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July 2012

New labour reforms in Spain: Employment Act 2012. "*Ley 3/2012, de 6 de julio, de medidas urgentes para la reforma del mercado laboral*".Following on from Real Decree-Law 3/2012, of 10 February 2012)

Spain has a new Employment Act ("Ley 3/2012, de 6 de julio, de Medidas urgentes para la reforma del mercado laboral", the "Act") introducing urgent reforms of its labour market. Details were published in the Official State Gazette of 7 July 2012.

The Act puts the finishing touches to the sweeping labour reforms already announced in a Royal Decree in February 2012 (*Real Decreto-Ley 3/2012, de 10 de febrero*, the "**Royal Decree**"). The shake-up of Spanish employment law includes giving companies more internal flexibility, making it cheaper to lay off workers, untying certain terms and conditions from collective bargaining agreements and giving more prevalence to internal company agreements.

Major changes were made to the wording of the Royal Decree as the bill was pushed through the Spanish parliament. These adjustments have to be looked at closely. In the interim, judges and magistrates found themselves falling back on a still rather sketchy Royal Decree, with differences in opinion on various aspects. The High Courts of Justice have also started to hear cases based on events that took place after the Royal Decree came in, making some very important rulings that need to be considered when applying the new rules in our companies.

Some of the main changes set out in the Act compared to the Royal Decree are as follows:

1 Boosting labour market efficiency and tackling the two-tier system

The following is new in the Act:

(i) Economic circumstances in which companies can make redundancies now include a "steady decline in revenue or sales". A steady decline is when for three consecutive quarters the revenue or sales for each quarter are lower than for the same three months the year before. The Royal Decree was worded so that companies' performance would be

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assessed by comparing consecutive quarters and not year-on-year.

(ii) At any point during consultation before collective redundancies are made, employers and employee representatives can agree to swap consultation for arbitration.

(iii) Where jointly requested by the parties involved, employment authorities can intervene as appropriate during the consultation period to try and solve collective redundancy issues. Authorities can also sit in on consultation meetings at the request of either party or at their own initiative. Employment authorities will also make sure employers have fulfilled their obligation to offer job placement programmes, in cases where more than fifty staff are to be laid off.

(iv) More companies in profit that make collective redundancies have to pay into the Spanish Treasury ("Tesoro Público") than before (payments which, you may recall, are tied to the cost of unemployment benefits). The requirement now extends to companies with over one hundred workers (previously, only companies with more than five hundred staff were liable). Companies also have to pay when they make temporary cuts (employees are suspended from work or working hours are reduced for a short time) before terminating the same workers' contracts, provided that temporarily laid off employees are made redundant less than a year after they return to work. Contributions to public coffers are based on the unemployment benefits paid by the Spanish employment service.

(v) Employee representatives have twenty days to challenge collective redundancies in court. If they do not take action in that time, employers have a further twenty days to apply for their actions to be declared lawful. Employee representatives are entitled to act as respondents in the proceedings and the court's decision is declaratory, with the principle of res judicata applying to individual claims. The employer's action stays any individual claims from employees, thereby avoiding multiple court claims and making the process less costly.

(vi) Collective redundancies are null and void if: (i) employers haven't consulted employees, provided the documents required under section 51.2 of the Spanish Workers' Statute ("Estatuto de los Trabajadores") or followed the procedure laid out in section 51.7 of the Statute; (ii) employers in insolvency proceedings haven't been granted the necessary authorisation from the courts, where applicable, and; (iii) employers' actions are in breach of fundamental rights and public freedoms. In these cases, the courts would rule that employees are entitled to reinstatement.

Since the Royal Decree was published, more than one case of collective redundancies has been declared void for these reasons in rulings by the country's High Courts of Justice. This happened at the Catalan High Court of Justice on 23 May 2012 and the Madrid High Court of Justice on 30 May 2012.

In the Madrid case, heard by the employment chamber of the High Court, the collective redundancies were declared void because of a number of formal irregularities during the consultation period. The court found as follows:

> "*the company has not complied in any way with the established procedure: a) due to clearly insufficient explanation as to the reasons for the redundancies or what led to that situation, simply providing a mere argument and general description; and b) due to the lack of the compulsory accompanying documents that have to show the fairness of such a drastic decision as to let go the company's entire staff. Consequently, under section 124.9 of Spanish employment tribunal regulations, the company's collective redundancies are found to be VOID due to non-compliance with article 51.2 of the Spanish Workers' Statute*".

(vii) The Act clarifies that the eight days' salary per year worked received by employees dismissed fairly by companies with less than twenty-five staff will be paid directly from the Salary Guarantee Fund ("Fondo de Garantía Salarial"). Before, the idea was for employers to be compensated by the Salary Guarantee Fund.

(viii) The rules on absenteeism now refer to 5% of working time. Employers have just cause to dismiss employees who are absent, even where explained and only intermittently, for 20% or more of working time in two consecutive months, provided that they were missing for at least five per cent of working time in the previous twelve months. Absence for 25% or more in four different months over a twelve-month period is also cause for dismissal. Medical treatment for cancer or serious illness no longer counts toward these percentages. The new wording makes it a little harder to dismiss employees for absenteeism, as staff working an ordinary week of Monday to Friday have to be absent (at least twice) for a total of 12 days (and not nine, as before) or for nine days if three days of working time were lost for this reason in the previous year.

(ix) The Spanish Income Tax Act 2006 ("Ley 35/2006, de 28 de noviembre, del Impuesto sobre la Renta de las Personas Físicas") is amended to include transitional provisions for cases of dismissals recognised as unfair by employers that

were made after the Royal Decree (13 February 2012) and before the Act comes in. The amendment clarifies that the compensation in these cases is exempt from the employee's income tax, in no more than the corresponding amount that would have been exempt had the dismissal been declared as unfair (twenty-second transitional provision).

2 Giving companies more internal flexibility to avoid job losses

New measures include:

(i) Irregular working hours that can be scheduled by employers over the year are increased from 5% to 10% of working time. Employees must be given a minimum of five days' notice of the date and time they will be required to work.

(ii) Just causes (economic, technical, organisational and production-related reasons) for temporary lay-offs and short time working are now defined. Economic circumstances are again broadened to refer to a "steady decline in revenue or sales". However, in this case, a steady decline is when the revenue or sales for each quarter are lower than for the same quarter the year before for two consecutive quarters (and not three as for collective redundancies). Again, consultation can also be swapped for arbitration at any time.

(iii) In relocation, preference is given to disabled workers requiring rehabilitation treatment elsewhere.

With regard to collective bargaining, under the Act:

(i) Economic circumstances in which companies can opt out from collective bargaining agreements are laid out in the same way as for temporary lay-offs and short time working. Employers cannot opt out of collectively-agreed obligations to avoid gender-based discrimination or other responsibilities set out in the company's Equal Opportunities Programme, where applicable. Employment authorities must be informed of opt-outs from collective bargaining agreements, purely to keep a record.

(ii) The time that previous collective agreements continue to apply until a new agreement is reached is reduced from two years to one. If a year elapses after a collective agreement is ended without a new agreement or arbitration award, unless agreed otherwise the original agreement becomes void and a higher-level collective agreement kicks in where applicable. The deadline is one year from the date the original agreement ended or, if that was before the Act, one year from the date the Act comes into force.

(iii) Section 84 of the Workers' Statute states that company-level agreements can be negotiated at any time while higher-level collective agreements are in force.

(iv) The time employment authorities have to publish registered collective bargaining agreements is extended from ten to twenty days.

3 More permanent contracts and other job-creating measures

Regarding the new type of permanent contract aimed at helping small businesses and start-ups:

(i) The contract can be used until the unemployment rate in Spain falls below 15%.

(ii) The trial period (one year) in the contract cannot be imposed where employees have already performed the same duties in the company under any kind of contract.

(iii) The jobs created using this type of contract must be maintained for at least one year for companies to remain entitled to its benefits.

The Act changes the incentives and deductions offered for this type of contract:

(i) Section 43 of the revised Spanish Corporate Income Tax Act ("*Ley del Impuesto sobre Sociedades")*, is reworded to set out the tax breaks for small businesses and start-ups using these contracts.

(ii) For small businesses to be eligible for the relevant deductions, employees over 45 years old no longer have to be registered unemployed for at least twelve months in the eighteen months before they are hired on the new type of contract.

(iii) Tax breaks for moving employees on training or apprenticeship contracts on to permanent contracts also apply to the training contracts signed before Royal Decree-Law 10/2011, of 26 August 2011, came into force and that are changed into permanent contracts on or after 1 January 2012.

(iv) A 50% deduction is available for eighteen months after registration for family members registered as "collaborators" by the self-employed.

(v) Private undertakings in the tourism, hospitality and related industries that take on seasonal workers between March and November each year and keep staff on fixed-term contracts in continuous service for that period are eligible for deductions. The applicable deductions in those months are 50% of the Social Security contributions paid by employers on

employees' earnings and on taxable benefits provided to those employees (unemployment benefits, Salary Guarantee Fund and professional training).

(vi) The system of deductions on contributions and restored entitlement to unemployment benefits is extended for cases of temporary lay-offs and short time working from 1 January 2012 to 31 December 2012 and redundancies between 12 February 2012 and 31 December 2013.

(vii) A number of measures are introduced aimed at helping victims of terrorism or domestic violence to find jobs.

4 Making workers more employable

The Act is an improvement on the Royal Decree on employability:

(i) The annually accrued twenty hours of paid professional training will relate to the company's business (previously it was linked to specific jobs) and can be accumulated for up to five years.

(ii) Employees' entitlement to the paid training is satisfied when professional training is made available to them as part of a training programme developed at the employer's initiative or agreed collectively.

(iii) The paid training to which employees are entitled cannot include compulsory training that companies have to provide under other legislation (occupational health and safety regulations, for example).

(iv) The paid training time will be taken according to collective agreements or, by default, by mutual agreement between employer and employee.

(v) The training available must include all the officially recognised professional training listed in the National Catalogue of Professional Qualifications (CNCP) and the Spanish Framework of Qualifications for Higher Education. Courses are recorded in training accounts linked to employees' social security numbers and the corresponding entries are made by the Spanish employment service.

The rules on training and apprenticeship contracts are changed as follows:

(i) Training and apprenticeship contracts of less than the collectively agreed or legal maximum duration can be extended at least twice by the parties' agreement. Each extension must be for less than six months and the total contract duration cannot exceed three years.

(ii) Spanish regional government employment services are given responsibility for various aspects of training and apprenticeship contracts. These include keeping records of specialised training and the contents of company-created training courses and authorising training centres.

Finally, under the new Act temporary employment agencies are required to obtain authorisation as official job centres and recruitment agencies, rather than simply submit declarations of compliance as provided by the Royal Decree.

5 Forced retirement in collective agreements

The Act brings yet another twist in the saga of forced retirement in Spain. On 1 July 2005, employment legislation was amended to bring back the possibility of mandatory retirement ages in collective bargaining agreements, subject to certain requirements. Now, such clauses are illegal once more.

The Workers' Statute (tenth additional provision) now says that collective agreements which make it possible for employers to terminate contracts when employees reach the statutory retirement age are void, irrespective of how extensive and far-reaching the clauses. This rule applies to collective agreements made after the new Act comes in.

The Act contains transitional provisions for collective agreements signed before it comes into force. For collective agreements expiring after the Act goes on the books, the new Workers' Statute kicks in on their original end date. However, for agreements expiring before the Act, the new rule applies from the date the Act comes in.

6 Forthcoming executive and legislative actions from the Government

Following the Act, the Government is bound by a number of short and medium term obligations that make further reforms and legislative changes likely in the coming months. The Government will:

(i) Launch a bill on the employment of disabled persons, within twelve months after the Act takes effect.

(ii) Before 1 January 2014, approve plans to update the regulations for job placement organisations.

(iii) Within three months, following public consultation, draft changes to the rules applicable to mutual insurance companies, for more efficient management of sick leave.

(iv) Within three months, in response to publication of the report by the Spanish parliamentary subcommittee on changes to working hours and the consequent improvement in work-life balance and shared responsibility, take measures to promote shorter working hours and work-life balance, after consulting the major business associations and unions.

(v) Publish an assessment of the Royal Decree after its first anniversary.

(vi) Report to parliament on the new "Family Home Service" regulation and possible improvements, including simpler administrative processes and larger relief on social security contributions.

(vii) Report annually on the expenditure and results of current policies.

Contacts

For further information please contact:

Naiara Rodríguez-Escudero
Counsel

(+34) 913996136

naiara_rodriguez.escudero@linklaters.com

Belén Lavandera
Associate

(+34) 913996022

belen.lavandera

@linklaters.com

Authors: Naiara Rodríguez-Escudero, Belén Lavandera

Linklaters, S.L.P.

Calle Zurbarán, 28

E-28010 Madrid

Teléfono (+34) 91399 60 00
Fax (+34) 91399 60 01

Linklaters.com