Employment Newsflash – February 2023 (1/23)

LEGISLATIVE DEVELOPMENTS AND SOME RECENT AND INTERESTING COURTS' DECISIONS

1. Legislative developments: Brief references to the main developments in the following provisions:

- **Law 31/2022, of 23 December, on the General State Budget for the year 2023.**

  In terms of relevant measures, we would highlight the following:

  - Application of the "intergenerational equity mechanism": A contribution of 0.6 percentage points from 1 January 2023 applicable to the contribution base for common contingencies in all situations of registration or similar to registration in the social security system in which there is an obligation to pay contributions to cover the retirement pension (of which 0.5% will be paid by the employer and 0.1% by the Employee).

  - The application of the system of reduction of contributions for professional contingencies is suspended for companies that have considerably reduced the number of accidents at work, for the contributions generated during the year 2023.

  - Increase of the legal interest rate to 3.25% and of the interest for late payment to 4.0625% until 31 December 2023.

  - Contribution to the Special Social Security Scheme for Self-Employed employees:

    - The self-employed employees will begin to pay contributions according to their real income or earnings from January 2023, in a system of 5 brackets according to levels of "net earnings", all of this by means of two tables, a Reduced Table and a General Table with figures that will increase over a period of three years. In any case, the maximum contribution base will continue to apply, which in 2023 will be 4,495.50 euros per month.

    - The previous "flat rate" regime of 60 Euros is replaced by a new regime established for the period 2023-2025, with a reduced quota (flat rate) of 80 Euros per month for the first 12 months of activity, extendable for a further 12 months if annual net income is expected to be lower than the minimum interprofessional wage.

- **Royal Decree 1060/2022, of 27 December, amending Royal Decree 625/2014, of 18 July, regulating certain aspects of the management and control of temporary incapacity processes during the first three hundred and sixty-five days of their duration.**

  The current management and control of temporary incapacity processes is modified, introducing, as one of the main measures, that the employee is no longer obliged to send the sick leave report to the company. We would also highlight the following measures envisaged:

- The public health service or, where appropriate, the mutual insurance company or the collaborating company shall send the data contained in the medical reports of sick leave, confirmation and discharge to the National Institute of Social Security, by telematic means, immediately and, in any case, **on the first working day following the day on which they are issued**.

- The National Social Security Institute will be the one that, by telematic means, will communicate to the companies **on the first working day following receipt at the said Institute**, the merely administrative identification data relating to the medical reports of sick leave, confirmation and discharge of employees issued by the doctors of the public health service or the mutual insurance company.

- Likewise, companies are obliged to transmit to the National Social Security Institute through the RED system, **immediately and, in any case, within a maximum period of three working days from receipt of the notification of the sick leave, the data determined by ministerial order**. It shall not be obligatory when the **employee belongs to a group for which the employer is not obliged to join the RED system**.

***** Failure to comply with the aforementioned obligation could constitute, where applicable, an infringement as defined in Article 21.4 of the LISOS.**

- In any of the processes contemplated in the regulation, **the doctor can set the corresponding medical check-up in a shorter period of time than that indicated in each case**.

- The company may provide the Administration with the additional data required to manage and control the situation of temporary incapacity and the corresponding benefit, **without the need for the employee to submit a report beforehand**.

- Proceedings in progress: The provisions introduced by this Royal Decree will apply, **as of its entry into force (to be calculated as of 5 January 2023),** to proceedings that are currently in progress and have not exceeded 365 days in duration

- Entry into force: The first day of the third month following its publication in the BOE **(i.e. from 1 April 2023)**, including processes that are in progress that have not exceeded 365 days in duration.

- **Royal Decree-Law 1/2023, of 10 January, on urgent measures in the area of incentives for employment contracts and improvement of the social protection of artists.**

  New Social Security bonuses/rebates are included with the aim of improving the quality of employment, its maintenance and favouring the hiring of unemployed people, with a special focus on the most vulnerable. Specifically, this Royal Decree-Law regulates, on the one hand, the persons targeted by the employment promotion measures, as well as the beneficiaries of the incentives, on the other hand, the incentives for employment contracts (in cases of part-time contracts and their transformation into full-time contracts) and other employment support instruments such as bonuses on Social Security contributions and joint collection concepts, Finally, it regulates incentives for indefinite-term contracts through rebates on employer social security contributions, as well as the impact of the measures included in this regulation.

Among the Social Security bonuses/rebates provided for in this Royal Decree-Law, the following should be highlighted:

- Bonuses for the indefinite-term hiring of people **with limited intellectual capacity, as well as those under 30 years of age who are registered and are beneficiaries of the National Youth Guarantee System**.
- Bonuses for the **indefinite-term hiring of employees who have been reinstated after having left the company due to total or absolute permanent disability**.
- Bonuses for the **formalisation of fixed-term contracts with unemployed persons to replace employees in certain cases**.
- Bonuses in the contribution of employees replaced **during the situations of birth and care of a minor, co-responsible care of a breastfeeding minor, risk during pregnancy and risk during breastfeeding**.
- Bonuses in the event **of a change of job due to risk during pregnancy or risk during breastfeeding, as well as in the event of occupational illness**.
- Bonuses for 4 years **for the indefinite-term hiring of people in a situation of social exclusion**.
- Bonuses in the employee's contributions **for the implementation of the training contract in alternation, as well as for the transformation of training and relief contracts into indefinite contracts**.
- Bonuses for the entire duration of the contract, or for three years in the case of **indefinite-term contracts in the case of contracts signed by insertion companies**.

- **Law 28/2022 of 21 December on the promotion of the start-up ecosystem.**

This new law introduces amendments to Law 14/2013 of 27 September, on support for entrepreneurs and their internationalization, and to Law 20/200, of 11 July, on the Statute of Self-Employment.

Specifically, it mentions the new "*international teleworkers*" and applies to both employees and self-employed employees.

A special authorisation is regulated for foreign employees to telework in Spain, with international teleworkers being considered for these purposes to be those nationals of a third country who are authorised to remain in Spain to carry out a remote work or professional activity. They will work exclusively for companies outside the national territory and only through the use of telematic and computerised means (although they may also work for a company in Spain for a maximum of 20% of their total professional activity).

Applications for a visa or authorisation to telework for a maximum period of one year may be made by **qualified professionals** who are graduates or postgraduates from reputable universities, professional education system and business schools of recognised standing or have at least **three years' professional experience**.

The requirements to be accredited in order to obtain such authorisations are: (1) Existence of a real and continuous activity for 1 year; (2) Documentation accrediting that the employment relationship can be carried out remotely; (3) Existence of the employment relationship between the employee and the company not located in Spain, for at least the last 3 months prior to the application, and (4) Proof of the existence of a professional relationship between the professional and one or several companies not located in Spain during the last 3 months prior to the application.

Foreigners who are in Spain on a regular basis or who have entered by means of the visa described above may apply for a **residence permit**, which will be valid for a maximum of three years and **may be renewed for two-year periods**.

2. Recent case law of interest and practical relevance:

- **[HOLIDAY COMPENSATION]** **High Court of Justice of Madrid, (Social Chamber, Section 1) Judgment no. 1020/2022 of November 25. JUR 2022\375020.**

The economic compensation for holidays not taken at the end of the employment relationship **will not be affected by its annual expiration and it will be possible to claim them, even with respect to holidays not taken in previous years, unless the company proves that it has had an active conduct, offering the employee to enjoy holidays with the warning that, if he/she does not do so within the year, he/she may lose the corresponding rights**.

To reach this conclusion, the doctrine of the STJUE of 6-11-18 (TJCE 2018, 252) (C-684/169) is taken into consideration, which directly affects the statute of limitation of article 59 ET, **allowing claim of financial compensation for holidays not taken beyond the last year of work, in those cases in which the employer does not prove having acted with due diligence, ensuring in a concrete and transparent manner that the employee can effectively enjoy paid annual holidays, insisting formally, where appropriate, to do so, and informing in a precise, transparent and timely manner, so that, if he/she does not take them, will be forfeited at the end of the accrual period**.

In conclusion, this doctrine modifies the traditional position of national case law with respect to Article 38.1 of the Workers' Statute, according to which the claim for payment for holidays not taken upon termination of the contract would refer only to those of the year prior to such termination, with any claims for previous years being time-barred.

- **[PERMANENT DISCONTINUOS WORKERS]** **National Court (Social Chamber) Judgment No. 162/2022 of December 15 (JUR 2022/376083)**

In proceedings to challenge a collective bargaining agreement, the ruling analyses the criteria and procedures established in such agreement on the call-up of permanent seasonal employees.

Thus, it is considered valid:

1) Provide that calls can be made via WhatsApp or other messaging applications, email or voicemail, in accordance with the contact details provided by the worker and provided that this can be used to prove that the call has been made.

2) Provide for a minimum notice of 48 hours for call-ups.

3) Establish as a selection criterion for the system of priorities in calls the suitability of each worker for the job profile and his or her previous experience and professional qualifications, and in the event of equal conditions, that seniority takes precedence.

It is not considered valid, however, to set a notice period of less than 48 hours for calls for "surprise services", as such services would not fit in the usual case of discontinuous seasonal permanent employment, given their unpredictability, which would refer to a case of temporary employment.

- **[INDEMNITY BOND]** **Supreme Court (Social Chamber) Judgment no. 917/2022 of November 15. RJ 2022\5131**

The aforementioned sentence develops previous doctrine of the Chamber on the matter, starting from reiterating that in the labour sphere, the guarantee of indemnity consists "*in the impossibility of adopting intentional retaliatory measures derived from the exercise by the employee of the protection of his/her rights so that a company action that causes damage and is motivated by the fact of having exercised a legal action tending to the recognition of any employee´s right must be qualified as radically null, as contrary to that fundamental right, since that among the basic labour rights of all employees is the right to exercise the actions derived from their employment contract*". This also applies to retaliation against preparatory acts or extrajudicial claims that seek to avoid litigation.

But also, although in principle and "*as a general rule, internal claims within a company do not activate the guarantee of indemnity", the ruling concludes that "**if an employee makes an internal claim and is immediately dismissed, without the company proving the existence of breaches that justify the termination of the contract, we must conclude that the impossibility of formulating the judicial claim prior to the dismissal is solely attributable to the employer, therefore, in this specific temporary context, it operates as an indication of the violation of the guarantee of indemnity** that obliges the employer to prove that the dismissal was unrelated to the violation of the fundamental right included in art. 24 of the Spanish Constitution. **By not having done so, the dismissal in question violated the plaintiff's guarantee of indemnity, for which reason it must be declared null and void**.*"

The judgement adds that "*the opposite argument would encourage the employer to dismiss the employee immediately in the event of any internal complaint within the company, before the latter could bring a legal claim, in order to avoid the dismissal being declared null and void*".

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