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Labor and
Employment

INFORMATIVE NOTE ON ROYAL DECREE-LAW 28/2020, RELATING TO REMOTE WORKING

SUMMARY

After the approval by the Council of Ministers of the agreement reached between the Government, Trade Unions and companies, the Royal-Decree Law 28/2020 on remote working was published on September 23, 2020, in the Official State Gazette, with the aim of regulating a new reality imposed by the COVID-19 pandemic which has changed the daily life of companies and employees.

Although remote working was already ruled in article 13 of the Labour Statute, this regulation has been insufficient because it does not rule the particularities derived from the provision of services undertaken outside of the premises of the company and to the usual use of technological means of communication.

This informative note will show the main changes included in Royal Decree-Law 28/2020.

I. CONCEPT OF REMOTE WORK

The term remote work is understood as the form of organizing work or the form of developing the activity in which the employee mainly renders his/her services in the place of his/her residence or in the place freely chosen by him/her, either during the whole working day or a part of it. On this sense, it is considered that the employee usually works on remote working when he/she renders the services from his/her own residence or in a place freely chosen by the employee during at least the 30% of the working hours or the equivalent proportional percentage according to the duration of the employment contract, in a reference period of 3 months.

However, the regulations distinguish between the concepts of “teleworking/telecommuting” and “remote working”. This second concept is a specific type of telework carried out entirely using information and telecommunication systems.

II. VOLUNTARY REMOTE WORK

Remote work is totally voluntary for the company and the employee, since it is essential to sign an agreement on remote working for its implementation, either at the beginning of the employment relationship or in a later date. Additionally, remote work is also reversible for both parties. The conditions of the reversibility of remote work should be agreed in the applicable Collective Bargaining Agreement or in the individual remote working agreement.

Nonetheless, as an exception, the will of the Company will not be considered when the employee requests telework for the reasons prevented in article 38.4 of the Labour Statute. In this case, the company will only be able to reject telework when justified objective reasons concur.

Given its voluntary nature, remote working cannot be imposed to the employee through a proceeding of substantial modification of the working conditions. Additionally, the refusal of the employee to work remotely or his/her decision to reverse remote work

to on-site work do not constitute a fair reason to proceed to the dismissal of the employee or to proceed to apply a modification of the employment conditions of the employee.

It is important to say that the Royal Decree-Law does not establish which types of work or job positions can be developed through remote work, leaving complete freedom to companies and employees to determine this.

III. LIMITATIONS OF REMOTE WORK

Underage employees and employees hired under internship contracts or training and apprenticeship contracts will be only able to sign a remote working agreement when at least the 50% of the services are provided on-site. It will not be considered the telematic development of the theoretical training linked to these employment contracts for calculating this percentage.

The provisions contained in the current Royal Decree-Law on remote work will not be applied to employees rendering services for the Public Administration, which will be governed by its specific regulations.

IV. FORMALISATION OF THE REMOTE WORKING AGREEMENT

The remote working agreement should be formalised in writing. This agreement can be included in the initial employment contract or can be added at a later date before beginning remote work.

On this sense, the said remote working agreement should be formalised within the period of three months after the Royal Decree-Law is applicable to the specific employment relationship. During the same period, it will be necessary to apply the necessary modifications to adapt individual remote working agreements in force to the new Royal Decree-law.

In the same manner, the company should deliver the representatives of the employees a copy of all remote working agreements that are made and their updates, omitting any information that could infringe personal privacy. The company should deliver these copies within 10 days to the representatives of the employees who will sign them in order to confirm their reception.

Afterwards, this copy will be sent to the Public Unemployment Service. When there does not exist representatives of the employees, a copy of the agreement should be as well sent to the Unemployment Service.

Article 7 of Royal Decree-Law 28/2020 establishes the minimum content that should be included in remote working agreements, without prejudice of the regulations prevented on this sense in Collective Bargaining Agreements or collective agreements. This minimum content is the following:

- a) Inventory of equipment and tools that are required to carry out the agreed remote work, including consumables and pieces of furniture, as well as the lifespan and maximum time period for their renewal.
- b) List of expenses that the employee could have due to providing services remotely, as well as the way of quantifying the compensation that the company is obligated to pay and how and when this will be done, which will correspond, if it exists, to the provisions stipulated in the applicable Collective Bargaining Agreement of collective agreement.
- c) Schedule of the working hours and the determination of the availability of the employee.
- d) Percentage and distribution of on-site and remote work, where necessary.

- e) Work centre in which the remote employee is assigned to and where, when applicable, he/she will spend the part of the workday on site.
- f) Place chosen by the employee where he/she will undertake remote working.
- g) Notice period to reverse the situation, when applicable.
- h) Measures of surveillance of the activity.
- i) Procedures to be followed in cases where technical difficulties arise that impede the normal undertaking of remote work.
- j) Instructions set by the company, with the participation of the representatives of the employees, relating to data protection, specifically applicable to remote working.
- k) Instructions set by the company, previously informing the representatives of the employees, on information security, specifically applicable to remote working.
- l) Duration of the remote working agreement

V. MODIFICATION OF THE REMOTE WORKING AGREEMENT

Any modification of the established conditions in the remote working agreement, including the percentage of on-site presence, should be agreed upon by the company and the employee, and must be formalised in writing before being applied and also delivered to the representatives of the employees.

VI. RIGHTS AND RESPONSIBILITIES

The Royal Decree-Law guarantees that those people who provide services remotely will have the same rights as those who provide services on-site at the work centre, so that they may not suffer prejudice relating to training and professional promotion. They will have the right to a flexible timetable under the terms established in the remote working agreement and they will have the right to correctly register their working hours. However, the regulation prevents the following rights:

- a) The right to sufficient resources and maintenance of equipment and tools: the company must provide the employee with all the necessary means for the development of his/her activity, in accordance with the inventory contained in the remote working agreement and under the established terms, where applicable, in the Collective Bargaining Agreement or collective agreement. Similarly, the company must guarantee essential services in case of technical difficulties, especially in remote working cases.
- b) The right to payment and compensation for expenses: The remote work must not suppose the assumption of costs by the employee related to equipment, tools and associated supplies linked to carrying out the employment activity.

However, the regulations do not detail which costs the employee should be compensated for, as could be the cost of the internet connection or mobile phone line. Therefore, it is necessary to determine the costs assumed by the Company in the remote working agreement or, where applicable, in the Collective Bargaining Agreement.

- c) The right to protection regarding Health and Safety at Work: Those persons who work remotely will have the right to adequate protection regarding health and safety at work. Thus, the risk assessment and planning of preventive activities for remote working should take into account the specific characteristic risks of this type of work, highlighting the psychosocial, ergonomic and organisational risks, in addition to specifically considering the distribution of the work day, times of availability and the guarantee of resting periods and disconnection throughout the day.

Similarly, the risk assessment should only reach the area authorised for lending services, not extending to the other areas in the chosen place for remote working.

To that effect, the company must obtain all the information about the risks to which the person working remotely could be exposed, as well as to anticipate all protection measures that are most appropriate in each case. However, when it is necessary to visit the place chosen for remote working for determining the risks and the measures, it will be necessary to prepare a written report justifying this necessity, which will be delivered to the employee and the delegates of health and safety.

Said visit will require, in any case, the permission of the employee if the place where he/she has chosen to work remotely is his/her residence or the one of a third individual. In case this permission is denied by the employee, the preventive activity carried out by the company can be undertaken based on the determination of risks that derive from information collected from the employee according to the instructions of the prevention service.

- d) The right to privacy and data protection: The right to privacy and personal data protection is guaranteed in the use of telematic media and the control of employment performance through automatic devices, without the company being able to demand the installation of programmes or applications on private devices belonging to the remote working employee or the use of those same devices to carry out their work.

Consequently, given that those who work remotely must make use of computing devices provided by the company, the company must adopt, with the intervention of the representatives of the employees, certain criteria for using digital devices, respecting the privacy of the users. Likewise, Collective Bargaining Agreements or collective agreements can specify the terms in which the employees can use the devices provided by the company for personal use.

- e) The right to digital disconnection: Outside working hours, remote workers -especially those under a telework regime-, have the right to digital disconnection. Thus, the right of the company to guarantee digital disconnection implies a limitation of the use of technological resources in resting periods, as well as respecting the maximum duration of the workday.

Similarly, the company must, following an audience with the representatives of the employees, apply an internal policy applicable to employees -including management- in which it is defined the modalities of the exercise of the right to disconnect and the training and awareness activities for staff on the reasonable use of technological resources.

The Collective Bargaining Agreement or collective agreements can establish the appropriate means and measures to guarantee an effective practice of the right to disconnect in remote working and the appropriate organisation of the workday in a way that is compatible with the guarantee of resting periods.

- f) The responsibilities of employees: The employees carrying out remote work must obey the instructions relating to data protection, information security and maintenance of the equipment or tools that the company indicates.
- g) Corporate control of remote working: The company can adopt surveillance and control measures that they deem convenient, including the use of telematic means, in order to verify the employee's compliance with this/her employment duties, respecting his/her dignity and taking into account, where necessary, the real capacity of employees with disabilities.
- h) The workday registry obligation: Companies must ensure that their employees fulfil their duty of registering their workday on daily basis through the means that the company has provided.

VII. EXTENSION OF THE 'MECUIDA' PLAN

The validity of the 'Mecuida' Plan is extended until January 31, 2021, from article 6 of Royal Decree-Law 8/2020, under which employees have the right to the adaptation and/or reduction of the workday when they confirm the duty of caring for another individual corresponding to a spouse or civil partner or relatives up to the second degree of kinship and exceptional circumstances occur related to the necessary intervention to avoid communal transmission of COVID-19.

VIII. REMOTE WORKING DERIVED FROM COVID-19

Despite not being explicitly mentioned in the regulations and bearing in mind that article 5 of Royal Decree-Law 8/2020 would have lost its validity (having been extended by Royal Decree-Law 15/2020 for two months, once a month has passed from the date of completion of the State of Alarm), remote working would have lost its preferential nature, therefore companies can request the reinstatement of employees, due to the fact that the employee cannot allege and demonstrate a personal situation that prevents it, but always applying the security measures and social distancing necessary to avoid possible infections.

Consequently, in the event that no special situation arises, those employees who wish to continue working remotely should sign an agreement to this effect with the company, without it being understood that this is unnecessary as it constitutes the provision of services remotely as the most beneficial condition, as it was not a unilateral and voluntary concession of the company, but a way to maintain business activity in the framework of an exceptional, inevitable and unforeseen situation.

Thereupon, the Royal Decree-Law determines that the ordinary employment regulation for remote working will continue to apply, exceptionally implemented in application of article 5 of Royal Decree-Law 8/2020, or as a consequence of the health containment measures derived from COVID-19, and as long as they remain.

IX. ENTRY INTO FORCE

The Royal Decree-Law will come into force 20 days after its publication in the Official State Gazette, except for the modifications contained within regarding those situations considered exceptional, equivalent to an accident at work from the lockdown periods, contagion or restriction of movement from the area, wherein lies the residence or work place of employees, as a result of COVID-19, provided for in Royal Decree-Law 6/2020, and to the minimum income regulated in Royal Decree-Law 20/2020, in which cases the Royal Decree-Law comes into force the same day of its publication in the Official State Gazette.

X. OTHER MEASURES INCLUDED IN THE LEGISLATION

- a) Consideration as a professional contingency derived from a work accident for diseases contracted from the contagion of COVID-19 throughout the validity of the State of Alarm: Illnesses suffered by employees who have provided services in health or social-health care centres as a result of COVID-19 contagion during the State of Alarm will be considered professional contingency derived from an accident at work.
- b) Penalty System: Not formalising the remote working agreement under the required terms and with the necessary and conventionally provided legal requirements is considered serious misconduct.
- c) The rights of victims of terrorism or gender violence: They will have the right to carry out the totality or part of their work remotely or to stop doing so if this were the established system in order to ensure their protection, provided that this modality of the provision of services is compatible with the position and the functions to be undertaken.

Note: The content of the present document may be affected or modified due to future decisions made by the authorities and competent bodies relating to this subject.

DO YOU HAVE ANY QUESTIONS?

At DWF-RCD we work to offer a response to any questions you may have arising from the current situation. If you have any doubts, do not hesitate to get in touch with us.

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