

SPAIN. NEW LEGISLATION ON REMOTE WORKING

In the exceptional context of the current pandemic, which has triggered a widespread generalisation of remote working in those sectors and activities in which it is possible, new legislation has been adopted, in the form of Royal Decree-Law 28/2020 of 22 September (the "**RDL**"), which replaces and expands the scant regulation existing on this area contained in article 13 of the Workers' Statute ("**ET**").

The most immediate legal precedent is RDL 8/2020 of 17 March ("**RDL 8/2020**"), exceptional legislation adopted in the State of Emergency, article 5 of which established the preferential nature of remote working with a view to ensuring the continuity of business activity in the context of the healthcare crisis, by virtue of which companies were to establish systems of organisation, particularly in the form of remote working, if technically possible, and as an alternative and priority organisational mechanism as opposed to the suspension or reduction of activity.

RDL 15/2020 of 21 April extended the validity of this exceptional measure for three months after the end of the State of Emergency (until 21 September 2020), and finally RDL 21/2020 of 9 June established a series of measures to be applied in the context of what was termed the New Normality following the State of Emergency, which included the duty of employers to "*adopt measures for the progressive return to on-site working and promote the use of teleworking when possible by virtue of the nature of the labour activity*".

With these precedents, the RDL establishes a stable legal framework for the development of remote working under normal conditions, although the regime is not applicable to remote work currently being carried out on an exceptional basis pursuant to article 5 RDL 8/2020 or as a result of the healthcare crisis.

Key aspects

- New regulations on Remote Working: it will be voluntary and reversible. Employers will assume costs potentially incurred by the employee.
- Remote work currently being performed as a measure of healthcare containment is not subject to the new regulations and the reimbursement of expenses will depend on collective bargaining.
- The new remote working regime requires prior written agreement, with a minimum content and with a copy being sent to the employees' representatives.
- The catalogue of rights of remote employees includes the right to flexible working times, digital disconnection and particular attention to the prevention of occupational hazards as well as professional training and promotion.

What follows is a summary of the most relevant aspects of the new legislation:

1. VALIDITY AND APPLICATION. NEW LEGAL REGIME.

The RDL enters into force 20 days following publication in the Official State Gazette (BOE)(23 September), although Transitional Provision 3 stipulates that "ordinary labour regulations", (understood as the regulations prior to the RDL) will continue to apply to remote work implemented exceptionally under article 5 RDL 8/2020, "*or as a result of the health containment measures derived from COVID-19 and for as long as they continue to be applied*".

In these situations, it is established that employers will in any event provide the means, equipment and consumables required for working remotely and ensure the maintenance of the same. With regard to how expenses incurred by the employee are to be reimbursed, the RDL refers the question to what is agreed in the collective bargaining.

With regard to situations of remote working of an ordinary nature already regulated by collective agreements or arrangements, the RDL will apply when such collective bargaining agreements or arrangements lapse (or within a term of 1 year if no term of validity is established, extendable to 3 years if so agreed by the parties in such agreements or arrangements).

The Remote Working Agreement regulated in the RDL will have to be formalised within a term of 3 months as of when the RDL becomes applicable to a particular labour relationship and the same timeframe applies to adaptations imposed by the RDL on agreements already signed independently of collective agreements or other collective arrangements.

Finally, the validity of article 6 RDL 8/2020 (MECUIDA Plan) is extended until 31 January 2021. This plan contains a series of rights enabling the employee to adapt his/her working regime, including the change to remote working, for "care duties" related to the healthcare crisis.

2. DEFINITION AND BASIC PRINCIPLE

Remote working is defined for the purposes of the RDL as that performed "*at the employee's home or any other place he/she freely chooses*" (as already contemplated in the ET), involving all or part of his/her working schedule "*on a regular basis*". This regularity is defined as working remotely for a minimum percentage of 30% of the work schedule over a period of 3 months (the ET simply referred to work done "*predominantly*" on a remote basis). Thus, in practice, the new legislation would not apply when working remotely just one day a week, but would affect employees working remotely for a day and a half per week or more.

Teleworking is defined as remote working using IT, telematic and telecommunications means.

The principle of Equal Treatment and Non-Discrimination constitutes a basic principle of this contractual form. It is stated that those who work remotely cannot be negatively affected or have their labour conditions modified to their detriment.

If remote working is agreed in internship or training contracts, or in contracts with minors, at least 50% of working time will be on-site.

3. THE REMOTE WORKING AGREEMENT

Remote working will have to be established in writing before it is implemented, being voluntary for employers and employees. It cannot be imposed unilaterally by an employer by means of the procedure in article 41 ET on substantive modification of working conditions.

The decision to switch from on-site working to remote working will be reversible for the employer and the employee in the terms regulated in the collective bargaining or, failing that, in the agreement the parties sign for remote working.

A refusal by the employee to work remotely, difficulties in executing the work remotely or the exercise of the right to return to on-site work will not constitute grounds for terminating the labour relationship or substantively modifying working conditions.

The minimum content of remote working agreements is established. They must include the following:

- **An inventory** of means and equipment for performing the work, including consumables and furniture, and the useful life for replacement thereof.
- A list of **expenses** that the employee may incur due to working remotely and how the mandatory compensation by the employer is to be quantified and paid, in accordance with the provisions of the applicable collective bargaining agreement or arrangement.
- **A working schedule**, rules on availability and distribution of on-site and remote work.
- The work centre to which the employee is ascribed, **place of work** chosen by the employee and how the **employer monitors** the labour activity.
- The procedure for addressing potential **technical difficulties** that prevent the normal execution of remote working and **employer's instructions** regarding data protection and information security.
- **Notice period** for exercising the right to return to on-site work and **the duration** of the agreement, which can be indefinite or for a set period of time.

The employer must provide the employees' legal representatives with a basic copy of all remote working agreements signed, as well as any modifications to the same (in line with data protection regulations and excluding certain personal data according to article 8.4 ET) within 10 days. This copy will also be sent to the Employment Office.

4. MODIFICATIONS TO REMOTE WORKING

Any modification of the terms set out in the remote working agreement, including the percentage of on-site work, requires agreement by the parties, and must be formalised in writing before it is implemented.

Those working remotely for their entire working schedule since the start of their labour relationship will take precedence when it comes to filling positions vacant in the company. To that end, the company will inform those employees working remotely and their representatives of such positions vacant.

The criteria, mechanisms and preferences for switching from one form of working to the other can be established in the collective bargaining agreements or other collective arrangements.

5. RIGHTS OF REMOTE EMPLOYEES

Compensation of expenses and provision of resources and equipment required to work remotely

Employers must provide their employees with the resources, equipment and tools required to work remotely, based on the inventory included in the agreement signed between the parties and, as the case may be, pursuant to the terms established in the applicable collective agreement or arrangement. Additionally, employers must ensure the maintenance of these resources and provide technical assistance as required.

In addition, the employers will bear the cost of or compensate employees for expenses related to the equipment, tools and means involved in working remotely. The mechanism for determining and compensating or reimbursing such expenses may be established in the collective agreements or other collective arrangements.

Working hours and time recording

Employees working remotely are entitled to flexibility when implementing the agreed schedule for their provision of services, in accordance with the terms of the remote working agreement and collective bargaining, and also keeping with the obligatory periods of availability and the regulations on work and rest periods.

The time recording systems must accurately reflect hours worked notwithstanding any flexible working hours, including, inter alia, the time the workday starts and ends.

Training and professional development

Employers must ensure that remote employees participate in training offered in the same terms as the rest of on-site employees and, in particular, they must offer remote employees specific training for the adequate performance of their activities.

In addition, employers must inform remote employees in writing of any promotion options which arise, which would include both on-site and remote work posts.

Prevention of occupational risks

Remote employees are entitled to adequate protection with respect to health and safety at work in the same terms as those applicable to on-site employees. Employers must take into account, in particular, the remote working risks deriving from, for example, ergonomics, psycho-social and organisational factors, and must collect the necessary information in order to carry out an adequate risk assessment of the workspace being used to provide services remotely.

In those cases where the collection of information on the risks faced by remote employees requires visiting the place where they are carrying out their activities, a prior report must be issued, which will be sent to the remote employees in question and the occupational risk prevention delegates. Any such visit will require the consent of the remote employee if it is to take place at the employee's home address or that of a third person. If such consent is

not granted, the employer's risk assessment will be based on the information provided by the remote employee, in accordance with instructions issued by the risk prevention service.

Use of digital means and the right to digital disconnection

The RDL expressly guarantees the remote employees' right to privacy and the protection of their personal data in the use of electronic means and the monitoring of their work by means of automatic devices, and establishes that control mechanisms used must be suitable, necessary and proportionate.

Employers must establish criteria for the use of digital devices, which will require the participation of the employees' legal representatives. The collective bargaining agreements or other collective arrangements can specify terms of the potential personal use of computer equipment made available to employees to work remotely.

Employers cannot request their employees to use their own devices or to install thereupon programs or applications to carry out their employment activities.

Likewise, employers must guarantee the remote employees' right to digital disconnection, which entails limiting the use of technological devices during rest periods, thereby complying with all legal restrictions with respect to working hours.

In accordance with article 88.3 of Spanish Organic Act 3/2018, of 5 December, on the Protection of Personal Data and the guarantee of digital rights, employers must draw up, after consultation with the employees' legal representatives, an internal policy defining the ways in which the above-mentioned right may be exercised, preserving the right to digital disconnection in remote working.

Collective rights

The collective rights of remote employees will be exercised in the same terms as those of the rest of on-site employees.

Employers must ensure communication between remote employees and their representatives, as well as with the other on-site employees, in addition to supplying the employees' legal representatives with the necessary elements for them to carry out their activities, such as the implementation of a virtual notice board or access to email addresses and notifications used in the company.

The RDL also establishes that the effective participation by remote employees in activities organised by their representatives or other employees must be guaranteed, emphasising that their right to vote in the election of their legal representatives will be exercised *in situ*.

6. CORPORATE MANAGEMENT AND CONTROL MECHANISMS

Remote employees must comply with the employers' instructions on data protection (with the participation of the employees' representatives) and information security (with the employees' legal representatives being duly informed), as well as on the use and maintenance of computer equipment or tools provided.

Employers may adopt the appropriate surveillance and control mechanisms to check compliance with the employees' duties, including the use of electronic means, respecting at all times the dignity of their employees.

7. PROCEDURAL ASPECTS

A specific procedure will be made available for the resolution of any remote working disputes, which will be urgent in nature and will not allow an appeal to be lodged against the decision rendered (unless this is admissible in cases of compensation where the action includes a claim for damages).

CONTACTS



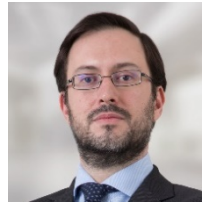
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