

July 2023
Labour Law Department

Employment law news. Royal Decree-Law 5/2023, of 28 June

[Royal Decree-Law 5/2023](#) of 28 June, which adopts and extends certain measures in response to the economic and social consequences of the war in Ukraine, supports the reconstruction of the island of La Palma and other situations of vulnerability, transposing European Union directives on structural changes to commercial companies and the work-life balance for parents and carers, and implementing and enforcing European Union law, has been published.

The main employment measures agreed are outlined below:

I. EXTENDING THE CIRCUMSTANCES EXPRESSLY RECOGNISED IN LAW WHEREBY WORKERS CANNOT BE DISCRIMINATED AGAINST

The Royal Decree-Law introduces an amendment to section c) of article 4.2 of the Workers' Statute by expanding those circumstances based on which it is not expressly prohibited to discriminate against workers, including cases of "disability" and *"the unfavourable treatment given to women or men for exercising rights based on the work-life balance or co-responsibility between family and working life."*

II. NEW REGULATION OF SECTION 8 OF ARTICLE 34 OF THE WORKERS' STATUTE

The regulation approved has amended significant aspects of this precept, with regard to the possibility of adapting the working day, such changes being the following:

- In those cases in which the collective agreement does not have a specific regime for exercising the right to adjustments of working hours for workers, the negotiation period between company and worker where a request for an adjustment of working hours has been made **has been lowered from 30 to 15 days**.
- The rule establishes two important provisions at the procedural level, since, if the company does not expressly oppose the request made by the worker, **the rule enshrines the presumption that adjustments to the working day requested by the worker have been granted** and, on the other hand, it states that **any refusal or a proposal for alternative adjustments to working time must be accompanied by**

an objective justification on which that decision is based.

- In the case of adjustments to the working day of workers with children, any adjustments regulated by the abovementioned precept can be enjoyed until the latter reach the age of twelve.
- After that age, the possibility of requesting an adjustment to working time is extended in cases where workers have care duties for any children over the age of 12, a spouse or unmarried partner, blood relatives of the worker up to the second degree, as well as regarding other dependents where, in the latter case, they live at the same address and where, for reasons based on age, accident or illness, they cannot fend for themselves. In all these cases the rule provides for the requirement to justify the circumstances on which a request is based.
- Finally, the return of the worker to his previous terms and conditions has been significantly specified since, under the new regulation, the worker has the right to return to his previous situation once the agreed or planned period ends or when the causes giving rise to the request have lapsed. In all other cases, the worker's application may only be refused when there are objective reasons for doing so.

III. NEW TERMS REGARDING PAID LEAVE

The new regulation has made changes to article 37 of the Workers' Statute, where clarifications and amendments of varying import have been made:

- As a general rule, unmarried couples have been expressly included on equal terms with marriage-related leave, which implies that in the case of the 15-day marriage leave, it has been extended to cases where *de facto* partnerships have been registered.
- Regarding leave for accidents and deaths, the regulations have been split up, and the following regime for each case established:
 - In the first place, with regard to leave for serious accidents or illness, hospitalisation or surgical intervention without hospitalisation requiring home rest for the spouse, unmarried partner or relatives by blood or affinity up to the second degree, including any blood relatives of the *de facto* couple, as well as any other person other than the above, who lives with the worker at the same home address and requires the effective care of the former, the duration of the leave has gone from two working days (where displacement is not required) or four working days (in cases where it is) in all cases to five working days.

- Secondly, leave for death retains the same duration (two days if this placement is not required and four if it is), but the cases in which it is appropriate, in line with what has already been mentioned, cover both those of the spouse, as well as those of the *de facto* partner or relatives up to the second degree of consanguinity or affinity.
- Regarding leave for breastfeeding (article 37.4 of the Workers' Statute), the possibility of the company limiting the simultaneous exercise of the latter in cases where two individuals in the same company are exercising this right regarding this issue has been specified.

In these cases, it is specified that the company's reasons for limiting the right must be *"well-founded and objective."* They must be *"duly substantiated in writing"* and in these cases both persons must be offered *"an alternative plan that ensures both workers can enjoy the leave, and which enables them both to exercise their work-life balance rights."*

- Regarding the reduction in working time for legal guardianship referred to in article 37.6 of the Workers' Statute, it is specified that any worker who is responsible for the direct care of their spouse, unmarried partner, or a relative up to the second degree of consanguinity and affinity, including the blood relatives of the *de facto* partner, who, for reasons of age, accident or illness, are unable to fend for themselves, and who are not gainfully employed, is also entitled to it.

This is likewise in the case of article 37.4, regarding the limitations that the company may impose for exercising this right in cases where two persons in the same company may have the same right due to care duties for the same person, these must be based on *"well-founded and objective"* operational reasons that should be *"duly substantiated in writing"* and, in these cases, both persons must be offered *"an alternative plan that ensures both workers can enjoy said leave and which enables them both to exercise their work-life balance rights."*

In this case, moreover, it is specified that *"when exercising this right account will be taken of encouraging co-responsibility between women and men and, likewise, preventing the perpetuation of gender roles and stereotypes."*

- With regard to article 37, a new paragraph 9 has finally been added to it regulating a new worker's right to leave due to force majeure that is defined as leave that is necessary for urgent family reasons related to relatives or cohabitants, in case of illness or accident making their immediate presence indispensable.

This paid leave is extended during the hours of absence for the

abovementioned reasons equivalent to four days a year, in accordance with what is indicated in the collective agreement or agreement between the company and Workers' Legal Representatives.

IV. NEW DEVELOPMENTS REGARDING VOLUNTARY LEAVE

The regulation of leave for caring for children or relatives (article 46.3 of the Workers' Statute) has also been affected by the new regulation.

The main new developments are as follows:

- Amendments have been made to include unmarried couples and their blood relatives as possible subjects for whom requesting this leave can be justified.
- As has been said regarding sections 4 and 6 of article 37 of the Workers' Statute, about the limitations that the company may impose on exercising this right in cases where two persons of the same company may have the same right due to care duties for the same person, these must be based on *"well-founded and objective"* operational reasons that should be *"duly substantiated in writing"* and, in these cases, both persons must be offered *"an alternative plan that ensures both workers can enjoy the leave and which enables them both to exercise their work-life balance rights."*

In this case, moreover, it has also been specified that *"when exercising this right, account will be taken of encouraging co-responsibility between women and men and, likewise, preventing the perpetuation of gender roles and stereotypes."*

- Finally, regarding extensions to the duration of the suspension of the employment contract in the event of birth, adoption, guardianship leading to adoption as well as for the purpose of multiple foster care or in cases of disability affecting the worker's children, it has been specified that they will be equally enjoyed by the parent, even if there is only one, on the same terms as if there were two parents.

V. PARENTAL LEAVE

A new form of parental leave (article 48.bis) has been created with the following characteristics:

- Its purpose is to care for children, and minors fostered for more than one year, until they reach the age of eight years old.
- Its maximum duration is eight weeks, which can be enjoyed continuously or discontinuously, full or part-time; it is expected that this regime will be further developed in relevant regulations.

- Parental leave is non-transferable.
- It is up to the beneficiary to indicate the start date and the end date or, where appropriate, the periods of enjoyment, which must be communicated by giving ten days' notice (or the notice that the applicable collective agreement indicates, where appropriate), except in cases of force majeure, taking into account the worker's situation and the company's organisational needs.
- Where two workers have the same right arising from the same causal event in the same company, or in other cases that may be defined by a collective agreement, and where the enjoyment of this leave "*seriously alters*" the smooth operation of the undertaking, the undertaking may "*postpone*" linking said leave for "*a reasonable period*", duly substantiating it in writing and after having offered an alternative way in which to enjoy said leave which is "*just as flexible.*"
- In cases where this full-time leave is being enjoyed, any compensation that must be calculated in accordance with the provisions of the Workers' Statute, must be made as if the worker were providing full-time services.

VI. TRANSITIONAL ARRANGEMENTS

The regulation provides for a transitional regime for adjusting working time (article 34.8 of the Workers' Statute), for granting leave, and leave of absence whose regulation has been amended (articles 37 and 46 of the same law).

Regarding the former, those that were already being enjoyed by workers remain in force, but they can benefit from the terms provided for in the new regulation since its entry into force. This is true particularly regarding the obligation to return on the same terms and conditions prior to the adjustment, where the agreed or planned period has elapsed, or where the causes giving rise to the request and the need for duly substantiated reasons to be able to deny the workers request in the remaining cases, lapse.

As for granted leave and leave of absence, those that are currently being enjoyed will continue to be subject to the regulations prior to the publication of Royal Decree Law 5/2023, that is, the regulations in force at the beginning of the leave.

As a rule of thumb in closing, we would point out that enjoying these forms of leave or leave of absence will not prejudice the enjoyment of the new parental leave regulated by article 48.bis of the Workers' Statute, which may be enjoyed at the end of the latter.

VII. EXTENDING THE CASE FOR OBJECTIVE NULLITY OF DISMISSAL AND THOSE DUE TO CONTRACTUAL TERMINATION FOR OBJECTIVE REASONS

The new regulation has amended articles 53.4 and 55.5 of the Workers' Statute to cover cases of: (i) parental leave; (ii) leave due to serious accident

or illness, hospitalisation or surgical intervention without hospitalisation that requires home rest of the spouse, unmarried partner or second degree relatives by blood or affinity, including blood relatives of the unmarried partner, as well as any other person other than the former, who lives with the worker at the same address and who requires the effective care from the worker; or those who (iii) have requested or are already enjoying the working time adjustments provided for in article 34.8 of the Workers' Statute, in cases in which the objective nullity of the dismissals or contractual terminations for objective reasons, unless the causes of such contractual terminations are declared appropriate for reasons unrelated to the above.

The rule has simplified the reference to these cases that was contained in Law 36/2011, of 10 October, Regulating Labour Law.
