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Labour Law Department

REFORMING THE EMPLOYMENT RELATIONSHIP, AS A GUARANTEE OF EMPLOYMENT STABILITY AND TRANSFORMING THE EMPLOYMENT MARKET

On 30 December 2021, [Royal Decree-Law 32/2021, of 28 December, on urgent measures for reforming the employment relationship, guaranteeing stability in employment and the transformation of the employment market](#) ("RD-L 32/21"), in order to reform certain provisions of the Statute of Workers' Rights (hereinafter, "**SoWR**"), was published in the Official State Gazette. With a few exceptions, it came into force on 31 December 2021.

The Government, the Employers' Association and the trade union organisations reached an agreement on reforming employment. In particular, we could say that the Reform has focused on three main issues, which are, essentially, the following: (i) transforming the temporary employment contract regime; (ii) "balancing the forces" in collective bargaining and (iii) reinforcing tools for flexibility and creating a RED mechanism (such as a new Temporary Employment Regulation File or "*Structural ERTE*"). In addition to these main agreed measures, there were others, which we summarise below.

I. TRANSFORMING THE TEMPORARY EMPLOYMENT CONTRACT REGIME

Companies will have three months to adapt to the regulations regarding hiring using temporary contracts, and six months in the case of work and service contracts. However, RD-L 32/21 staggers the coming into force of these rules, providing for different specific cases. The main changes are as follows:

- o It is established that there will be a general presumption that employment contracts will be agreed for indefinite periods.
- o Work and service contracts will be gradually repealed.
- o There is an obligation to specify precisely in the contract the following: (i) the reason enabling the temporary contract; (ii) the specific circumstances justifying it and, (iii) the connection of those reasons with the expected duration.

Likewise, the forms of temporary contract known to date are eliminated and replaced with two new types:

(i) Temporary contracts **due to production circumstances:**

- **Unpredictable**: In cases where there is an occasional and unforeseeable increase (including circumstances arising from annual leave) which, during the course of normal business activity, creates a temporary mismatch between the stable employment available and that required.

However, the framework of this contract will not include cases aimed at entering into a discontinuous fixed contract.

The duration of this contract may not exceed six months, extendable up to one year by sectoral collective agreement.

- **Predictable:** For cases in which occasional, foreseeable, situations which have a reduced and limited duration must be addressed (performing work within the framework of contracts, outsourcing or administrative concessions constituting the company's usual activity, is not included).

The duration of this contract may be no longer than ninety days in the calendar year, regardless of the number of workers necessary to attend to the specific situations on each of these days. The ninety days may not be used continuously.

It will be mandatory to communicate to workers' legal representatives at the end of each year the forecasts for the following year regarding the use of this contract.

(ii) Temporary contracts **for replacing workers**, which may be used:

- For replacing a worker who has the right for his/her job to be kept open.
- To complete the reduced working day of another worker.
- For temporarily covering a job during the selection or promotion process whereby it will be definitively covered.

On the other hand, it will be mandatory to state the circumstances whereby people acquire the status of fixed-term workers in the following cases:

- (i) Workers hired on a temporary basis in breach of the provisions of the Statute of Workers' Rights.
- (ii) Workers who have not been registered with the Social Security Department once a period equal to that of the trial period has elapsed.
- (iii) Those who, due to production circumstances, in a twenty-four-month period would have been engaged for a period of more than eighteen months under two or more contracts, with or without continuity, for the same or a different job with the same company or group of companies, either directly or through a temporary employment agency.

II. PRECEDENCE, PREVALENCE AND OUTSOURCING IN MATTERS OF COLLECTIVE AGREEMENTS

- **The precedence of company agreements over those taken at a higher level, with the exception of provisions regarding the amount of the basic wage and wage supplements**, is retained, including those linked to the company's situation and profits, where agreements taken at a higher level will prevail.

However, it should be noted that it has already been anticipated that no agreement can be affected during its period of validity by another taken at a different level. RD-L 32/21 will therefore only affect those companies which, lacking their own company agreement, use the sectorial agreement and wish to negotiate a new company agreement. This new company agreement may not set lower remuneration conditions.

- The **unlimited prevalence of collective agreements has been brought back**. Therefore, one year following an agreement being denounced without a new agreement having been reached, the parties must submit to the regulated mediation procedures or, provided there is an express, prior, or contemporaneous agreement, to the arbitration procedures agreed and, in the absence of a final solution, where the negotiation process has elapsed without an agreement being reached, the original agreement will remain in force.
- The specification that the **collective agreement applicable to the companies of contractors and outsourcers will be that of the sector for the activity carried out in the contract or outsourcing agreement** has been incorporated. When the contracting or outsourcing company has its own agreement, this will be applicable (following the rules of concurrence of art. 84 SoWR).

III. STRENGTHENING FLEXIBILITY TOOLS AND SETTING UP THE NETWORK MECHANISM

(i) ETOPE RTE

The possibility of temporarily reducing workers' working time or temporarily suspending employment contracts for economic, technical, organisational or production reasons is retained. The changes introduced by the Reform regarding this well-known form of ERTE is aimed at easing its processing and flexibility, reducing the minimum consultation period.

(ii) ERTE due to temporary force majeure

The temporary reduction of working hours or the suspension of contracts due to temporary force majeure (an outside, extraordinary event, independent of the will of the employer), is developed, and certain requirements in relation to those in force to date have been amended, albeit upholding a flexible procedure in line with that applied during the pandemic.

(iii) ERTE due to an impediment or limitation

This is an ERTE due to temporary force majeure determined by impediments or limitations placed on the company's ordinary or normal activity as a result of a decision taken by an authority with jurisdiction. The procedure provided for the ERTE due to temporary force majeure will be applied to these, except for certain requirements.

Some common rules are established regarding these current ERTes [AJ September 2021]. During the period of application of the redundancy plan, (a) the company may apply and disapply it to workers based on a change in those circumstances indicated as a reason justifying the measures and, (b), overtime may not be worked, nor may new procedures for outsourcing the activity be undertaken, or new employment contracts arranged.

(iv) "Structural ERTE" or RED Mechanism

Through a novel and, for the moment, somewhat complicated, RED mechanism, companies will be allowed to request reductions in working time and/or the suspension of the workers' contracts (as with a "structural ERTE"). The Mechanism will be activated by the Council of Ministers and, subsequently, companies may apply to the aforementioned Council to avail themselves of the reduction or suspension, with the aim of avoiding contractual terminations, under two headings:

- (i) **Cyclical:** When there is a general macroeconomic situation that means adopting additional stabilisation tools is advisable, with a maximum duration of one year.
- (ii) **Sectoral:** When in a certain activity sector or sectors there are permanent changes giving rise to the requirement for requalification and professional transition processes for workers, with a maximum initial duration of one year, and the possibility of two six-month extensions.

IV. OTHER RELEVANT CHANGES

- o **Disappearance of the internship contract and reform of training contracts**, there will be a distinction between alternating training contracts and those directed at obtaining professional practice experience.
- o **Promoting discontinuous fixed term contracts**, by broadening their purpose and better defining their formal requirements.
- o Reforming the General Social Security Law **penalising short-term contracts in terms of contributions**.
- o Increasing the amounts of **penalties imposed in cases of employment contract fraud** and treating each contract individually, setting an infringement for each of the workers affected.
- o Defining **new infringements for monitoring during ERTes** to comply with the prohibition on contracting and outsourcing.