the application of the principle of publicity, i.e. there will be an obligation to publish it in the corresponding Official Gazette.

3.3. Scope and legitimacy

The negotiating parties are free to determine the functional (intersectoral, sectoral, subsectoral, group of companies, company or workplace), territorial (national, interprovincial, Autonomous Community, provincial, regional or local) and personal (groups or groups of employees) scope of application of a collective agreement (Article 83.1 ET).

The parties with standing will depend on whether we are dealing with the representatives of the employees

or of the company itself. Focusing on this chaos in the representation of employees:

- In company-level or lower-level agreements:
  - Works council or personnel delegates, where applicable, or the Intercentre Committee, if it exists, and the agreement assigns it this negotiating function.
  - Trade union sections (if any) that together account for most of the members of the Works Council. The intervention in the negotiation shall correspond to the trade union sections when they so agree, if they represent most of the members of the works council or among the personnel delegates.
  - In agreements aimed at a group of employees with a specific professional profile ("fringe" agreements), the trade union sections that have been designated by most of their representatives by means of a personal, free, direct and secret ballot shall be entitled to negotiate.
- In agreements for a group of companies, as well as in agreements that affect a plurality of companies linked for organizational or productive reasons and identified by name in their scope of application, the entitlement to negotiate on behalf of the employees shall be the same as that established for the negotiation of sectoral agreements.
- Sectoral collective agreements:
  - Most representative trade unions at state level and, in their respective spheres, the trade union organizations affiliated, federated or confederated to them.
  - Most representative trade unions at Autonomous Community level for agreements that do not go beyond that territorial scope, and, in their respective areas, the trade union organizations affiliated, federated or confederated to them.
  - Trade unions with at least 10% of the members of the works councils or personnel delegates, in the geographical and functional scope of the agreement.
- In state-level agreements, also the Autonomous Community trade unions that are the most representative in accordance with Article 7 of the Organic Law on Freedom of Association.

On the other hand, regarding the representation of the company itself, we find the following legitimized parties:

- In company or lower-level agreements, the employer.
- In company group agreements and in agreements affecting a few companies linked for organizational or production reasons and identified by name in their scope of application, the representation of these companies.
- In sectoral collective agreements, the employers' associations that account for 10 per cent of the employers included in the scope of the agreement and which also employ at least 10 per cent of the employees in said scope, as well as those employers' associations that employ 15 per cent of the employees affected in said scope.

  In those sectors in which there are no employers' associations that are sufficiently representative, as provided for in the previous paragraph, employers' associations at the national level that account for 10 per cent or more of the companies or employees at the national level, as well as employers' associations in the Autonomous Community that account for at least 15 per cent of the companies or employees, shall be authorized to negotiate the corresponding sector collective bargaining agreements.
- In state-level agreements, also the Autonomous Community business associations that have the most representative status in accordance with the provisions of Additional Provision 6.ª ET.

A relevant aspect regarding both legitimizations - be it employees' or employers' - is that it is necessary for both parties to recognize each other at the time of bargaining as genuine social partners. However, there are three limits to the freedom of choice of bargaining unit:

a) Firstly, case law, with dubious legal grounds in view of the legally established freedom of choice, has indicated that the bargaining units must be reasonable and appropriate (STS of 18 December 2002, Ar/2698 and 2344), with no room for arbitrariness on the part of the parties.

b) Secondly, collective agreements cannot be negotiated by those who are not legally entitled to do so.

c) Thirdly, the legal rules on the concurrence of application between statutory collective agreements, although not so much the freedom to choose the bargaining unit as the application of collective

agreements. In this respect, although during the term of a collective agreement another collective agreement may be negotiated in a different sphere without it being null and void, it would nevertheless be inapplicable because the previous collective agreement would be preferentially applicable. Thus, as a rule, there is a principle of non-applicability between collective agreements of different scope, so that during its term a collective agreement may not be affected by another collective agreement (Article 84 ET), unless one of the following exceptions applies:

- That the applicable framework agreement expressly establishes the possibility of concurrence, given that Article 84 ET has a dispositive nature as it admits "agreement to the contrary.
- The collective agreement itself admits the concurrence of another collective agreement.
- That it is a supra-company collective agreement of a lower scope than the one previously in force, which has been agreed by the majority required by Article 88.3 ET to constitute the negotiating committee in the corresponding bargaining unit and not by the simple majority of each of the two representatives required by Article 89.3 ET and provided that it does not refer to any of the following matters: probationary period, hiring modalities, except in the aspects of adaptation to the scope of the company, professional groups, disciplinary regime, minimum standards in matters of safety and hygiene at work and geographical mobility (Article 84 ET), without this list being extended by collective agreement or by interprofessional agreement.

If the lower collective agreement were to encroach on matters reserved to the higher collective agreement, the "encroaching" clauses would be null and void. On the other hand, clauses in the higher collective agreement that go beyond the reserved matters would not be null and void, but simply inapplicable if there are lower collective agreements regulating these matters.

3.4. Personal area

The collective agreement can be negotiated for all or part of the company's employees, but in principle there is freedom to negotiate separately for certain groups of employees within a company, if there is no discrimination.

3.5. Content of the negotiation

The negotiating parties are free to set the normative content of the collective agreement, although it is important to note certain limits:

- With regard to negotiable matters, the law refers to "matters of a labour nature", "matters of a trade union nature and, in general, any others affecting the relations between employees and their professional organizations", "matters of an economic nature" (Article 85.1 ET) and "matters of Social Security" (Articles 39, 191 and 192 LGSS).
- Collective agreements must respect the mandatory legal and regulatory rules (Articles 3.3 and 85.1 ET).
- Collective agreements must respect the principle of equal treatment and non-discrimination on the grounds listed in Articles 4.2(c) and 17.1 ET.
- Collective agreements must respect employees' contractual rights, both those expressly established in their written contract and the most beneficial conditions of contractual origin converted into rights acquired over time, if they are more favourable to the employee than the conditions established in the agreement (Article 3.1(c) ET).

Bearing in mind the limits, it should be noted that Article 85.3 ET stipulates that all the statutory collective agreements must comply with a mandatory minimum content. In fact, if it does not regulate any of these issues, we would be dealing with an extra-statutory agreement. In this sense, it is a mandatory minimum content:

a) The determination of the negotiating parties.

b) The personal, functional, territorial and temporal scope.

c) The form, conditions and notice period for termination of the agreement.

d) The designation of a joint committee representing the negotiating parties.

e) The clause on the uncoupling of wages.

In any case, the content of this type of agreement is generally characterized by the following subjects:

- Economic (salaries, indirect remuneration, etc.).

- Labor (daily, weekly and annual working hours and rest periods; professional classification; duration of contracts; performance requirements, etc.).
- Trade union (works councils, staff delegates, negotiation fees, etc.).
- Conditions of employment.
- The establishment of criteria for the determination of the means, personnel and materials of the company's own prevention services, the number of employees designated, where appropriate, by the employer to carry out prevention activities and the time and means available to them for the performance of their activity, taking into account the size of the company, the risks to which the employees are exposed and their distribution within the company, as well as the planning of preventive activity and for the training in preventive matters of employees and prevention delegates.
- Relations of employees and their representative organisations with the employer and employers' associations.
- Welfare (voluntary improvements in Social Security).
- Professional promotion measures.
- Working conditions and productivity.
- Obligations aimed at regulating labour peace.
- Exercise of the rights to promotion and professional training at work, which will be adapted to criteria and systems that guarantee the absence of direct or indirect discrimination between women and men employees.
- Likewise, the duty to negotiate on measures aimed at promoting equal treatment and opportunities between women and men in the workplace, which in the case of companies with more than 50 employees, will be articulated through equality plans.

3.6. The negotiation procedure

The initiative to promote the negotiation of a collective bargaining agreement corresponds to any of the parties entitled to negotiate in its corresponding area (Articles 87 and 88 ET), by means of a written communication addressed to the other party -a copy of which must be sent to the competent administrative labour authority for registration purposes-, with the following content (Article 89.1 ET): the representation held, the areas of application (territorial, functional, personal and temporary) of the agreement and the matters to be negotiated.

Article 89.1 ET establishes the duty to negotiate of the party receiving the notice to open negotiations. The latter may not refuse to initiate negotiations except for a legally or conventionally established reason (for example, failure to give written notice, lack of legal standing of the initiating party or of the receiving party, or an attempt to negotiate in an inappropriate bargaining unit) or when it is a matter of revising an agreement in force.

When there is no cause for exclusion from the duty to bargain, the receiving party must respond affirmatively to the bargaining proposal within a maximum period of one month (Article 89.2 ET). Article 89.1 ET establishes that both parties are obliged to negotiate in good faith. In the event of non-compliance with the duty to negotiate, a collective dispute may be brought.

The special negotiating body must be set up within one month of receiving notice of the initiation of negotiations (Article 89.2 ET). The members of the special negotiating body shall be freely appointed by the negotiating parties (Article 88.2 ET), the maximum number of which shall be 12 for each of the parties in company-level or smaller agreements, and 15 for agreements at the supra-company level (Article 88.3 ET). Likewise, the committee may have a chairperson appointed by mutual agreement between the parties, from outside the parties or a member of the committee, to direct and moderate the sessions (Articles 88.2 and 4 ET). There shall be a secretary to keep the minutes of the negotiation sessions (Article 88.4 ET).

Agreements are reached by a majority vote in favour of each of the two "representations" (Article 89.3 ET). These agreements must be made in writing, as the law establishes that the collective agreement must necessarily be in written form on pain of nullity and must be signed by the negotiating parties in the commission. The absence of this signature also renders the agreement null and void (Article 90 ET).

Once these formalities have been completed, the law establishes three administrative procedures following the agreement. Firstly, the submission of the agreed agreement for registration with the competent labour authority within 15 days of the signing of the agreement by the negotiating parties (Article 90.2 ET). Secondly, the submission of the registered agreement for deposit (Article 90.2 ET). Thirdly, the agreement must

be sent by the labour authority that registered it to the corresponding Official Gazette for publication, within a maximum period of 10 days from the date it is filed with the registry (.Article 90.3 ET).

Failure to comply with the obligation to register by the special negotiating body or its President will make publication in the corresponding Official Gazette impossible and will therefore be legally unenforceable. In the event of non-compliance with the obligations of deposit and sending for publication by the competent labour authority, the defaulting Administration will in any case be held liable, although the agreement will be applicable in the event of non-compliance with the obligation of deposit if it has over published.

3.7. Duration of the agreement, termination and ultra-activity

It is up to the negotiating parties to set the date of entry into force of the collective agreement (Article 90.4 ET), which may be the date of the official publication of the agreement, before or after that date. They will also be responsible for establishing the duration of the agreement.

Unless otherwise agreed, the duration of the collective bargaining agreement expires when the final term of the agreement is reached, following denunciation by one of the negotiating parties. The denunciation must be express in writing or, at least, by unequivocal conduct on the part of the denouncing party. The form, conditions and term of the termination must be fixed by the bargaining parties in the collective agreement. Normally, the denunciation will be the responsibility of the bargaining parties, but if they have disappeared for any reason, those who have standing to negotiate in that area may denounce.

Article 86.3 ET establishes what is known as the "ultra viability" of regulations, stating that "once an agreement has been denounced, and until an express agreement is reached, its binding clauses shall cease to be in force. The validity of the regulatory content of the agreement, once the agreed duration has expired, will be in accordance with the terms established in the agreement itself. In the absence of an agreement, the regulatory content of the agreement shall remain in force".

4. Extra-statutory collective bargaining agreement

4.1. Applicable regulations

Extra-statutory collective bargaining is governed by Article 37.1 CE and by the will of the bargaining parties in compliance with the mandatory legal and regulatory rules and the rules of the Cód.Civ. on contracts in terms of the requirements of capacity, consent, object and cause. In this sense, it is recommended to read Articles 1257 and following Cód.Civ., as well as Article 37.1 CE.

4.2. Conceptual notions

Agreement signed between employees and employers or between the representatives of both, which regulates aspects of the employment relationship but does not meet all the requirements to be classified as a Collective Bargaining Agreement of the Employees' Statute, for example, those of sufficient legitimacy of the signatories.

The reason why the parties can reach this type of agreement is in relation to the following scenarios:

- By necessity (or by original impossibility), in the absence of representatives entitled to negotiate a statutory collective agreement in accordance with Articles 87 to 89 ET: absence of works councils, staff representatives or trade union sections in company collective bargaining or absence of trade unions and/or employers' associations entitled to negotiate in supra-company collective bargaining or impossibility of reaching a majority agreement of each of the two representatives in a validly constituted negotiating committee.
- Voluntarily (or due to supervening impossibility), in the case of the existence of representatives entitled to negotiate a statutory collective bargaining agreement, when the parties opt to negotiate extra-statutory, provided that, where applicable, the duties to negotiate and to negotiate in good faith under Article 89.1 ET have been respected.

Non-statutory agreements - unlike statutory agreements - have limited contractual legal effectiveness. This means that non-statutory collective agreements have a limited personal effectiveness limited to the employers and employees represented by the negotiating parties, and this limited personal effectiveness implies several considerations:

- The collective agreement does not automatically apply to the employers and employees within its

scope of application but must be applied by means of the express or tacit incorporation of its clauses in individual employment contracts.

- The collective agreement will not be a mandatory rule for individual contracts, which may establish conditions that are contrary to or less favourable than those set out in the collective agreement, giving rise only to contractual liability between the negotiating parties.
- In the case of concurrence with other collective agreements, Article 3.3 ET - referring to "concurrent rules" - should not apply.
- There is no administrative control of the extra-statutory agreement in the case of a possible breach by the employer.

4.3. Scope of application

Extra-statutory collective agreements may have the personal, territorial and functional scope freely decided by the parties.

4.4. Scope and legitimacy

There is no rule whatsoever on the legitimization that the negotiating parties must have, the only requirement being that they be effective representatives of the employees and employers according to the rules of civil representation, with the rules of Articles 87 to 89 ET not being applicable. In fact, this type of agreement is only binding on those who negotiate it, either directly or through their representatives, and has no general legal effect.

4.5. Content of the negotiation

In principle, there is freedom for the negotiating parties to negotiate as many terms and conditions of employment as they see fit, subject only to the limits of mandatory legal and regulatory requirements.

Case law has come to limit this freedom of the parties, declaring null and void those clauses of the agreement that by their very nature must be applicable to all employees in the company, even to employees not represented by the negotiating parties. Thus, for example, clauses regulating the professional classification system, the shift regime, working hours or performance monitoring.

4.6. Negotiation procedure

There are no legal rules on the negotiation procedure for this type of collective bargaining agreement, and the negotiating parties are completely free to negotiate. Of course, the duty to negotiate in Article 89.1 ET is not applicable to these agreements, nor are the formalities of deposit, registration and official publication in Articles 90.2 and 3 ET.

4.7. Duration of the agreement and ultra-activity

The duration of the extra-statutory collective bargaining agreement will be that freely decided by the negotiating parties. In this case, the extra-statutory collective bargaining agreement will not have ultra-activity once its validity has ended and it has been denounced, and Article 86.3 ET will not apply.

5. Framework agreements

Given their purpose (to regulate collective bargaining), framework agreements will, in principle, have a sectoral or sub-sectoral functional scope and a national or Autonomous Community territorial scope, and may not be negotiated in smaller functional or territorial scopes (Article 83.2 ET). Experience shows, however, the negotiation of company and group of company's framework agreements.

The parties entitled to negotiate framework agreements are the most representative trade union organizations and employers' associations at the national or Autonomous Community level (Article 83.2 ET).

The legal regime of framework agreements (legal and personal effectiveness, temporal scope, the negotiation procedure, duration, interpretation or judicial challenge) is the same as that of ordinary collective agreements (Article 83.3 ET).

Framework agreements do not regulate the working conditions applicable to individual employees and employers, but the conditions for collective bargaining. They are thus "agreements to agree" that regulate the bargaining structure in a sector of activity (Article 83.2 ET). In this case, they focus particularly on:

- By articulating bargaining (dividing up the matters that can be negotiated at each level).
- Or by allowing the concurrence of collective agreements of different scope, in which case the criteria for resolving conflicts of concurrence must be

specified (favourability criterion, specialty criterion, temporality criterion, etc.).

6. Company agreements

6.1. Normative scope

To deal with company agreements, we must refer to Article 83 ET.

6.2. Conceptual notions

Company agreements are signed between the most representative trade union organizations and employers' associations at the national or Autonomous Community level, which are treated in the same way as collective bargaining agreements. Trade unions and employers' associations that have the necessary legal standing may also agree on clauses in sectoral collective bargaining agreements, at the State or autonomous community level, with the same purpose as interprofessional agreements.

6.3. Modalities

They can be of two types, depending on their purpose:

- Interprofessional or structural agreements, to establish the structure of collective bargaining, setting the rules for resolving conflicts of competition between agreements of different scope.
- Agreements on specific matters, regulating working conditions or other labour matters such as conflict resolution.

6.4. Interprofessional agreements

Arts. 83.2 and 3 ET provide the possibility of negotiating interprofessional agreements on specific matters. Interprofessional agreements must have a national or Autonomous Community territorial scope and a cross-sectoral functional scope (Article 83.3 ET).

The negotiating parties must be the most representative trade union and employers' organizations, at the State or Autonomous Community level (Articles 83.2 and 3 ET).

The content of these interprofessional agreements must be a "specific matter", i.e. working hours, wages, out-of-court procedures for settling labour disputes, collective bargaining, vocational training, among others (Article 83.3 ET). In fact, the negotiation procedure will be the same as for statutory collective agreements (Article 83.3 ET).

In general, interprofessional agreements will have a general and personal legal effectiveness, as they have the same treatment that the Employees' Statute gives to statutory collective agreements.

Statutory collective bargaining agreements

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Contents

1. Introduction

In employment relations, there are also "agreed" norms, resulting from collective bargaining between employees' and employers' representatives. The validity of these rules is supported by Article 37.1 CE, which recognises the right to collective bargaining and entrusts the law with guaranteeing its exercise, as well as the "binding force" of collective agreements. Various legal precepts also enshrine the regulatory effectiveness of agreements - Article 3.1(b) ET-.

In accordance with Articles 37.1 CE, 3.2(b), 82 and 87 ET, the collective agreement "is a source of law, has normative efficacy and creates rights and obligations between the parties that enter into it, in such a way that it constitutes the most direct and specific rule that regulates the relations existing between them" (STS of 4 of June of 2002).

The agreed norms are based on the principle of "collective autonomy", which presupposes the ability to organise and create rules for the juridical relationships included in the own norm. In the field of Labour Law, employees and employers enjoy this legal capacity. However, the agreed norms which are often referred to as collective bargaining agreements, differ from the legal norms in a number of respects:

1) The agreed rule is the result of a negotiation process between two parties (employees and employers), which requires a minimum willingness to reach an agreement. It presupposes the possibility that there will be no agreement and that, consequently, the planned regulation will not be frustrated.

2) The agreed rule does not come from State bodies with regulatory capacity, but from private subjects (employees' and employers' representatives), which requires a prior definition of the legitimised subjects, sometimes after verifying their capacity to represent employees or companies (representativeness).

3) Although it may have a general scope (intersectoral or interprofessional), the usual field of play of the agreed rule is the company or sector (provincial, regional or national), which requires prior delimitation or

predetermination of the appropriate spaces or "units" in which to develop the negotiation.

4) The agreed norm has usually a temporary duration (one, two or three years), which requires periodic revision for adaptation (especially in economic matters) to changing circumstances in the world of production and work.

5) There is no reservation of matters for the collective bargaining agreement but there are aspects of employment relations that are typical or proper to the agreement (wages, working time, etc.), in which a self-restriction of the law is required, to safeguard a "living space" in favour of the collective agreement.

6) The agreed norm is subject to the law by the principle of hierarchy but its relationship to legal norms is also governed by the criterion of "competence", which results in a certain distribution of roles or functions between law and collective agreement.

7) The agreed rule is subject to respect for the Constitution and the laws *ex* Article 85.1 ET, (STC nº 62/2001, 10 March). Nor can it introduce clauses that affect those who are not party to the negotiation or set working conditions that must be assumed by companies not included in its scope of application.

The agreed norm, as the result of collective bargaining between employees' and employers' representatives, may therefore be developed for very different purposes and may give rise to many types of collective results differentiated by their function (regulation or management), by their content (general or monographic), by their duration (stable or temporary), by their nature and manner of binding, or by their effectiveness from a personal point of view. Of all these results, the most important and most frequent agreement in the Spanish system is the "statutory" collective agreement, so called because it is the result of a negotiation process that follows the express mandates of the specific law on the matter, Title III ET

2. Capacity and legitimisation

The legal legitimisation to negotiate collective agreements is regulated in Article 87 ET and differs depending on the type of collective agreement:

a) Company or lower-level agreements. On the employees' side may negotiate the work councils or, where appropriate, the personnel delegates, or the trade union sections that make up the majority of the work councils. And on the part of the company may negotiate, the employer itself or the person to whom she/he delegates this power.

b) Sectoral agreements: On the employees' side, the most representative trade unions or those with at least 10% of the members of the work councils. On the employers' side, employers' associations which represent 10% of the employers, provided that they employ the same percentage of the affected employees.

3. Negotiation procedure

The bargaining procedure is regulated in Article 89 ET. The initiative may come from either of the authorised parties and is materialised with a communication sent to the other party stating the authorisation held, the scope of the agreement and the matters to be negotiated. The negotiating committee must be set up within one month to establish the negotiating calendar, and the maximum period for negotiating the new agreement is eight months when the previous agreement has been in force for less than two years, or fourteen months in all other cases. The agreements of the committee require the favourable vote of the majority of each of the representations.

Article 90.1 ET provides that the collective agreements referred to must be in writing, under penalty of nullity. This means that a simple verbal agreement is not sufficient, but that the full text of the agreement must be in writing.

The written form requirement is intended to expressly record what has been agreed, to make it easier for the addressees to know about the agreements and to ensure that the provisions are disseminated and publicised.

The bargaining procedure sets out a series of obligations or formalities, articulated in different stages or phases, to which the parties must adhere in the negotiation of the collective bargaining agreement.

These conducts do not only concern the behaviour of the negotiating parties but also acts in which the public administration is involved, in almost all cases, as a mere recipient.

Before negotiations begin, the parties with bargaining capacity and authority must select the bargaining unit or determine the scope of application of the collective

agreement (Article 83.1 ET). To do so, they have different options, either to maintain the pre-existing bargaining unit, select a new one in which there are no precedents, or negotiate in an area other than the one in which they have been negotiating as a bargaining unit.

After determining the scope of application of the future agreement, the actual negotiation procedure begins with the request for negotiations by one of the parties.

3.1. Letter of communication

The representation wishing to promote the agreement must comply with the formal procedure of submitting its initiative using a written communication, in which it must express in detail the minimum content regulated in Article 89.1 ET and, specifically, the legal standing it holds, the scope of the agreement, as well as the matters to be negotiated or the table of demands it proposes as the content of the agreement, although these may be modified and others may be incorporated.

3.2. Sending a copy

A copy of this communication is sent, for registration purposes, to the competent labour authority, according to the territorial scope of the agreement:

- To the Directorate General for Labour when the agreement to be negotiated covers more than one province.
- To the functional area of labour and immigration of the corresponding government delegation, if the future agreement has a provincial scope or lower.
- If competences have been transferred to the Autonomous Communities, to the corresponding competent autonomous body.

The inobservance of the requirement to forward a copy of the formal communication of the negotiation of the agreement with the labour authority is a mere administrative formality, and, therefore, non-compliance does not necessarily result in the annulment of the agreement (STS 15 May 2000).

3.3. Obligation to reply

The party to whom the request is addressed is obliged to reply to the letter requesting the commencement of negotiations within a maximum period of one month from its receipt, in writing and stating its reasons.

The party receiving the request can only refuse to start negotiations in the following three cases.

- Firstly, the existence of a legal cause (e.g. lack of standing to negotiate on the part of the promoting or receiving party (STS 23 November 1993); cases of artificial bargaining units (STS 10 December 2002); the existence of formal defects in the communication (STS 14 February 1996).
- Secondly, the existence of a conventional cause (e.g. that such negotiation involves contradicting the rules that resolve conflicts of concurrence between agreements in different areas (STS 29 January 1997), that the company refuses to negotiate a wage supplement that was excluded, from the beginning, from the collective agreement (SAN 165/2011, of 1 December).
- Thirdly, when it is not a question of revising an agreement that has already expired.

The fact that an extra-statutory agreement has been reached during the negotiation of a statutory agreement does not prevent the duty to negotiate; in other words, there is a duty to negotiate during the term of an extra-statutory agreement (STC 108/1989, of 8 June).

3.4. Constitution of the negotiating table

The next step following the affirmative response to the proposal for negotiations by the party receiving the request is the constitution of the Negotiating Committee, which must conform to the rules of initial and full legitimisation on both sides.

The memorandum of incorporation, which must be documented in writing, must include, in addition to other matters, the mutual recognition of legitimisation to agree (STS 14 July 2000).

In company-level agreements, the negotiating committee must be made up of the employer or his/her representatives on the one hand and the employees' representatives on the other.

In agreements that go beyond the scope of the company, the negotiating committee must be made up of the trade unions entitled to do so that represent at least an absolute majority of the members of the work councils and personnel delegates, where applicable, and by the employers' associations that represent the percentage of employers required by the Employees' Statute that

employ the percentage of employees affected by the agreement (Article 88.2 ET).

The time limit for setting up the negotiating body is the same as that established for replying to the request, i.e. one month from receipt of the communication, although shorter periods are permitted (STS 14 February 1996).

However, the constitution of the negotiating table cannot be considered null and void or ineffective after this deadline (STS 27 September 1997) or in the event that the trade union that is fully aware of the commencement of the negotiation freely decides not to take part in the negotiation (STS 24 July 2008).

The appointment of the members of the negotiating committee is the responsibility of the parties with initial legitimisation (Article 88.3 ET). Each party may not exceed 13 members in the case of company-level agreements or agreements at a lower level, or 15 in the case of agreements at a higher level than the company (Article 88.4 ET).

The negotiating parties may fix a lower numerical composition, even reduce its number compared to previous occasions, as long as the designation is not arbitrary, unjustified or detrimental to the right to freedom of association, which could happen, for example, if its sole purpose is to exclude a trade union (STS 13 November 1997).

The appointment of the persons making up the negotiating body must be carried out by applying the principle of proportionality (STS 31 October 1995), in order to respect the representativeness of each of the negotiating parties (STC 137/1991, 20 June).

The special negotiating body, once constituted, may freely appoint a chairman by mutual agreement of both parties represented. Furthermore, a secretary must be appointed (STS of 27 April 1995), without it being necessary for the election to fall to a member of the negotiating table, who is responsible for drawing up the agreements, which need not reflect a minimum or exhaustive content of each session due to their merely instrumental nature (STS of 27 April 1995). The record of the essential agreements is sufficient.

The negotiation process takes place within the negotiating committee, without submission to procedures and formalities. The ET contains only two rules, of particular significance, concerning the negotiation of the collective bargaining agreement:

- Obligation to negotiate in good faith: this is an ethical principle to encourage dialogue between the parties and mutual respect. The aim is to ensure that the initial approaches are credible.
- Requirements for the adoption of valid agreements: they require "the favourable vote of the majority of each of the two representations", according to Article 89.3 ET. About the concept of majority, the courts have imposed the following two requirements: (a) the majority must be understood as simple; therefore, absences or abstentions must not be computed, as there is no clear reference on this issue, without prejudice to the fact that the parties may agree unanimity as a rule for the adoption of agreements (STS of 7 June 1999); b) it is calculated on the total number of members that make up the committee, using the criterion of proportional voting according to the representativeness of the organisations that make up the committee at the time it is formed and not at the time the agreement is signed, regardless of the number of people who must participate in the negotiation (STS 18 January 1993).

3.5. Administrative processing

When the negotiation process ends with an agreement, it results in a collective agreement, and in this case, three administrative procedures are established: registration, deposit and official publication, developed by Royal Decree 713/2010 of 28 May.

1. Registration

The collective bargaining agreement must be submitted electronically within 15 days of its signature by the negotiating parties to the territorially competent labour authority, solely for the purposes of registration, in accordance with Article 90.2 ET.

2. Deposit

If the labour authority considers that the collective agreement complies with the law, and therefore does not violate it or seriously harm the interests of third parties, it must order the registration of the agreement in the corresponding register and the deposit of the already registered agreement.

3. Publication

Within a maximum period of 20 days from the submission of the agreement to the registry, the labour authority must arrange for compulsory publication free of charge

in the corresponding official gazette according to the territorial scope of the agreement (Article 90.3 ET).

This obligation is consistent with the intrinsic legal rule nature of the agreement; it is therefore a constitutive or essential requirement.

Only when the agreement is published can the agreements enter into force, although their effects will be produced from the date agreed by the parties (Article 90.4 ET), which may be after the date of publication or before it.

The collective agreement, once approved by the negotiating committee, submitted to the labour authority, deposited and officially published, has in its favour a presumption of legality, legitimacy and validity that can only be destroyed by the appropriate legal proceedings aimed at declaring its nullity or effectiveness.

4. Content of the collective agreement

Article 85 ET refers to the content of collective agreements, which can be systematised as follows:

4.1. The substantive content of collective agreements refers to the different matters regulated in collective agreements, which can be classified into five main groups.

1. Working conditions (including prevention and equality plans).
2. Conditions of employment (remuneration, seasonality, partial retirement).
3. Collective labour relations.
4. Work organisation and the exercise of entrepreneurial power in personnel management (working hours, shifts, work-life balance).
5. Supplementary social protection (pension plans and funds, benefit supplements).

4.2. The minimum content, the observance of which is mandatory for the negotiating parties, is made up of the following subjects under Article 85.3 ET:

1. Determination of the negotiating parties.
2. Personal scope -this refers to the employers and employees bound by the clauses of the agreement-; functional scope -this refers to the framework where the agreement applies, i.e. the type of companies to which the agreement applies-; territorial scope -this refers to the geographical area of the agreement: company, provincial, regional or national level-; and temporal scope - this refers to the duration of the agreement: the date of entry into force and the duration-.
3. Conditions and procedures for the non-application of the wage regime established therein, in accordance with the provisions of Article 82.3 ET. These are the so-called wage opt-out clauses.
4. Form and conditions of termination of the agreement, as well as notice period for such termination.
5. Maximum time limit for the start of negotiation of a new agreement, once the previous one has been terminated.
6. Maximum time limit for negotiating a new agreement.
7. Submission to the procedures established to resolve existing discrepancies after the maximum negotiation period has elapsed without an agreement being reached.
8. Appointment of a joint committee representing the negotiating parties to deal with any issues attributed to it, and determination of the procedures for resolving discrepancies within this committee.

4.3. Clauses of the agreements

Traditionally, a distinction has been made between:

1. Regulatory clauses: These regulate the working conditions of employers and employees included in their scope of application. They are a source of law, according to Article 3.1.b) ET, and compliance with them is mandatory as they generate rights that can be exercised directly. So the failure to comply with them constitutes a labour infringement punishable by the corresponding administrative sanction. Examples of regulatory clauses, according to case law, are the specific agreements regulating working conditions (STS 26 April 2007); the wage review clause (STS 16 June 2008); the rules regulating an inter-centre committee (STS 1 December 2004).

2. Obligatory clauses: aimed at the parties negotiating the agreement, they are intended to avoid conflict situations or facilitate compliance (peace clauses), to

simplify the application of the agreements (creation of *ad hoc* bodies or commissions, provision for meetings or specification of agreements expressed in general terms) or to prepare for the negotiation of future agreements (future negotiation clauses). These clauses are addressed specifically to the negotiating parties and are binding on them without prejudice to the fact that their indirect addressees may be the employees and employers included within the scope of application.

Within the obligatory content, the most important clauses are the so-called trade union peace clauses, whereby the negotiating parties prohibit strike action during the term of the collective agreement. If they relate to any matter that has or has not been the subject of a collective agreement, they are called absolute peace clauses, and if they only refer to matters provided for in the agreement, they are called relative peace clauses.

The peace clause does not limit the fundamental right to strike, since it is not a definitive and irrevocable waiver, but a temporary and transitory one. It does not affect the right itself but its exercise, so that there is no extinction of the right, but rather a commitment not to exercise it, with consequences in the event of non-compliance.

Its effectiveness is limited to the signatory parties to the agreement, for the foreseen period of time and on the matters agreed (STS 1 March 2001). For this reason, nothing prevents employees included in the scope of application of the agreement or other collective subjects from exercising their right to strike while it is in force and while the strike affects different matters of included in the peace clause.

5. Succession of collective agreements

5.1. Term, duration, termination and ultra-activity of the agreement

The determination of the temporary scope of application of the agreement -i.e. its **duration**- is the responsibility of the negotiating parties, as established in Article 86 ET, and they may establish the duration of the agreement that best suits their interests. The legal system has not expressly established maximum or minimum limits concerning the duration of the agreement; the only requirement foreseen in Articles 85.3(b and d) ET, is that the minimum content of the agreement must include its temporal scope and the form and conditions for termination of the agreement, as well as the period of notice.

Theoretically, and given the absence of explicit limits on the duration of the agreement, the parties could set an indefinite duration for the agreement. However, this is not the most popular option because, apart from the problems it could cause for the dynamic nature and necessity of adaptability of the agreement, it should be borne in mind that the limitation on the right to strike (implicit or absolute duty of peace if agreed) and on the right to collective bargaining (prohibition of competition and limitation of the duty to negotiate) should mean that the entitled parties, despite the indefinite duration, could denounce the agreement. Hence, in the absolute majority of cases, the parties establish a fixed duration by providing for a specific period of time to run from the moment the parties decide, or by setting a date, or by using mixed formulas. Thus, for example, references can be found along the following lines: "The duration shall be four years: from 1 January 2023 to 31 December 2025, except in the case of clauses for which a different term and duration are laid down".

Article 86.1 ET allows the parties to establish different periods of validity for each subject or homogeneous group of subjects within the same agreement, which is particularly frequent in wage matters in order to allow for early renegotiation.

Express denunciation of the agreement under the terms established is a "sine qua non" condition for the agreement to expire. In the absence of express denunciation by either of the parties, the agreement is automatically extended from year to year (Article 86.2 ET).

The termination of the agreement is a unilateral declaration of intent, whereby one of the parties notifies the other of its intention to give effect to the date of expiry of the term of the agreement and to exclude the entry into force of the annual extension provided for in Article 86.2 ET. With regard to the form that this termination must take, the law limits itself to establishing the need for it to be expressed, and it is up to the parties themselves to specify other formal requirements and conditions, as well as the period of notice, elements that Article 85.3(d) ET establishes how the minimum content of the agreement.

The requirement of an express form has led the courts to deny the consideration of acts such as the development of negotiations aimed at the approval of the successor agreement as denunciation (STC 332/1994, 19 December).

With regard to the party entitled to denounce the agreement, the Supreme Court has established that the concept of parties used by Article 86.2 ET should not be identified with the parties signing the agreement, but rather with the parties entitled to negotiate. STS 1035/2016 of 2 December 2016 provides that the parties that meet the requirements determined by the initial legitimisation may validly denounce the agreement, and it is not necessary, therefore, to have full entitlement.

Unless otherwise agreed, and in accordance with Article 86.3 ET, the agreement remains in force after termination or **ultra-activity** occurs during the negotiations for the renewal of an agreement, which operates with respect to the entire agreement except for the clauses in the agreement under which the strike has been waived. Thus, these will lapse as of its denunciation.

The reality on which the agreement is applied is not temporary and does not end with the duration of the agreement. This explains why it is not uncommon for legal systems to provide for some kind of transitional rule of law to avoid situations of regulatory vacuum in the interval that may exist between the conclusion of an agreement and the signing of a subsequent one. This is what happens with Article 86.3 ET and the figure of ultra-activity that it regulates.

The ultra-activity of the agreement constitutes a figure, only applicable to the statutory agreement, which represents the maintenance, by legal provision, of part of the content of the agreement, even if one of the legitimised parties has denounced the agreement and its period of validity has ended.

Some aspects to be taken into account in relation to ultraactivity:

- It applies only to the statutory agreement (STS of 17 April 2000) and while it is being negotiated for renewal.
- Its dispositive nature. The parties negotiating the agreement have absolute freedom to exclude ultra-activity or to modulate its scope, and to indicate, for example, the clauses to which it is to apply or a final term of duration.
- Ultra-activity applies to the entire content of the agreement except for the clauses whereby the parties have waived the right to strike (peace agreements). The negotiating parties may, however, limit the content affected by ultra-activity.
- Ultra-activity is not fully comparable to the situation in which the agreement is in force, since during this situation the duty to negotiate provided for in Article 89.1 ET is applicable; the legal duty of relative peace -provided for in Article 11(c) RDLRT does not apply, and the rule prohibiting the concurrence of agreements does not apply, although with nuances when negotiations persist (STS 958/2021 of 5 October). It is foreseen that during the ultra-activity phase, the negotiating parties may reach partial agreements that modify the content of the agreement in a situation of ultra-activity, in order to modify some or some of its contents with the aim of adapting them to the conditions in which, after the termination of the agreed term, the activity in the sector or in the company will be carried out. These agreements shall be in force for such period as the parties may determine.
- With regard to the temporal scope of ultra-activity, the 2021 reform has introduced a very relevant change that implies a return to the traditional regime of the regulation of this figure, i.e., it returns to the configuration of an ultra-activity that is not limited in time, unless otherwise provided in the agreement or agreed by the parties during it. In relation to this regulatory change, it should be noted:

  A) That the new regulation of ultra-activity (not limited in time) applies to all statutory agreements unless otherwise agreed by the parties, who could thus limit it temporarily or materially.

  B) It also applies to agreements before the reform, even if they have been terminated by the date of entry into force of Royal Decree-Law 32/2021, 31 December 2021 (seventh transitional provision).

- The end of the ultra-activity shall occur when the negotiating parties reach a new agreement, an agreement in mediation or, if the parties have submitted to an arbitration procedure, when an award has been rendered. The parties may adopt partial agreements for the modification of one or more of their extended contents. These agreements shall have the duration determined by the parties.

5.2. The succession in time of the agreements

The essentially temporary nature of collective bargaining agreements and the permanent nature of the labour relations that the agreement regulates determine that, as a general rule, the expiry of a collective bargaining agreement is followed by the approval of a new

agreement. This succession should allow the regulatory content of the agreement to be adapted to changes in the socio-economic reality in which it is to be applied.

According to Article 86.4 ET, "the agreement that succeeds a previous one repeals it in its entirety, except for those aspects that are expressly maintained"; thus, the principle of modernity was expressly incorporated as an organising criterion for the succession in time of agreements, although it should be borne in mind that:

- The derogation mechanism established in Article 86.4 ET is of a reinforced nature. In the succession of agreements, the derogation operates automatically, and the approval of a new agreement entails, a priori, the total derogation of the previous one, regardless of the compatibility or incompatibility of its contents.
- The parties negotiating the new agreement may limit the derogating effects with respect to the previous agreement, expressly indicating the aspects that will be maintained.
- The succession of agreements only occurs between agreements negotiated in the same bargaining unit. The existence of successive agreements negotiated in different units must be treated as a case of concurrence of agreements, in which the rules specific to this phenomenon of regulatory convergence will apply. A convergence that, precisely because of the effect of the principle of modernity, does not occur in the case of successive agreements negotiated in the same bargaining unit.
- Although it is most common for the succession to take place once the term of the agreement has expired, case law has admitted the possibility that the succession may take place before the end of the final term provided for by the parties. In this case, the material and formal limitations set out in Article 41 ET do not apply (STS of 10 March 2003).
- Finally, it should be noted that the repeal of the previous agreement entails, by Article 82.5 ET, the full application of what is regulated in the new agreement, regardless of its more or less favourable nature and except for the provisions of transitional law included in the new agreement (for example, the non-retroactivity of non-favourable punitive provisions or provisions restricting individual rights, Article 9.3 CE; the ultra-activity of the normative content of the denounced agreement).

6. The management of the collective agreement

From the legal regime described in the previous section, it follows that, in the Spanish industrial relations system, there are generally particularly intense periods of bargaining, culminating, where appropriate, in the adoption of an agreement that regulates working conditions in each bargaining unit for a given period of time. Its effectiveness normally extends for several years until the next bargaining period. This arrangement provides a certain stability to labour rights in the scope of application of each agreement, to the benefit of legal certainty and social peace, and avoids the wear and tear and consumption of resources to which negotiators would be subjected if they were negotiating continuously. However, it is probably impractical for the parties to lose all contact with each other when the agreement is in full force and effect, as many problems may arise that need to be addressed.

For this reason, the Employees' Statute establishes that all statutory agreements must set up a *joint committee* representing the negotiating parties and responsible for managing the day-to-day application of the agreement and resolving any disputes that may arise, given that the negotiating committee in the strict sense is dissolved when the agreement is registered. This joint committee will have the functions that the agreement itself entrusts to it, but in any case, the law confers on it the power to resolve questions of application and interpretation of the agreement that may arise (Articles 91.1 and 3 ET). In fact, before going to court to bring a collective dispute over the interpretation of the agreement, an appeal must first be made to that body (Article 91.2 ET). Given that the joint committee represents the negotiating committee for the duration of the agreement, the agreements reached therein on its interpretation have the same value as the agreement (Article 91.4 ET), which means that they must be registered with the labour authority and published in the relevant official journal.

The negotiating parties could decide to set up other committees to deal with specific aspects of the management, administration and monitoring of the agreement, or to entrust these aspects to the joint committee itself.

7. Accession to and extension of the collective agreement

Article 92 ET provides for the application of the collective agreement to subjective areas not initially covered by

the agreement by means of the techniques of adhesion and extension.

Adherence is a mechanism whereby the parties entitled to achieve an agreement in a given bargaining unit in which there is no agreement in force decide to apply a statutory agreement that is already in force in another area (Article 92.1 ET). Thus, for example, the employees' representatives of one workplace can adhere to the collective agreement of another workplace in the same company, so that they do not have to agree on a full text themselves; however, this is only one possibility, since it is possible to adhere to any agreement in force.

For all intents and purposes, the act of accession has the value of a collective agreement in itself, although instead of drafting a full text, reference is made to the content of a pre-existing agreement. Therefore, all the rules that have been discussed with regard to the negotiation of statutory collective agreements (entitlement, negotiation in good faith, registration with the labour authority, publication, etc.) apply to the act of accession.

The ***extension of*** the collective agreement is a mechanism by which the competent labour authority expands the effects of a collective agreement in force to an area in which there is no applicable agreement, in order to avoid regulatory gaps, as there are no parties with sufficient legal standing to agree it (Article 92.2 ET). The extension involves an administrative procedure, regulated by Royal Decree 718/2005 of 20 June 2005.

The provisions of a collective bargaining agreement in force at a higher level than the company level may be extended to a number of companies and employees or to a sector or sub-sector of activity belonging to the same or a similar functional area or with comparable economic and labour characteristics. It must be taken into account that the activity where it is to be applied and that those agents are not bound by a collective bargaining agreement, regardless of its scope. These agents cannot also be limited by the impossibility of signing a collective bargaining agreement in their area due to the absence of parties legitimised to do so.

In the absence of a collective agreement that can be extended beyond the scope of application of the company agreement, a company agreement may, exceptionally, be extended to a number of companies and employees or to a sector or sub-sector of activity with similar economic and social conditions.

The request for extension shall be made in writing by the parties that have the initial legal legitimisation to negotiate collective agreements in that area (Article 92.2 ET) to the competent Labour Authority. A mandatory report shall be requested from the most representative employers and trade union organisations, and shall be then sent to the National Consultative Commission on Collective Agreements for its report, or to the similar consultative body of the Autonomous Communities when the procedure is within their competence, and whether it is considered to be decisive.

Once this report has been received from the corresponding advisory body, the labour authority shall issue the decision and notify it within a period of three months, calculated from the date on which the application was entered in the corresponding register, and the application shall be deemed to have been rejected if no express decision has been issued after this period has elapsed.

Such a decision shall terminate the administrative procedure.

They shall be competent to decide on procedures for the extension of collective agreements:

- The Ministry of Labour and Social Economy when the scope of the extension covers the entire national territory or the territory of more than one Autonomous Community.
- The bodies of the Autonomous Community when the scope is limited to its corresponding territory or to areas smaller than it.

8. Non-application of the agreement during its term

In order to allow for an adaptation of the conventional regulatory framework applicable to labour relations, the legislator has established two complementary mechanisms: on the one hand, the mechanism of non-application in the company of the working conditions provided for in the applicable agreement (Article 82.3 ET) and, on the other hand, the possibility of renegotiating or modifying the agreement *ante tempus.*

The logic behind this is to allow the company to have a regulation that is more adapted to its specific circumstances and needs, which makes it possible to partially and temporarily derogate from the sectoral or company agreement by means of a company agreement. As an exception to the normative and

general effectiveness of the agreement, the parties may, by means of a company agreement, agree on a specific regulation of preferential application to that included in the sectoral agreement of reference.

The case of the modification of the agreement by the decision of the negotiating parties before the expiry of the term of the agreement is different. This case of bilateral *ante tempus* denunciation does represent a genuine modification of the content of the agreement by the parties entitled to negotiate it. Case law had admitted these cases of *ante tempus* succession in the same bargaining unit without any limitations other than the requirement of an agreement by the parties entitled to negotiate in the bargaining unit and that this occurred in the bargaining unit itself. Royal Decree-Law 3/2012 and Law 3/2012 took this up and the 2021 reform has maintained it in the same terms in Article 86.1 ET.

Focusing on the non-application regime provided for in Article 82.3 ET, the 2012 reform completely changed the regulatory framework governing this issue and greatly enhanced the possibility for the company to derogate from the regulatory framework provided for in the applicable agreement. Thus, the causal regime has been made more flexible, the matters in respect of which non-application can occur have been extended and the procedural regime has been made more flexible. Previously, except in the case of non-application of the wage regime, agreement with the employees' legal representatives was essential; now, if there are no legal representatives, it is possible to negotiate with a committee of up to three employees and, if there is no agreement, a third party can impose the decision.

The 2021 reform has left unchanged the legal regime of the non-application procedure regulated in Article 82.3 ET. According to this provision, when there are economic, technical, organisational or production-related causes in a company, the company may, after a prior negotiation or consultation process, cease to apply the working conditions referred to in certain matters regulated in the applicable sectoral or company agreement.

With regard to the matters in which non-application is possible, it should be borne in mind that this is only possible with regard to the matters that appear on the list in Article 82.3 ET, which is configured as a *numerus clausus*, of an imperative nature. It must be said, however, that this is a list that includes the most important and transcendental working conditions:

a) Working day.

b) Working hours and distribution of working time.

c) Shift work.

d) Remuneration system and salary level.

e) System of work and performance.

f) Functions, where they exceed the limits for functional mobility that are provided for in Article 39 ET.

g) Voluntary improvements in social security protection.

With regard to the content of the agreement, the rule establishes an additional limitation to that deriving from the limited material content: the non-application agreement may not entail non-compliance with the obligations established in the agreement regarding the elimination of discrimination based on gender or those provided for, if applicable, in the equality plan applicable in the company. Finally, it should be noted that the agreement must determine exactly the new working conditions applicable to the company. The non-application will have the validity or duration agreed by the parties, but its duration may not extend beyond the moment in which a new agreement becomes applicable in the company, and it may not have retroactive effect, but will only be effective from the moment in which the agreement is reached (STS of 6 May 2015).

Conflict and Conflict Measures

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Contents

1. Introduction

In this topic we are going to approach the labor conflict and, particularly, the right to strike as an institutionalized measure of conflict. We will try to justify how this right to strike is one of the essential rights that define our system of labor relations to the extent that it is an expression of the conflict of interests that underlies it and the different negotiating position of the productive agents. One of the main purposes of this unit is to understand the intricate legal regime of the right to strike in Spain, especially derived from its pre-constitutional regulatory development, which is not always in accordance with the mandates of the Constitution and the content of the fundamental right to strike. which is collected in this.

In response to what has already been announced, the basic objectives of this unit will be: 1) Present the right to strike as an expression of the conflict of interests inherent to the system of labor relations in a capitalist system. 2) Understand the current legal regime of the right to strike and its different components: RDLRT of 1977, CE and successive harmonizing rulings of the TC. 3) Know the guarantees provided in our legal system for the exercise of the right to strike. 4) Know the content and legal regime of essential services as a limit to the exercise of the right to strike. 5) Know the basic content of the lockout.

2. Conflict in Labor Law: concept and types

We understand labor disputes as discrepancies, disputes or disagreements that arise between employers and employees, or between their respective organizations, in relation to working conditions, remuneration, labor rights and obligations, or any other issue arising from the employment relationship.

Labor conflict is a manifestation of the confrontation of interests between the parties involved in a work relationship. This conflict may have its origin in various

causes, such as discrepancies regarding compliance with the employment contract, working conditions, disciplinary measures, changes in work organization, among others. The management and resolution of these conflicts is essential to maintain harmony in the work environment and ensure compliance with labor rights.

Labor disputes can be classified into various categories depending on their nature, scope and the actors involved. Below are the main typologies:

- According to their nature: a) Legal conflicts: These are those that deal with the interpretation and application of legal, regulatory or conventional norms. This type of conflict is generally resolved through the courts or competent administrative bodies. b) Conflicts of interest: These arise when the parties have conflicting interests in relation to economic issues or working conditions that are not specifically regulated by law or contract. These conflicts are usually resolved through collective bargaining and, where appropriate, through pressure measures such as strikes or lockouts.
- According to the scope of impact: a) Individual conflicts: They involve a employee and his employer in relation to the interpretation or application of an individual employment contract or labor standards applicable to a particular situation. These conflicts are usually resolved through administrative, judicial or mediation procedures. b) Collective conflicts: They affect a group of employees or the entire workforce of a company or sector, and are generally related to the negotiation of collective agreements, general working conditions or collective labor demands.
- According to the actors involved: a) Conflicts between employees and employers: They are the most common and cover a wide variety of situations, from salary disputes to working conditions and dismissals. B) Conflicts between unions: They may arise between different unions that represent employees in the same company or sector, and that have different approaches or strategies in collective bargaining. c) Inter-union conflicts and between unions and employers: They may involve several unions and one or several employers, especially in sectors where there are multiple union organizations with representation.

3. Regulatory framework of the right to strike in Spain

One of the most conflictive aspects when addressing the right to strike is its intricate legal regime. And although the RDLRT was approved to established the bases of this legal regime, this is a pre-constitutional norm. which therefore could not take into account the basic provisions of our supreme norm. Then we have Article 28 CE, which recognizes this right as a fundamental right, so it has immediate legal effectiveness, not programmatic. It is a right that can be directly protected in a judicial procedure equipped with the notes of preference and summary. The consideration of the right to strike as a fundamental right requires that its development after the CE must be done through organic law, and although there have been attempts to undertake this new development, the reinforced parliamentary majorities required by this type of law have prevented it from being carried out. The last part of the legal regime of the right to strike is the jurisprudence of the TC, especially the STC of April 8, 1981, which refines and interprets the RDLRT to decide which of its precepts are or are not in accordance with the CE. This ruling will have great weight in the explanation of this topic, so it is recommended that you read it.

4. Entitlement of the right to strike

According to the aforementioned STC 11/1981, the right to strike "is a right attributed to employees uti singuli, although it has to be exercised collectively through concert or agreement between them [...] although the ownership of the right to strike belongs to the employees and each of them has the right to join or not join declared strikes, the powers What the exercise of the right to strike consists of, as a collective and concerted action, corresponds to both the employees and their representatives and the union organizations. Since then, a distinction has been made between: a) the individual dimension of the right to strike, that is, the right to join or not to strike; and b) the collective dimension of this right, which includes the right to call and call off a strike. Within the individual dimension of the right to strike, it is discussed whether there truly exists a negative right to strike (right not to join) and, above all, whether this deserves the classification of a fundamental right. The interpretative controversy arises from the moment in which this negative right to strike would coincide in its content with the right to work, which, as is known, is outside section I of Chapter. II of Tit. I, that is: it is not considered a fundamental right (Baylos Grau).

As for the holders of the fundamental right to strike, they are subordinate and employed employees, and self-employed employees and students will be excluded, despite the fact that on many occasions, in the press or in popular language, it is stated It speaks of a student strike or a strike of autonomous groups (such as the transporters' or farmers' strike).

Regarding the extension of the right to strike to civil servants (who, as is known, are not considered employed employees ex Article 1.1 ET) it is worth making some separate clarifications: Although they are not included in the scope of application of the RDLRT, Their right to strike has been regulated in subsequent regulations, mainly in LEBEP, whose Article 15(c) conditions the exercise of this right "to the guarantee of the essential services of the community." For its part, regarding members of the armed forces, Organic Law *9/2011, of July 27, on the rights and duties of members of the Armed Forces,* prohibits strikes by members of the armed forces (which has been endorsed by the Committee on Freedom of Association of the ILO, which authorizes limiting them to those who exercise authority functions within the State).

5. Motivations for the strike

By strike motivations we understand those causes that legitimize recourse to it. There are a series of causes that do not allow resorting to this measure of labor conflict. These are listed in Article 11 of the RDLRT that prohibits political, solidarity and novice strikes. We will now explain each of these motivations prohibited by the law.

5.1. The political strike

Political strikes are protest actions or demonstrations in which the participants, instead of being employees who are striking over labor issues, are citizens or groups who are expressing their disagreement or dissatisfaction with political decisions, government actions or political events. It is a strike prohibited by the RDLRT, although jurisprudence observes this prohibition in a very restrictive manner. Scientific doctrine is also divided when it comes to assessing the legality of a politically motivated strike. Those in favor invoke: 1) The literality of Article 28.2 CE, which uses a fairly broad term to refer to the purposes of the strike "for the defense of their interests." 2) The systematic location of Article 28.2 between public freedoms and the existence of Article 37.1 on collective conflict measures. 3) The teleological interpretation of Article 28 in relation to Article 1 and 9.2 CE. 4) Article 10.2 CE and pronouncements of the ILO Trade Union Freedom Committee that admits political strikes with labor significance (while endorsing the prohibition of political strikes without that significance). In this regard, it is worth highlighting the ambiguity of STC 11/1981. He declared that the political strike was legal from a criminal point of view, but illegal from a contractual point of view: That is to say, anyone who participated in a strike of this type could not be punished criminally, although in the eyes of the employer the absence of the employee was not protected by the fundamental right to strike.

5.2. The solidarity strike

By this name we refer to a strike that is not directly related to labor issues of employees of a particular company or industry. Instead, a sympathy strike is a demonstration of support for other employees or groups who are involved in a labor strike or protest related to labor issues. In other words, when a group of employees in a specific company or industry is on strike over working conditions, wages, layoffs, or other labor disputes, other groups, unions, or individuals can call a sympathy strike in support of the employees' cause. original strikers. It is also a strike prohibited by the RDLRT. The reason for this prohibition is that the employer affected by the strike does not always have the possibility of influencing the situation of a employees' demand outside his company.

STC 11/1981 expressly ruled on this motivation prohibited by the RDLRT, where it stated: "the requirement that the incidence of professional interest be direct, restricts the essential content of the right and imposes that this adverbial expression be considered as unconstitutional. [...] Resolving: "The expression directly from section b of article 11 is unconstitutional" specifying that "the professional adjective that the text uses must be understood as referring to the interests that affect the employees as such, not naturally as members of a specific category. An example of a legal solidarity strike could be the one called for the reinstatement of employees unfairly dismissed, arguing that the strike defended "not only the particular interest of those dismissed, but the general interest of the entire workforce".

5.3. The novatory strike

The Article 11(c) RDLRT establishes that an illegal strike will be "one whose purpose is to alter, within its period of validity, what is agreed upon in a collective agreement". STC 11/1981, for its part, endorses the prohibition with

nuances, and declares the: 1) Admissibility of interpretive strikes. 2) Also those that claim a point that does not imply the modification of the agreement. 3) It appeals to the civil doctrine that would enable a strike in the event of employer non-compliance and the application of the *rebuc sic stantibus clause*. This prohibition is undoubtedly connected with the duty of peace that is typical of collective bargaining, where the cession in the negotiation by the negotiating parties should generate certain expectations of certainty or security regarding the maintenance and compliance with the agreed terms. It must be remembered, however, that the duty of peace provided for in the ET limits its effectiveness to the validity of the ex agreement. Article 86.3 ET, not to its ultraactivity.

This duty of peace does not extend, moreover, to new complementary agreements that may be approved during the validity of a previous one (e.g. company or extra-statutory). As long as this new agreement does not violate the prohibition of competition, conflict measures may be agreed upon aimed at the conclusion of that agreement.

5.4. The strike motivated by legal conflicts

The strike is an expression of the conflict of interests between employees and employers. These conflicts seek to resolve discrepancies that affect the collective interest of a generality of employees, and attempts can be made to resolve them through extrajudicial procedures such as conciliation, mediation and arbitration, or before the labor authority in specific cases. Ultimately, a strike is resorted to to seek a satisfactory solution to the conflict on the part of the employees.

For the resolution of legal conflicts, those that can be resolved by applying a legal norm, there are other institutionalized resolution channels (mainly the Jurisdiction). At the international level, the ILO Freedom of Association Committee understands that strikes are only admissible in the event of conflicts of interest (non-legal). STC 11/1981 qualifies this exclusion a little to resolve that a strike due to a legal conflict will be legal if it has an interpretative or application purpose of an existing norm. In any case, the regulations are responsible for declaring the incompatibility of a strike of this type with the jurisdictional procedure of collective conflict (Article 17 RDLRT), in such a way that, by opening a conflict channel, through a strike or the Jurisdiction, the other cannot be acted upon.

6. Strike procedure

Article 11(d) RDLRT establishes that the strike will be illegal: "when it occurs in contravention of the provisions of this Royal Decree-Law, or what is expressly agreed in the Collective Agreement for the resolution of conflicts." That is, the strike must conform to the guidelines set by the law or risk being declared illegal. What are these procedural guidelines that are applicable to a strike: Regarding the declaration of a strike and prior notice, Article 3 of the RDLRT indicates:

*One. The declaration of a strike, whatever its scope, requires, in any case, the adoption of an express agreement, in this sense**, in each workplace** .*

Two. The following are authorized to agree to declare a strike:

*a) The employees, through their representatives. The agreement will be adopted, in a joint meeting of said representatives, by majority decision of them. Minutes will be taken of the meeting, **which must be attended by at least seventy-five percent of the representatives,** and must be signed by those attending.*

*b) Directly the employees of the workplace themselves, affected by the conflict, when **twenty-five percent of the workforce decides** to put the agreement to a vote. The vote must be secret and will be decided by simple majority. The result of this will be recorded in the minutes.*

The sections in bold were declared unconstitutional for hindering the right to strike.

Additionally, it must be documented in the minutes of the conveners (employee representation or assembly). The affected employers and the labor authority must also be notified. Containing within a period of 5 days (or 10 if it affects essential services for communication, Article 3.3 RDLRT). The TC has admitted lack of notice when it does not cause prejudice. It must be notified to the affected companies or their representatives and, finally, it must contain: the objectives of the strike, the steps taken to resolve the conflict, the start date and the composition of the strike committee.

6.1. The strike committee (Article 5 RDLRT)

Only employees from the workplace affected by the conflict may be elected members of the strike committee (this will be extended in the case of sectoral strikes). The composition of the strike committee may not exceed twelve people. It is the responsibility of the strike

committee to participate in any union, administrative or judicial actions carried out to resolve the conflict. Ensure safety of people and things. Nothing is said in the RDLRT about the specific subjects who should make up the strike committee, but it seems logical that they are the subjects who declared it. The strike committee is a representative negotiating body of the striking employees, in charge of negotiating with the employer to reach an agreement during the development of the strike. In addition, the strike committee has the responsibility of ensuring the provision of security and maintenance services during the strike, participating in union and administrative actions to resolve the dispute, and may unilaterally call off the strike or reach an agreement to end the strike. same. You also have the right to access the workplace during the strike to inform non-strikers and verify compliance with regulations, without hindering the activity of non-striking employees.

7. The strike with occupation of the working center or other business facilities

Article 7.1º RDLRT states that the exercise of the right to strike will be done without occupation of the work center or any of its dependencies. This prohibition admitted with nuances by STC 11/1981, which interprets that:

a) It cannot be understood as a rule preventing employees' right to assembly.

b) The existence of "occupation" must be assessed restrictively, interpreting that it exists when there is "an illegal entry into the premises or an illegal refusal to evict in the face of a legitimate abandonment order, but not, on the other hand, the simple permanence in the jobs»

c) The occupation is illicit when it violates the right to freedom of the employees, there is a danger of violation of other rights or the production of disorders.

8. The abusive strike

Article 7.2 RDLRT establishes that "rotating strikes, those carried out by employees who provide services in strategic sectors with the purpose of interrupting the production process, strikes of zeal or regulations and, in general, any form of collective alteration in the work regime other than a strike, will be considered illegal or abusive acts." It involves carrying out work stoppages sequentially and in a rotating pattern, rather than a conventional strike in which employees cease their activities continuously and jointly. The concept of a "rotating strike" implies that different groups of employees or unions participate in the strike at different times and on different shifts. This is done with the intention of keeping production or service provision running during the strike period, albeit at a reduced pace. According to STC 11/1981, there is a iuris tantum presumption of abuse in such cases. For these purposes, the criteria for deciding whether or not these strike modalities are abusive will be those of "proportionality in the damage": "Proportionality and mutual sacrifices are required, which means that when such demands are not observed, strikes can be considered abusive".

Strategic strikes involve the strike of some employees, due to the position they occupy, which can interrupt the entire production (for example, a pilot strike to improve the working conditions of the entire staff of an airline). For its part, in rotating strikes: partial stoppages of different employees occur that completely prevent the production process. According to judicial doctrine, the rotating strike is considered abusive, which occurs "when small groups of employees alternate the situation of inactivity in such a way that they manage to paralyze the company" (STSJ Catalonia of 12-17-97); and STS 30-06-90 also qualifies as illegal the strategic or stoppage strike, which takes place when the strike of a few employees, who suffer the consequences of the strike due to the suspension of their work contracts, causes the paralysis of the entire company; However, outside of such cases, the remaining forms of strike are presumed lawful, and it is the employer who is responsible for proving that he has acted with abuse of rights by opting for a certain modality, for which the concurrence of the strike must be proven. existence of serious damage to the company (not only the damage that is inherent to any strike), that the damage is disproportionate, and that the intention of the organizers is precisely to cause that damage (STC 41/84 referring to the one cited above).

The common characteristic of all these forms of abusive strike, and hence their illegitimacy, is the produced imbalance in the mutual sacrifices that a strike requires. The employees, through this type of strike, see increased their pressure capacity, reducing the economic loss that participation in the strike entails.

9. The scab

By scabs we understand the business action of hiring employees to cover the functions of employees declared on strike. It is a prohibited practice to the extent that it implies the annulment of the right to strike, by taking

away bargaining power from striking employees. It is debated whether technological shaving is possible, that which is carried out through the businessman's relatives or that which is carried out with the company's own human resources.

According to Article 6.5 RDLRT: "While the strike lasts, the employer may not replace the strikers with employees who were not linked to the company at the time it was communicated, except in the case of non-compliance with the obligations contained in section seven of this article (security services)". The law on temporary employment companies prohibits user companies from entering into provision contracts to replace striking employees (Article 8(a) RDLRT).

The scant regulation casts many doubts about whether its prohibition extends to possible contracts or subcontracts with other companies or to the use of family or benevolent employees who are therefore excluded from labor legislation (Article 1.3(d and e) ET).

Also with regard to the contracting with other companies of the services that the employees of a contract who went on strike were performing for an employer, jurisprudence has understood that it violates the right to strike when the companies are part of a group of societies, even if it is not pathological [cf. STS February 11, 2015, followed by others].

Likewise, the replacement of employees through technical or technological means represents a prohibited scab, which can also be an act harmful to the right to strike when it empties the aforementioned right of its content, depriving it of effectiveness [STS December 5, 2012], as well as when, through the temporary functional modality, it is the managers or directors who replace or adopt the initiative to replace the striking employees [STC 33/2011, March 28], even if, as has been said, the initiative was directly from the managers or directors themselves, such as, among many others, SSTS May 6, 2021 and October 6, 2021 (Tol 8623530)], or when employees are used who begin to perform functions other than those they usually performed [STS March 18, 2016 and STS March 13, 2020]. This is what is called technological scabbing and refers to the replacement of human means with mechanical or automatic means during a strike, being considered a practice that violates the right to strike by depriving employees of their fundamental right. Furthermore, it has been established that this form of scabbing can have negative consequences for those who strike, beyond the suspension of the employment relationship, which can result in sanctions for the companies that practice it (Article 8.10 LISOS). These conducts of the company can also be understood as criminally classified as: Articles 315.1 and 2 CP, has classified as a crime the conduct consisting of preventing or limiting the exercise of freedom of association or the right to strike, "through deception or abuse of a situation of necessity".

10. Publicity of the strike and pickets

According to Article 6.6 RDLRT ("employees on strike may advertise their strike peacefully and collect funds without any coercion"), limited by the provisions of Article 6.4 RDLRT ("the freedom to work of those employees who do not want to join the strike will be respected"). The TC has indicated that "the right to require others to join the strike and to participate within the legal framework in joint actions directed to this end", that is, "the right to disseminate and inform about it" is part of the content essential of the right to strike (SSTC 2/1982, January 29; 120/1983, December 15; 134/199, May 9; 332/1994, December 19 or, among others, 37/1998, February 17).

The general criterion applicable in this matter is, therefore, that the participation of employees in the strike must be obtained by persuasion and not by violence or coercion (STC 137/1997, July 21), although persuasion is more than simple advertising (for all, STS March 20, 1991).

Responsibility for illicit conduct (coercion) is personal and does not affect the development or legality of the strike: SSTC 254/1998, December 21, and 332/1994, December 19). In addition, a specific criminal offense has been removed from Article 315.3 CP which referred to the coercion exercised by the employees during the strike. These coercions are now redirected to the generic crime of coercion. Also punishable at work.

The employer's advertising questioning the legality of the strike is harmful to the fundamental right to strike STC 80/2005, April 4.

11. Security and maintenance services

Article 6.7 RDLRT states that "the strike committee must guarantee during the strike the provision of the services necessary for the safety of people and things, maintenance of the premises, machinery, facilities, raw materials and any other attention that may be necessary." for the subsequent resumption of the company's tasks. It is the employer's responsibility

to designate the employees who must perform said services".

STC 11/1981 admitted the constitutionality of the demand, although not the possibility of setting it by the employer, requiring mutual agreement between the employer and the strike committee. In case of disagreement, there will be a jurisdictional appeal, although with difficulties due to the shortness of the established deadlines. In the meantime, while this decision is adopted, they can be set by the employer unilaterally, STS May 28, 2003.

The RDLRT says nothing about what should be understood by "security and maintenance services." Restrictive nature, by limiting the exercise of a fundamental right. The obligation of the strike committee to guarantee the security of property and things is a responsibility of means.

12. Essential services

Article 28.2 CE states that "the law that regulates the exercise of this right will establish the necessary guarantees to ensure the maintenance of the essential services of the community."

For its part, Article 10.2 RDLRT establishes that "when a strike is declared in companies in charge of the provision of any type of public services or recognized or unavoidable need and circumstances of special gravity occur, the government authority may agree on the necessary measures to ensure the operation of the services. The Government may also adopt appropriate intervention measures for these purposes".

This is a different case from that regulated in Article 6.7 RDLRT related to security and maintenance services (the latter applies to all companies).

On the meaning of essential services, the Constitutional Court restrictively specifies the concept of "essential services" when interpreting Article 28.1 CE, not "in response to the public or private ownership of the service, but through the character of the good satisfied".

According to TC (SSTC 183/2006, 184/2006, 191/2006 or, among others, 193/2006, June 19), essential services must be defined as industrial or commercial activities from which vital or necessary benefits derive for the community life. In this sense, there must be considered essential goods and interests, fundamental rights, public liberties and constitutionally protected goods.

It is worth specifying that the public service should not be confused with the essential service (STC 26/1981): "essential services are not injured or put in danger by any strike situation... but it will be necessary to examine in each case the territorial extension that the strike reaches, the personal extension and the duration" (STC 26/1981, July 17).

Regarding the guarantees and procedure for establishing essential services: Regarding the subjects who must establish these guarantee measures, Article 10 RDLRT speaks clearly of "the governmental authority" and the "Government" (Political Decision, STC 27/1989, February 3).

The TC recognizes in this matter the competence within its scope of the Autonomous Communities, understanding that the decrees on essential services are not acts of a regulatory nature but of execution or application of the norm (SSTC 33/1981, November 5 and 122/1990, July 2). Like any administrative decision, it requires sufficient motivation to be able to generate a sufficient right of defense (for all, STC 193/2006, June 19, SSTS, Contentious-Administrative, October 1, 2010, Rec. 4117/2007).

The jurisdiction for its control will be the contentious-administrative jurisdictional order (Article 3(d) LRJS) – not concerning the specific designated employees, in which case the competent jurisdictional order will be the social one.

If the measures on minimum services are not complied with, the Government may resort to other measures consisting of replacing the strikers with other employees based on Article 6.5 RDLRT, or, very exceptionally, by military personnel, and even, where appropriate, recourse to mandatory arbitration of Article 10.1 RDLRT.

Regarding the subjects who must establish these guaranteed measures, Article 10 RDLRT mentions clearly "the governmental authority" and the "Government" (Political Decision, STC 27/1989, February 3).

The TC recognizes the competence within its scope in this matter. CC.AA., because it is understood that the decrees on essential services are not acts of a regulatory nature but of execution or application of the norm (SSTC 33/1981, November 5 and 122/1990, July 2).

Designated employees who do not provide these services will be subject to sanction or dismissal "ex Article 16.2 RDLRT" and may be replaced.

13. End of the strike

The RDLRT establishes three ways to end a strike: a) By employees' withdrawal, for any reason. The order to end the strike must be given by the employees' representation that called it or by the strike committee [STS February 25, 1981]. b) By pact or agreement between the parties in conflict. Exceptionally, through mandatory arbitration, ex Article 10.1 RDLRT. c) "The Government, at the proposal of the Ministry of Labor, taking into account the serious damage to the national economy. For two months or permanently, subjecting the parties to mandatory arbitration.

14. Effects of the strike

When referring to the effects of the strike, it is necessary to distinguish between the effects of the legal strike and those of the illegal strike:

14.1. The effects of the legal strike

a) Effects on non-striking employees

There are three possibilities:

1. That they continue working, maintaining the same previous working conditions.

2. That they continue working with changes in working conditions to mitigate the effects of absences. There are doubts about the legality of this altered provision of services during the strike as it could constitute a case of prohibited scabring. And the measures of "internal substitution" of employees are contrary to the right to strike regardless of their voluntary acceptance by the striking employees. STS May 8, 1995.

3. That they do not continue working effectively, but go to the workplace and remain at the employer's disposal or at home by express order of the employer. With the right to salary unless the lockout is agreed, which we will refer to below. This solution is also applicable to cases of inability to go to work due to strike sabotage (perhaps a contractual suspension due to force majeure ex Article 45.1(i) ET.

b) Effects on striking employees

The legal strike is cause for suspension of the employment contract of the striking employee (Articles 6.1. RDLRT and 45.1(l) ET), with suspension of salary and right to reserve the job for when the strike ends (Articles 45.2 and 48.1 ET and 6.2 RDLRT). Absences due to strikes will not affect the calculation of vacations or seniority.

Article 6.3 RDLRT indicates that the striking employee remains in a special discharge situation (Article 166.7 LGSS), with suspension of the obligation to contribute by the employer (Article 144.5 LGSS) and the employee himself, without the right to unemployment benefit. nor to the economic one due to temporary disability.

14.2. Effects of the illegal strike

As we have already mentioned, a strike is considered illegal when the formal and material requirements established in the legal or conventional regulations are not met, such as the lack of prior notice to the employer and the labor authority, or when the established minimum services are not met. Additionally, the illegality of a strike may arise from the conduct of the members of the strike committees by refusing to establish a negotiating committee, thus preventing the development of a negotiation that could have facilitated an agreement on the end of the strike. Furthermore, the total and unjustified lack of notice may determine the illegality of the surprise strike, although in some cases this requirement has been interpreted rigidly. Regarding its effects.

a) Effects on non-striking employees.

Same effects as the legal strike.

b) Effects on striking employees.

- Absences are considered unjustified.
- It may be cause for disciplinary sanction that may lead to dismissal if the employee's participation in it has been active (Articles 16 RDLRT and 54 ET)
- The carrying out of violent or coercive activities may be cause for sanction or dismissal, regardless of whether the strike is legal or illegal, and provided that individual participation in these behaviors is demonstrated (STS December 23, 1989).
- There are frequent agreements to end the strike between the strike committee and the employer in which the latter renounces sanctions or dismissal, which is perfectly legal.

15. The lockout

The lockout is the temporary closure of the workplace by the employer in the event of a strike or other collective irregularities in the labor regime. Furthermore, the lockout can be carried out without the need for administrative or judicial authorization, and may be agreed unilaterally by the employer, and must be limited to the time necessary to ensure the resumption of the company's activity, and may be terminated at the initiative of the employer, at the request of the employer. of the employees or at the request of the labor authority. It has express recognition in RDLRT (Articles 12-14) and, subsequently and indirectly, in the CE itself which in its Article 37.2 establishes that "the right of employees and employers to adopt collective conflict measures is recognized. The law that regulates the exercise of this right, without prejudice to the limitations that it may establish, will include the necessary guarantees to ensure the functioning of the essential services of the community." As STC 11/1981 has highlighted, the constitution does not expressly recognize this right, but rather implicitly admits it among the collective conflict measures.

As regulated in the current legal system, it is not in the nature of a conflict measure, but rather a response or defense against the possible excesses of a previously initiated conflict. Thus, in the words of Mellado, it would be a "defensive business closure, both for police reasons (ensuring order within your company when the conflict measures adopted by employees may endanger life, physical integrity, facilities or assets), as well as for economic reasons (compared to the disproportionate damage that would result from not being able to close and continue paying salaries to non-strikers, if the normal production process is seriously impeded)".

If we compare the lockout with the strike... -According to STC 11/1981, it is deduced that it is impossible to equate lockout and strike, since only the lockout can be admitted as a defensive measure and not the so-called reprisal or retaliation lockout to prevent or sanction a strike), nor the so-called offensive lockout (to pressure in favor of a business claim or for employees to abandon a demand), because this would unbalance the balance of powers achieved through the recognition of the right to strike.

The fact that employers do not have a means of conflict equivalent to a strike can be easily explained if we look at the management power that the employer holds within labor relations. This explains why its claims can be applied directly, without the need to exert pressure on its employees. In any case, based on this same power of direction or management, employers have other implicit mechanisms such as investment strikes or transfers.

Finally, it is worth clarifying that the right to lockout does not require regulation by organic law nor is it actionable directly through the courts in an urgent, preferential and summary procedure. Nor can it be protected by the appeal for protection.

15.1. Causes of lockout

Article 12. RDLRT lists the cases in which it is legitimate to resort to a lockout. According to this provision, employers may only proceed to close the workplace in the event of a strike or any other form of collective irregularity in the work regime, when any of the following circumstances occur:

a) Existence of obvious danger of violence to people or serious damage to things. The notorious danger must occur in the workplace as a consequence of a strike by the employees [SSTS January 14 and 17, 2000, Rec. 2478/1999 and 2597/1999], of collective irregularities or of the violent action of pickets. Therefore, closure is illegal when the danger or alteration occurs outside that area.

b) Illegal occupation of the workplace or any of its premises, or certain danger of this occurring. Illegal occupation of the workplace or any of its premises, or certain danger of this occurring. This cause is linked to the strike with occupation of premises. Therefore, we must refer to the interpretation that has already been made in this regard, remembering that not every occupation of the workplace or any office is illegal. According to what was said, this strike was only prohibited when it posed a risk to the company's assets or the production process. That is why this cause of lockout is confused with the previous one.

c) That the volume of non-attendance or irregularities at work seriously impedes the normal production process. The normal production process must be seriously impeded or paralyzed, "to such an extent that it is not possible to provide effective employment to those who exercise their right to work," "even if there is no obvious danger to people and things, nor illegal occupation of the center or certain danger of its occurrence" (STS March 31, 2000, Rec. 2705/1999). Really, then, both legal assumptions are reduced to one. It is about the conduct of the employees seriously

impeding the normal production process, regardless of the form in which the conduct materializes, causing the company economic damage disproportionate to the sacrifices endured by the employees.

15.2. Labor authority communication

Regarding the communication requirements, these are included in Article 13 RDLRT: The employer who, under the provisions of the previous article, proceeds to close the workplace, must inform the Labor Authority within twelve hours. The closure of work centers will be limited to the time necessary to ensure the resumption of the company's activity, or to remove the causes that motivated it. The absence of this procedure makes the lockout illegal. The lack of administrative prohibition does not legitimate the closure, which will always have to find a substantive cause.

15.3. End of lockout

The duration of the closure will be limited to the time necessary to ensure the resumption of the company's activity or to remove the causes that motivated it (Article 13.2 RDLRT). In any case, the employer must proceed to reopen when required by the Labor Authority within the period indicated (Article 14 RDLRT). If you do not comply with this requirement, you incur a very serious offense and may be subject to the sanctions provided by law (Article 8.9 LISOS), although they cannot be repeated for each day of closure [SSTS (CA) January 25 and 26, 1984].

The opening decision can be appealed in the social courts.

Once the center has reopened, it can be closed again if, eventually, the persistence of the motivating cause is verified. If the company lifts the closure by administrative decision and this causes damage, it will have the right to compensation: STS March 10, 1982.

15.4. Effects of lockout

Again, like the effects on the strike, it is appropriate to distinguish here between legal and illegal lockout.

a) Effects of legal closure

The legal closure produces the same effects for the employees as the legal strike, namely: suspension of the employment contract, non-payment of salaries and special registration in social security (Article 16 RDLRT).

b) Effects of legal closure

The legal closure produces the same effects for the employees as the legal strike, namely: suspension of the employment contract, non-payment of salaries and special registration in social security (Article 16 RDLRT).

Conflict Resolution Mechanisms

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Contents

1. Introduction

Conflict is an inherent situation in labour relations. The causes and frequency of conflict can vary in nature. We must take into account that the opposing interests of the parties directly contribute to the emergence of conflict in labour relations.

Bearing in mind what has said before, to reach an agreement between the parties, it is often necessary for a third party to intervene in managing the conflict. This third party can be an *ad hoc* body or a pre-established authority, which can be either administrative or judicial. The intensity of this intervention will depend on the third party involved, ranging from light or moderate intervention that facilitates dialogue between the parties to reach a solution, to the maximum degree where a solution is imposed to settle the conflict.

In this chapter, we will allude to collective labour conflicts, specifically those where the parties involved are the representatives of the employees on one side, and the employers or their representatives on the other. This right to negotiate, which legitimizes the parties to intervene in collective conflicts, it is recognized in Article 37.1 CE : *"The law shall guarantee the right to collective labour bargaining between the representatives of employees and employers, as well as the binding force of agreements."* This provision empowers the representatives of employees and employers, to reach agreements regarding *conflicts of interest*. These conflicts do not concern the interpretation or application of an existing norm, but rather the decision or determination of the norm that will govern the questioned aspect of the relationship in the future.

On the contrary, the object of *legal conflict* revolves around a labour norm, whether legal, regulatory, conventional, or customary, that regulates a specific aspect of the employment relationship—either individual or collective—over which the parties hold differing interpretations or applications.

2. Conflict Resolution Mechanisms: Concept and Typology

We can define conflict resolution mechanisms, as the processes or procedures through which parties seek to resolve disputes. These mechanisms can be classified in various ways:

- **By the decision-making capacity of the parties**: they can be *voluntary*, where the parties freely decide to submit to the procedure, or *mandatory*, where they must submit as prescribed by a norm.
- **By their composition:** there are ***auto compositive* mechanisms**, where the parties involved directly manage their discrepancies without the intervention of a third party who imposes a solution, such as direct negotiation between the parties. On the other

hand, there are ***hetero compositive mechanisms***, characterized by the intervention of a third party, being more rigorous and formal than auto compositive mechanisms, such as arbitration and judicial litigation.

- **By their origin:** they can be *legal*, established by law and whose use may be mandatory in certain circumstances, or *conventional*, which emerge from an agreement between the parties, either before or after the conflict arises.

3. Judicial Conflict Resolution Mechanisms

In our current society, where labour conflict is fully established and normalized, it is essential to have access to justice for citizens to see their legitimate rights or interests addressed. This is known as the *right to effective judicial protection*, recognized in various legal texts both internationally and nationally.

At the international level, this right is referenced in Article 6 of the European Convention on Human Rights of 1950, Article 47 of the Charter of Fundamental Rights of the European Union, and Article 8 of the Universal Declaration of Human Rights of 1948, among others. In Spain, this right is primarily enshrined in Article 24 CE as a fundamental right, especially protected, which states: *"Everyone has the right to obtain effective protection from judges and courts in the exercise of their rights and legitimate interests, without in any case suffering defencelessness."* This right to effective judicial protection and a fair process before judicial bodies is linked to the necessary social peace referred to in Article 10.1 CE.

Regarding the collective conflicts under our analysis, when seeking a reasoned and legally founded response from the judicial body, the collective conflict process will be appropriate for resolving essentially legal conflicts, which are those where discrepancies concern the interpretation or application of a labour norm, whether legal, conventional, customary, or regulatory.

Individual and plural conflicts are excluded from this procedural modality. The exclusion of the former is due to the fact that resolving the conflict requires an assessment of particular circumstances without collective significance. Plural conflicts are excluded because, despite affecting more than one employee, they do not transcend general interest, being reduced to a specific number of employees, representing in sum an accumulation of individual interests. Plural conflict, although potentially subject to joint action in defence of their interests, will only affect those individuals who are part of the initiative.

The regulation of the process is found in Article 153.1 LRJS. First, it establishes the scope of application, being of a collective dimension. The norm provides that claims affecting the general interests of a generic group of employees or a generic collective susceptible to individual determination will be processed through this modality.

Jurisprudence requires, to conclude that a collective conflict exists, that the conflict be current, have general legal significance, and affect a generic group of employees, which does not include a juxtaposition of several individually considered employees. Thus, the STS of June 2007 indicates that the collective conflict procedure requires the existence of a current, legal disagreement related to a general interest and affecting a homogeneous group of employees.

In addition to this collective dimension, the regulation requires that for a conflict to be considered collective, it must concern the application and interpretation of a state norm, collective agreement, regardless of its effectiveness, or company agreements or pacts.

The collective process also aims to challenge internal company flexibility measures, as long as they involve collective business decisions, including those regulated in Article 40.2 ET, collective geographical mobility, the business decisions in Article 41.2 ET, substantial modifications of collective working conditions, and those business decisions that imply suspensions and reductions of working hours as established in Article 47 ET, provided they affect a threshold of employees equal to or greater than that established in Article 51.1 ET. This modality will also process conflicts arising from company practices and professional interest agreements affecting economically dependent self-employed employees. Similarly, the direct challenge of collective agreements or pacts not included in Article 163 LRJS will be processed under the collective conflict modality.

Likewise, this process will handle the challenge of collective agreements and the arbitration awards substituting them, when considered to violate current legislation or seriously harm the interests of third parties, in accordance with Article 164 LRJS.

Furthermore, this special procedural modality will handle challenges to business decisions that assign a reserved nature or do not communicate certain information to

employee representatives, as well as disputes regarding compliance by employee representatives and their assisting experts with their confidentiality obligation.

The judicial challenge of business decisions regarding collective dismissals is expressly excluded from this procedural modality of collective conflict, as these will be processed under another procedural modality, in accordance with Article 124 LRJS.

As for the active legitimation to initiate a collective conflict, that is, who has the capacity to file the claim that starts the procedure, this is restricted to those subjects authorized to exercise collective actions. Therefore, the possibility of an individually considered employee being the claimant in this procedural modality is excluded, regardless of whether they may be affected by a potential judgment. This is reinforced by Article 154 LRJS, which establishes that those entitled to initiate conflict processes are those whose scope of action corresponds to or is broader than the conflict's scope, both functionally and territorially. This includes employees, unions, and, on the employer's side, employer associations, for conflicts of a scope higher than the company. If the conflict affects the company or is of a lower scope, representation lies with the employers and the legal or union representation bodies of the employees.

It is important to note regarding procedural legitimation that the most representative unions —those with representativeness according to the Organic Law on Trade Union Freedom— representative employer associations, and legal or union representation bodies can join the procedure as parties, provided their scope of action corresponds to or is broader than the conflict's scope.

Furthermore, these representations can initiate the process through the labour authority, provided they meet the requirements for filing the judicial claim. If the claim has formal defects, the court clerk (now LAJ) will grant the promoting party 10 days to rectify them.

Regarding the initiation of the judicial process, it is important to consider Article 63 LRJS, as the attempt at conciliation is a prerequisite for the judicial process. It states: *"It shall be a prerequisite for the process to attempt conciliation or, where appropriate, mediation before the corresponding administrative service or the body that assumes these functions, which can be established through interprofessional agreements or collective agreements referred to in Article 83 of the revised text of the Employees' Statute, as well as through professional interest agreements referred to in Article 13 and paragraph 1 of Article 18 of the Statute of Self-Employed Work Act".* This prerequisite of conciliation is a clear manifestation of the legislator's intent to promote that parties directly resolve conflicts through consensus, as we will see below. Therefore, the attempt at conciliation becomes a mandatory step for the parties, with the exception of those procedures established in Article 64 of the same legal text.

However, as it is not included among the exceptions of the LRJS, collective labour conflicts are subject to the mandatory pre-procedural conciliation-mediation process, which, as mentioned, is obligatory and replaces the prior administrative conciliation provided for in Article 156 LRJS. Therefore, although the judicial system is responsible for ensuring the right to effective judicial protection and it is not possible to prevent parties from accessing judicial bodies if they wish, exercising this right is conditioned on the prior exhaustion of extrajudicial procedures.

Thus, if an agreement is reached in conciliation or mediation, it will have the same effectiveness as a collective agreement, provided that the parties signing the agreement have the required legitimacy as stipulated in Title III of the ET. When the mediation process ends without reaching an agreement, the authorized party may initiate the judicial process by filing a claim with the competent body.

The content of the claim must meet the general requirements of the ordinary procedure in Article 80 LRJS (it must be written, designating the body it is presented to, stating the procedural modality, identifying the claimant and their address, clearly and concretely enumerating the facts on which the claim is based, stating the request, designating the defendant's address for notifications, date, and signature). Additionally, as this is a special modality, it must comply with the requirements of Article 157 LRJS. This includes identifying the employees and companies affected by the conflict. If the outcome of the ruling can be individually determined without initiating a new procedure, the necessary data, characteristics, and requirements for the subsequent individualization of those affected and the enforcement of the judgment must be provided.

The claim must also include the designation of the defendant, which means precisely identifying the defendant or defendants, including the employer, employer association, union, or unitary representation affected by the claims. The claim should succinctly

reference the legal grounds supporting the claim and the type of claim sought, whether interpretative, declarative, condemnatory, or otherwise.

In addition to the already listed requirements, as anticipated, to resort to the judicial process, the conciliation procedure must first be exhausted according to Article 63 LRJS. Therefore, the claim must be accompanied by a certificate proving that conciliation or prior mediation was attempted or a statement that it was unnecessary.

The collective conflict process is urgent and takes priority over other matters, except those seeking the protection of fundamental rights and public freedoms. The initiation of the collective conflict process interrupts the prescription periods for individual actions related to the conflict's object.

Once the claim is admitted or the communication to the Labour Authority is properly made, the LAJ will summon the parties to the hearing within 5 days of admission, and this hearing will take place in a single session. After the hearing, the judge must issue a judgment within 3 days according to the LRJS. If the procedure was initiated by communication to the Labour Authority, the judgment will be notified to them.

If the judgment upholds the claim, for it to be subsequently enforceable individually, all necessary data and requirements for the individualization of those affected by the conflict's object must be determined so they can benefit from it. Lastly, following the specificities of the process, the judgment must explicitly mention the non-limited procedural effects on the litigating parties.

If the parties disagree with the judgment, any appeal against it does not prevent its immediate execution.

It is also important to note that individual processes with the same object or directly related to the collective conflict cannot be initiated, as the judgment has res judicata effects on these. This prohibition extends to the administrative contentious order, and any related matters in this order will be suspended until the collective conflict is resolved.

The conflict can end with the judgment or, among other reasons, if the parties reach an agreement at any time before the judgment is issued. In this case, after notifying the court of the consensus, the LAJ will archive the proceedings.

4. Extrajudicial means of conflict resolution: special attention to agreements on extrajudicial resolution of conflicts

Traditionally, both collective bargaining and judicial intervention have been the most common means for resolving labour conflicts. However, currently, our legal system offers a much broader range of procedures.

Among the most important means created by the legislator, we can mention those established in the provisions of RDLRT and those recognized in the ET as tools for resolving collective bargaining issues. The Statute's provisions mainly refer to mandatory consultation periods in cases of geographic mobility under Article 40.2 ET, substantial modifications of working conditions under Article 41.4 ET, and the non-application of working conditions in the collective agreement under Article 82.3 ET, known as the convention derogation.

Continuing with the means of conflict resolution recognized in the statute, Article 91 ET grants the joint commission the possibility of issuing an opinion to resolve discrepancies arising in the interpretation and application of collective agreements.

The Labour and Social Security Inspection is also empowered to resolve conflicts, thus ensuring the maintenance of social peace. It is normatively allowed to intervene in conciliation, mediation, and arbitration in strikes and labour conflicts when this intervention is accepted by both parties. This authority is recognized both in Article 3.3 of Law 42/1997, of November 14, which organizes the Labour and Social Security Inspection, and in Article 9 RDLRT.

Parallel to these legislatively created means, alternative means for conflict resolution coexist, which have been created through collective bargaining. These means have been institutionalized both at the state level and in each autonomous community, and experience has shown that they are a fundamental pillar of our labour relations system. We are referring to the Agreements on Extrajudicial Resolution of Conflicts, a manifestation of the collective autonomy of the parties.

The procedures provided in these resolution agreements give special importance to collective bargaining, enabling the possibility of reaching a satisfactory agreement through reciprocal concessions between the parties, without the social agents losing control and prominence in managing the conflict they are part of. These tools promote spaces for agreement, fostering

an approach between the parties in a climate of trust and legal security. In most cases, once the conflict has arisen, the mere willingness of the parties to reach an agreement will not be enough, necessitating the intervention of a third party to facilitate and promote dialogue.

The differences that emerge in the workplace cause a flood of claims that, as we will see, are largely resolved satisfactorily through the use of *extrajudicial* procedures for resolving labour conflicts. These resolution systems fundamentally rely on tripartite and institutionalized *social dialogue*. The main objective of mediation and conciliation is to reach a consensus between the parties and additionally avoid the judicial process, while arbitration will often replace it.

The majority doctrine prefers to refer to these procedures as autonomous conflict resolution systems. The fundamental reason is that the term "extrajudicial" seems to only refer to legal conflicts that can be resolved outside the judicial sphere. However, the term "autonomous" emphasizes that the social agents are the protagonists who manage their resolution without needing to resort to the judicial system or administration.

Regarding what we should understand by social dialogue, the International Labour Organization defines social dialogue *as "any type of negotiation, consultation, or simply exchange of information between government representatives, employees, and employers, on issues of common interest related to economic and social policies."*

The main characteristics of each of these figures provided in the conflict resolution agreements, which share the intervention of a neutral third party outside the conflict, are as follows:

- Conciliation: Conciliation involves a third party outside the conflict, the conciliator, assisting the parties by facilitating communication between them, thus channelling the conflict's resolution. The mediator does not impose a solution but facilitates dialogue.
- Mediation: Mediation has similarities with conciliation, but in this case, the third party, the mediator, goes beyond facilitating dialogue and seeks to solve the conflict by proposing solutions to the parties to resolve the conflict. The parties can accept the solution or disagree with it and reject it.
- Arbitration: In this case, the parties in the conflict voluntarily agree to submit their dispute to an arbitration process. The arbitrator will make a binding decision known as the arbitration award, which sets the terms and conditions of the conflict's resolution. There are exceptional cases where arbitration will be mandatory, such as arbitration for the renewal of a denounced collective agreement if expressly provided for in the collective agreement.

The regulation at the state level of these autonomous conflict resolution means currently resides in the VI Agreement on Autonomous Resolution of Labour Conflicts (hereinafter, ASAC). Like other agreements of the autonomous communities, it has established mediation and arbitration as standard procedures, without mentioning the conciliation procedure.

In our autonomous community, Andalusia, as a result of the social agents' consensus, the Extrajudicial System for Resolving Labour Conflicts was created. This is an interprofessional agreement on specific matters, signed on April 3, 1996, called the *"Interprofessional Agreement for the Constitution of the System of Extrajudicial Resolution of Collective Labour Conflicts of Andalusia,"* also known as the *constitutive agreement* (BOJA No. 48 of April 23, 1996). This Agreement was signed by the Confederation of Entrepreneurs of Andalusia, the General Union of Employees of Andalusia, and Employees' Commissions of Andalusia.

The parties signing this agreement are legitimized to do so under the provisions of Article 83.3 ET: *"Such employees' organizations* (most representative trade unions and business associations, whether state or autonomous community level) *and employers may also draft agreements on specific matters. These agreements, as well as the interprofessional agreements referred to in paragraph 2, shall be treated as collective agreements under this law*."

This Andalusian interprofessional agreement is endowed with direct and *erga omnes* efficacy. This means it will apply to all employees and employers within its scope without needing to adhere to the agreement.

In this regard, and concerning the legitimacy of the signatories of the agreement, the STS 475/2021, in its legal basis 4th, stated that ***"Title III of the Employees' Statute contains various requirements regarding the representativeness of those who negotiate it. These are public order rules, clearly justified because the Law is not regulating all collective bargaining (art. 37.1 CE)***

but only the highly privileged one that has general scope (art. 82.3 ET) and normative effectiveness (art. 3.1.b and 3.1.c ET)"

Currently, in Andalusia, the *"Interprofessional Agreement on the Extrajudicial System for the Resolution of Labour Conflicts of Andalusia"* (hereinafter, SERCLA) is in force, signed on January 7, 2015 (BOJA No. 26 of February 9, 2015), along with its operating regulations dated January 25, 2022, *"Operating and Procedural Regulations of the Extrajudicial System for the Resolution of Labour Conflicts of Andalusia"* (BOJA No. 27 of February 9, 2022). The change in the agreement's name occurred following the inclusion of certain individual conflicts within its scope, which had been overlooked by both the state system and the majority of agreements in other Autonomous Communities.

As a result of various legislative reforms, to different labour laws since the original agreement came into effect in 1996, there has been a need to modernize and adapt the agreement to the current context in which labour relations are conducted. This necessity was realized with the approval of the Interprofessional Agreement on the Extrajudicial System for the Resolution of Labour Conflicts of Andalusia, signed on January 7, 2015 (BOJA No. 26 of February 9, 2015), followed by the approval of the corresponding operating regulations on January 25, 2022.

In this context, where the resolution mechanism is institutionalized, it is important to note that the involvement of the Junta of Andalusia in both the agreement and its operation is carried out with absolute respect for the constitutional rights expressly recognized to these organizations, without undermining the essence and purpose of the system.

The previous statement is supported by STS on January 30, 1999, issued in appeal 1477/1998: *"The Interprofessional Agreement for the Constitution of the Extrajudicial System for Collective Labour Conflicts of Andalusia is a collective agreement on specific matters as provided for and regulated by number 3 of Article 83 ET. It meets the elements, conditions, requirements, and objectives inherent to such agreements, as it is a pact made by representatives of employers and employees regulating a specific labour issue concerning the geographic scope of an Autonomous Community. This statement is not undermined at all by the fact that a Public Administration, such as the Junta of Andalusia, has also participated in it, as such involvement is purely instrumental."*

Considering the above, it is evident that labour conflicts and relations are closely linked and that opposing positions and needs for improvement by the involved actors often lead to conflicts within these relations. We cannot ignore that proper conflict management will have a direct impact on mitigating its consequences, which will, in turn, improve the competitiveness and productivity of companies.

Once a dispute arises, the party seeking to assert its claim may exercise those legally sanctioned pressure measures, including the one representing the highest degree of pressure -strike or lockout- with negative consequences for both parties involved in the conflict.

As a consequence of the judicial process explained above, a serious deterioration of the relationship between the parties can be expected, often leading to a definitive break. The judicialization of the cause has numerous unfavourable implications, developing in a hostile climate, as it involves placing the resolution of the conflict in the hands of a third party - in this case, a judge, as a public authority vested with jurisdictional power. By submitting the conflict to a judge, the parties lose control over its management. The decision that resolves the conflict - the judgment - often will not be wholly or partially satisfactory, even for the party presumed to have won the case, as their expectations may not be met by the eventual judgment that must be obeyed.

Keeping these considerations in mind, we must also note that, while it is true that this conciliation-mediation is a mandatory pre-procedural step for collective conflicts, one of the characteristic features of Andalusia's autonomous system, which extols respect for autonomy and collective bargaining, is the subsidiarity of the system's application concerning the intervention of the parity commission when so provided in the applicable collective agreement.

The SERCLA Regulations themselves require that, among the documentation accompanying the mediation request, there must be evidence that the prior step of the parity commission's intervention has been fulfilled, even if the outcome was ineffective, and that the opinion is provided if it has been issued.

Thus, as a summary, initially, before formally presenting the conflict - both to the autonomous system and to the competent judicial body if mediation is not a prior requirement - the parties must exhaust the procedure prescribed in the collective agreement. Therefore, the

parties must bring the conflict to the parity commission, whose competence is attributed both by legal imperative of Articles 82.3, 85.3(e), and 91 ET, and by collective bargaining. The commission will process the request for assistance and issue the corresponding opinion, possibly reaching an agreement.

The autonomous Andalusian resolution agreement is directly applicable to employers and employees who carry out their activities within the territorial scope covered - the eight provinces of Andalusia - and who are affected by the conflict in question. This means that it can address those collective conflicts affecting companies and employees performing their activities in work centres located in Andalusia, as established in Article 3 of the aforementioned Operating Regulations.

To the above statement - territorial competence - an additional requirement must be added: the conflict must concern one of the matters exhaustively listed in Article 4 of the Regulations, although it is foreseen that these may be expanded.

Focusing on what concerns this study, and beyond the strict definition of collective conflict - which starts from the relationship between the parties - if we refer to the claim postulated during the procedure, we can make the following classification: a *legal conflict*, when the dispute revolves around the interpretation or application of a norm or regulation - legal, regulatory, conventional, or customary - whose main objective would be the strict application of the norm; and a *conflict of interests*, when the dispute does not refer to the application or interpretation of a specific norm previously accepted by the parties, but rather the conflict would concern the specification or novation of the norm that should govern the labor relationship in the future. This distinction is widely accepted by the majority doctrine.

Therefore, the following collective conflicts will be within SERCLA's competence:

- Legal conflicts arising from: The interpretation, application, or non-application of legal norms, collective agreements, pacts, practices, company agreements, or collective business decisions, and any others that may be agreed upon by the Monitoring Commission in the development of the operating regulations.
- Conflicts arising from the challenge of collective agreements before the judicialization of the conflict.
- Conflicts of interest arising from:
  - Negotiations of collective agreements, agreements, or collective pacts, including those that have arisen and persist after the negotiation period without reaching an agreement, or negotiations on specific matters, such as equality diagnoses and plans, telework regulation, or any other matters related to collective bargaining that the parties deem appropriate.
  - Discrepancies arising during the consultation periods provided for in Articles 40 (geographic mobility), 41 (substantial changes in working conditions), 44.9 (business transfers), 47 (suspensions for objective reasons), and 51 (collective dismissals) ET.

    Any others that may be included within the functional scope by agreement of the Monitoring Commission.

  - Conflicts of interest arising within the parity commissions of collective agreements, concerning the functions legally or conventionally assigned to them and provided that the affected parties mentioned in paragraph 1 of the same Article 4 are present.
  - Conflicts that may lead to a strike call, or those arising during a strike concerning the determination of security and maintenance services, including those related to minimum services. In cases of a strike, the use of the mediation or arbitration procedure will prevent the strike from being called or the lockout measure from being adopted during the processing, as well as promoting judicial or administrative actions aimed at resolving the same conflict. If the parties fail to comply with the commitment, the proceedings may be ordered to be archived.

Regarding the legitimacy to initiate the procedure, it is necessary to submit a request by any of the parties legitimized in the conflict. Thus, on the employees' side, the request can be made by unions or unitary employees' representations, and on the employers' side, by companies or employers' associations whose competence scope corresponds to or is superior to that of the conflict.

It is important to note that although resorting to the conflict resolution system is voluntary for the parties, in the sense that the request is left to their free decision and is not imposed on them, if one party receives a request initiated by a properly legitimized party in the

scope of the conflict and is prompted to proceed with the process, their attendance becomes mandatory.

Regarding the system's operation, it is structured through a Conciliation-Mediation Commission, which is collegiate and bipartite in nature. This Commission comprises representatives from the employer's organization and the signatory trade unions of the Agreement, as well as a body of arbitrators that includes both legal professionals and renowned experts. The Andalusian Council of Labour Relations provides technical and managerial support to SERCLA.

The operational approach involves mediation-conciliation and arbitration procedures. In any case, opting for arbitration requires mutual agreement by the parties involved, who will be bound by the arbitrator's decision, with the arbitration award having the same standing as a final judgment for definitive execution purposes, in accordance with Article 68.2 LRJS. This makes the voluntary nature particularly relevant, especially for collective conflicts, with the exception noted in Article 32.2 of the Operating Regulations for the renewal of a collective agreement that has been denounced, where compulsory arbitration is expressly stipulated.

Once the system's intervention is requested, the parties commit to refraining from adopting any other measures aimed at resolving the conflict, to avoid disrupting the normal progression of the procedure.

The mediation procedure can conclude in various ways: by reaching an agreement between the parties, either on the whole conflict or part of it, upon reaching the maximum duration of 30 business days (this period may be extended by the Mediation Commission for matters not affecting conflicts with preclusive deadlines), or by attempting mediation without success even if the party against whom the procedure is directed has been duly cited. This is one of the system's issues, as often the party against whom the procedure is directed does not attend the sessions, hindering mediation. The procedure can also conclude if one or both parties withdraw or if the requesting party fails to appear, leading to the case's filing, or if the parties mutually agree to submit to arbitration.

Regarding the value of the agreement reached in conciliation-mediation, this agreement will have the same effect as a statutory collective agreement, with general and normative effectiveness. For this *erga omnes* effect to unfold, the parties that reached the agreement or signed the arbitration commitment must be legitimately empowered within the conflict's scope to negotiate a collective agreement as stipulated in Articles 87 and following ET. Once the agreement is reached and verified, it will be registered in the collective agreements register.

Nonetheless, any agreement reached can be contested by the signatory parties or those who may suffer harm from the agreement. Such a contestation will be processed before the court or tribunal that would have originally handled the matter leading to the conciliation or mediation, through the nullity action.

If the least desirable outcome occurs—the procedure concludes without an agreement—the parties will be offered the possibility of submitting the conflict to arbitration. If the offer is declined, the judicialization of the collective conflict becomes available, in cases where it is applicable, such as legal conflicts, as discussed in the relevant section of this chapter.

Conversely, if the parties accept arbitration, a record will be made explicitly including the arbitration commitment, which must be signed by all involved parties.

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