Villanueva 13, 1º
MADRID 28001 España
Tel. 91 702 26 52
Fax. 91 308 34 14

www.aefabogados.com

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Employment Law Department

THE NATIONAL COURT OF SPAIN RULES ON RECORDED WORKING TIME

The National Court of Spain ("AN" – *Audiencia Nacional*) has issued a further ruling on the sensitive issue of Recorded Working Time, on the basis of a recent **judgment of 10 December, 2019**. In this regard, we would remind the reader that the same Companies Division at the National Court of Spain had earlier considered the pre-judicial issue decided by the European Court of Justice (ECJ) May 2019 (see commentary in **AJ June 2019**) and also, thereafter, in view of the judgment issued on 29 October 2019 in the *Zurich case*, in which the AN ruled that the recorded extra half-hour of working time added to the working day was lawful.

That being so, on this particular occasion and based on **Judgment No. 144/2019** (or the *Galp case*) the AN dismissed a petition brought as a '*conflicto colectivo*' or grievance procedure on the basis that certain company decisions on **implementing the working time do not amount to a Substantial Amendment to Working Conditions ("MSCT" - Modificación Sustancial de las Condiciones de Trabajo) as prior terms and conditions were not changed**. The decisions analysed by the National Court specifically comprised:

- Travel: when an employee is required to travel as part of the job description the time spent travelling does not count as extending the working day but is taken into account as part of the working day calculations, rather than as additional time.
- Overtime hours: only time worked with prior authorisation from the direct hierarchical superior counts as overtime, deemed to be the manner in which a company consents to overtime arrangements.
- Time spent having a cigarette or coffee: this aspect of the Judgment has been the most widely reported in the media: the issue as to whether time taken to smoke, grab a coffee or have breakfast should be taken into consideration as working time. In the case in question, the **AN ruled that, on the basis of a policy referred to as "company confidence" policy, it was normal practice for Galp employees to step out for a cigarette or coffee and this had been tolerated by the company. Nevertheless, there was no basis to argue in any event that this consideration might be deemed a more beneficial condition or acquired right. Therefore, the AN ruled that the new timeclock calculations according to which from now on the company would be discounting the effective breaks from time worked was valid, as this was not a Substantial Amendment to Working Conditions**.

All in all, this Firm believes it necessary to look beyond the specific case and the recommendation to turn to self-regulation. It has now become increasingly **urgent,** to consider previous case rulings and see which ideas for company measures can be deemed valid for establishing internal protocols and to distinguish what does and what does not comprise effective time worked, **to bring in a Regulation to implement Article 34.9 Workers Statute in the sense of regulating the main guidelines companies must follow, for the sake of *en pro* and *en pos* judicial certainty.**