

EMPLOYMENT FLASH

NEWS - DECEMBER 2021

REGULATORY CHANGES

Order PCM/1353/2021, of 2 December, which develops the legal rules on social security contributions, unemployment, protection in the event of cessation of activity, the Wage Guarantee Fund and Vocational Training for the financial year 2021, with effect from 1 September 2021.

This order was published on 4 December but takes effect from 1 September 2021, increasing the minimum contribution base to 1,125.90 euros per month from the previous 1,050 euros.

The maximum contribution base remains at 4,070.10 euros per month.

Contributions to the General Scheme for common contingencies are limited according to their contribution group and their minimum and maximum bases as established in the following table:

Contribution group	Employment status	Minimum base- Euro/month	Maximum base- Euro/mes
1	Engineers and graduates. Senior management personnel not included in article 1.3.c) of the Worker's Statute.	1.572,30	4.070,10
2	Technical engineers, experts and qualified assistants.	1.303,80	4.070,10
3	Administrative and Workshop Managers	1.134,30	4.070,10
4	Non-graduate assistants	1.125,90	4.070,10
5	Administrative officers	1.125,90	4.070,10
6	Subordinates	1.125,90	4.070,10
7	Administrative assistants	1.125,90	4.070,10
8	First and second officers	37,53	135,67
9	Third and specialist officers	37,53	135,67
10	Pawns	37,53	135,67
11	Employees under 18 years of age, regardless of their professional category	37,53	135,67

Likewise, the contribution order establishes both the minimum and maximum bases and the contribution rates for the groups with specialities that are included in the General Scheme as well as the special social security schemes (i.e. the self-employed, seafarers, agricultural employees, domestic workers, etc.).

The contribution rates for common contingencies under the General Scheme remain unchanged.

It is important to note that any contribution differences that may have arisen as a result of the application of the provisions of this order with respect to the contributions made as of 1 September 2021 may be paid without surcharge by the last day of the second month following publication of this order in the BOE, i.e. until 28 February 2022.

Strategic Plan of the Labour and Social Security Inspectorate (ITSS) 2021-2023

The Cabinet of Ministers has approved the Strategic Plan for the Labour and Social Security Inspectorate for the years 2021 to 2023 with the aim of modernising the organisation by providing it with new tools and resources to ensure that it can adapt to and overcome the new challenges that arise in the labour sphere and thus position the ITSS as a key body in the defence of labour rights.

The plan consists of a series of structural and operational improvements that will strengthen inspection activities. Some of these improvements (which make it possible to anticipate some of the focal points of action over the coming years) will basically consist of the following:

- The creation of the state anti-discrimination office.
- The creation of a special unit focused on the fight against transnational labour fraud.
- The Labour Inspectorate's intervention in collective dismissals, contract suspensions and substantial modifications to working conditions will be reinforced. Similarly, the powers to intervene in cases of non-application of collective agreements have been extended.
- Likewise, a special intervention is made with regard to false self-employed employees, false trainees and any type of fraud in the area of recruitment.
- A new general regulation on the actions and procedures of the Labour Inspectorate is envisaged as a line of action to adapt the procedures to the new telematic reality and to strengthen the figure of the Territorial Director given the increasingly frequent need to act on companies beyond the province.

Occupational risks and Covid-19

The Ministry of Health has drawn up and published a guide with a series of recommendations of great interest regarding the procedures for action for occupational risk prevention services in the event of exposure to SARS-COV-2, which can be consulted at the following link: [18 11 2021 Proteccion Trabajadores SARS-CoV-2 \(mscbs.gob.es\)](https://www.mscbs.gob.es/18-11-2021-Proteccion-Trabajadores-SARS-CoV-2) and which main issues are as follows:

- Establish organisational, collective and personal prevention measures.
- Protecting particularly sensitive employees.
- Protection of those suffering from persistent Covid, chronic Covid or "Long Covid".
- Vaccination strategy as an effective element to reduce infection.
- Detection, notification, study and management of cases and contacts by companies through prevention services in order to collaborate with health authorities.
- Support in carrying out screening studies.
- Collaboration in the management of temporary incapacity.
- Collaboration with the Labour and Social Security Inspectorate.

RECENT COURT CASES OF INTEREST

Dismissal without cause of a pregnant woman, the employer being aware of her situation. The nullity of the dismissal, which must be understood to be discriminatory, entails the payment of compensation for moral damages.

Judgment of the High Court of Justice of Madrid, Social Chamber of 18 June 2021, n.º 286/2021

This case was resolved by declaring the dismissal of the employee to be null and void on the grounds that the dismissal took place during her pregnancy. In addition, the company was ordered to pay additional damages in the amount of €6,251 given the violation of the employee's constitutional right not to be discriminated against on the grounds of sex.

The company argued that Article 55.5 of the Labour Statute contains two distinct blocks, the first when the dismissal is based on any of the causes of discrimination prohibited by the Spanish Constitution or by law or when the dismissal occurs in violation of the fundamental rights and public freedoms of the employee, and the second when the dismissal occurs in any of the situations referred to in paragraphs a) to c) of that article, including the dismissal of pregnant workers. Thus, the company argues that as it is a cause within the second block, i.e. objective nullity, it does not presuppose an infringing action on the part of the company and therefore there is no need for any additional compensation.

However, the Chamber recalls the doctrine of the Constitutional Court, which has repeatedly established that intent is not necessary for the infringement of the fundamental right to occur, given that it is not subject to the concurrence of malice or negligence in the conduct of the active subject, and it is sufficient to establish the appropriate causal link between the unlawful conduct and the harmful result prohibited by the law.

In this ruling, the High Court points out that the purpose of article 55.5 of the Workers' Statute is to provide pregnant employees with stronger protection than the ordinary protection against discrimination, relieving them of the burden of proving any evidence of violation of a fundamental right and exempting them from proving that the employer was aware of their pregnancy. It is therefore an objective and automatic guarantee consisting of establishing reinforced protection from a constitutional point of view, given that the only thing that the employee has to prove is the pregnancy which, in itself, constitutes by legal provision sufficient evidence of discrimination, and this evidence can only be destroyed by the accreditation of the alleged cause for the dismissal that deserves to be classified as fair, that is, that the reason for the dismissal is completely unrelated to the pregnancy.

Therefore, as the cause of the dismissal had not been accredited, the dismissal was declared null and void and the company was ordered to pay additional compensation for damages, as it had failed to destroy the evidence of discrimination on grounds of sex protected by article 14 of the Spanish Constitution, as it had not obtained evidence of the cause of the dismissal, the procedural consequence being that the legal presumption of discrimination would become fully and inexorably effective. In this regard, the Court recalls that such compensation is intended to compensate for the suffering, pain, uncertainty, anguish or anxiety that the violation of the fundamental right may have caused the employee, who is entitled to compensation for the damage suffered.

When requesting a reduction of working hours in advance for legal guardianship in the face of imminent dismissal can shield the relationship: null dismissal and compensation for moral damages.

Judgment of the Tribunal Superior de Justicia de Galicia, Social Chamber, of 7 May 2021, REC. No. 1216/2021

The issue at stake is whether the dismissal of the applicant employee, who requested a reduction in his working hours to care for his three daughters under the age of 12 at the same meeting at which the company was to inform him of his dismissal for disciplinary reasons, should be declared unfair, as the lower court ruled, or null and void, as the appellant claims.

The ruling of the court of first instance focuses on ruling out the nullity of the dismissal insofar as there is no discrimination on the part of the company, as it was unaware of the employee's intention to request a reduction in working hours at the time of dismissal.

However, the solution to the case is not to be found in a possible cause of discrimination, but in the wording of article 55.5 b) of the Workers' Statute, given its automatic and objective nature. This article establishes that dismissal will also be null and void in the following cases: b) "... that of employees who have requested one of the leaves referred to in articles 37.4, 5 and 6, or who are enjoying them..."

In application of the criteria for the interpretation of the rules, this precept leads the Court to understand that we are faced with a case of objective nullity of the dismissal. The guarantee established by the regulation of disciplinary and objective dismissals for these employees is "objective and automatic" and must operate regardless of any discriminatory motive, given that the purpose of the rule is to provide these cases with more vigorous protection than the ordinary protection against discrimination, exempting the plaintiff from the burden of proving any evidence of violation of the fundamental right and exempting him from proving that the employer was aware of the facts.

Therefore, the case in question involves an objective nullity different from nullity on grounds of discrimination, and this regardless of whether or not there is evidence of discriminatory treatment, whether or not there is a discriminatory motive or even that the employer had no knowledge, but this does not prevent the company from being ordered to pay compensation for damages in the amount of €15,000 for the non-material damage caused to the employee and following the guiding criteria established by the Law on Infringements in the Social Order (LISOS) for the determination of such compensation.

Covid-19 in a care home for dependent persons: dismissal due to the employee's refusal to be vaccinated is null and void.

Judgment of the Social Court No. 6 of Bilbao, of 7 October 2021, Case 832/2021

This judgment analyses the case of the employee who provided her services as a carer in a care centre for dependent persons and who refused to have the Covid vaccine administered.

The letter of disciplinary dismissal given to the employee set out facts considered insufficient to be covered by article 54.1 of the Workers' Statute, as they fell far short of the required control of seriousness, making it clear, therefore, that the termination decision could never have been based on those reasons.

The termination decision could only have been avoided by obliging the employee to undergo medical treatment, a circumstance that is limited by our constitutional case law in accordance with the prescription established in article 15 of the Spanish Constitution. The court of first instance found that the dismissal decision must be considered harmful to the employee's right to her physical integrity, a right which protects the inviolability of the person, not only against attacks aimed at harming her body or spirit, but also against any kind of intervention in these assets that lacks the consent of the owner, without any less invasive means of infringing the content of her fundamental right. All of this leads to the dismissal being classified as null and void.

Judgment declaring it lawful to abolish compensation for meals when teleworking is introduced.

Judgment of the National High Court (Audiencia Nacional), Social Chamber, 196/2021, 22 September

In this judgment, the Audiencia Nacional validates the lawfulness under the general state-wide collective agreement for insurance, reinsurance and mutual insurance companies collaborating with the Social Security to abolish the compensation of meals in teleworking and split working hours.

The ruling refers to the fact that it can be deduced from the collective agreement that the general rule is that compensation for meals is paid in kind (canteen service at the workplace or in the immediate vicinity) and only exceptionally in cash. Based on the above, it is concluded that the meaning to be given to the rule under discussion is that compensation for meals during split working hours is intended for on-site work and not for teleworking, and is compensation and not a salary.

In this way, the National Court affirms that there is no infringement of the principle of equality, as it is not possible to claim identical treatment between on-site and off-site employees, as the latter do not have to make any travel during the split working day, while the on-site employees do.

This case is different from the one recently analysed in one of our previous flashes, since the previously analysed case (which concluded that it was against the law to suppress compensation for meals during teleworking) resolved a conflict arising from the suppression by a company of the lunch break and the restaurant ticket by trying to unilaterally impose a continuous working day in the teleworking regime without carrying out the procedure provided for in article 41 of the Workers' Statute on substantial modification of working conditions (judgement of the National Court 44/2021 of 18 March 2021).

Substantial modification of working conditions: the agreement reached by the employees' representatives no longer shields the legal presumption of the concurrence of the alleged objective cause (ETOP).

Judgment of the National High Court (*Audiencia Nacional*), Social Chamber of 11 November 2021, n.º 239/2021

Collective conflict proceedings, followed by lawsuit filed by the INDEPENDENT ENERGY UNION and CCOO against ENDESA. ENDESA's employees have seen their working conditions relating to social benefits modified by means of a substantial modification of working conditions, specifically in relation to the subsidised electricity tariff, bringing those benefits into line with the regulations set out in the 5th Collective Bargaining Agreement of the ENDESA group.

The company argued that its intention was, firstly, to alleviate a situation of unequal treatment, bringing the group of employees excluded from the collective agreement into line with the employees affected by the collective agreement; and, secondly, to comply with the commitment made to the UN regarding sustainability and the consequent reduction in energy consumption, given that, as is reflected in the technical report provided at the trial by the company itself, the average consumption of the employees excluded from the collective agreement is much higher than the average consumption of a household in Spain.

The Chamber considers that, when article 41.1 of the Workers' Statute provides for the presumption of the validity of the grounds when there is a majority agreement with the employee representatives in a collective modification of employment conditions, it operates in relation to the concurrence of the alleged justifying cause, but without that presumption implying that the alleged cause is one of the economic, technical, organisational or production (ETOP) reasons required by the regulation and which justify the measure.

Thus, in this case, the Court argues that the presumption cannot operate, because neither the reduction in energy consumption nor the defence of the principle of equity respond to business needs of an organisational or productive nature, since neither by reducing consumption nor by equating the social benefits of employees outside the collective agreement with those within it, are possible imbalances in the products that the company supplies to the market mitigated, nor are new criteria introduced either in the systems or methods of work or in the way production is organised.

Furthermore, it would be acting in violation of the law, since the intention in such a case is to modify a working condition unrelated to the causes invoked, and the act was carried out without the coverage of the necessary regulations, for which reason the agreement reached in the consultation period is declared null and void.

The Supreme Court considers Covid-19's irregular distribution of working hours to be in accordance with the law since, as it does not exceed 10%, it is not obliged to negotiate with the trade unions and can implement the measure unilaterally.

Judgment of the Supreme Court of 20 October 2021

The disputed issue in this ruling concerns the irregular distribution of the working day when it is implemented unilaterally by the company.

The solution reached by the Supreme Court consists of considering the decision taken by the company to distribute the working day in an irregular manner, derived from COVID-19, as it does not exceed 10% of the working day, as it is not obliged to negotiate with the trade unions by virtue of article 34.2 of the Workers' Statute and its unilateral imposition is lawful.

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