

## THE NEW LABOUR REFORM IN SPAIN.

Royal Decree-law 32/2021, of 28 December, on urgent labour reform measures (the "RDL"), was published in the Official State Gazette on 30 December, entering into force on the 31st, although for some of its main new developments, the entry into force is put back until 30 March 2022. The RDL contains important new developments in the labour law framework in Spain, affecting matters such as temporary hiring, contracts with permanent seasonal employees, new mechanisms for contract suspension or temporary reduction of working hours ("ERTE") and collective bargaining.

This new labour reform was initially to be a return to the labour regime existing prior to the 2012 labour reform, which made the Spanish labour law system significantly more flexible. However, in the end it is the outcome of negotiation between the Administration and the social partners (trade unions and business associations), focusing on specific modifications to the earlier labour reform, and also significantly changing other essential aspects of labour regulations (such as the legal regime for temporary hiring).

What follows is a summary of the main new developments in the RDL, drawing attention to the fact that it is a wide-ranging piece of legislation, affecting numerous aspects, that require detailed study and analysis.

### EXECUTIVE SUMMARY

The main new developments introduced by the RDL are the following:

- **Fixed-term contracts:** the existing temporary hiring formats are eliminated; specifically, the works or service contract disappears completely, while the contingent temporary contract is replaced by a fixed-term contract due to production-related circumstances with a more limited duration and in more specific scenarios. The legal regime of the interim contract is amended and it is now called the "substitution contract".

The sanctions due to infringements in temporary hiring are increased and now range from 1,000 euros to 10,000 euros per employee affected.

- **Permanent seasonal contracts:** a new regime is established for permanent seasonal contracts, increasing the number of scenarios in which they can be used, with the aim of a large part of the hiring

#### Key issues

- Fixed-term contracts
- Permanent seasonal contracts
- Training contracts
- Subcontracting works and services
- ERTes (*procedures for temporary suspension of contracts or reduction of working time*)
- RED mechanism
- Collective bargaining agreements

previously done using temporary “works or service” contracts now using this format.

- **Training contracts:** the internship contract formats, the training and learning contract and the dual university training contract, are eliminated, and a new single training contract is created, which has two forms: (i) work-linked training involving remunerated employment; and (ii) performing a labour activity for the purpose of acquiring a professional practice.
- The **new legal regime** for temporary hiring, permanent seasonal contracts and training contracts will enter into force on **30 March 2022**.
- **Subcontracting works and services:** the obligation is established for contractor companies to apply the collective bargaining agreement corresponding to the sector of activity to which the contract refers, unless they have a company-level collective bargaining agreement.
- **ERTEs** (*procedures for temporary suspension of contracts or reduction of working time*): the duration of the consultation period is reduced to 7 days in companies with less than 50 employees and a new extension procedure is regulated. Moreover, a new type of ERTE of impediment or limitation of activity due to force majeure is established. Exemptions to Social Security contributions are also established depending on the type of ERTE, with obligations to provide training and maintain employment.
- **RED mechanism:** a new type of ERTE is created, which is activated by a government decision, with two formats: cyclical, linked to a certain general macroeconomic situation, and sector-specific, related to permanent changes in a sector. Exemptions to Social Security contributions are established that are more favourable than those applicable to standard ERTes, and a specific public benefit for RED Mechanisms is created. It is a preferential temporary adjustment mechanism acting as an alternative to possible contract termination measures, and it requires prior administrative authorisation.
- **Collective bargaining agreements:** (i) "continued validity" ("*ultraactividad*") returns and (ii) the priority application of the company collective bargaining agreement is eliminated, but only in relation to the base salary and salary supplements.

The above points are developed briefly below.

## **1. Fixed-term contracts**

The general presumption that contracts of employment are indefinite is reinforced, allowing for just two specific fixed-term contract scenarios: (i) fixed-term contracts due to production-related circumstances and (ii) fixed-term contracts for replacing an employee.

The need to provide justification for the contract is reinforced and the contract must specify “*the reason giving rise to the temporary hiring, the specific circumstances that justify it and the connection to the envisaged duration*” in order to justify the temporary cause giving rise to the contract.

### 1.1 Contract due to production-related circumstances

This includes two subtypes, each one with its own characteristics:

- i. Contract due to “unforeseeable” production-related circumstances: in order to cover occasional and unforeseen increases and oscillations (including those derived from annual holidays) which, while part of the company’s normal activity, generate a temporary mismatch between the stable employment available and that required, provided the scenario is not one of those for which permanent seasonal contracts are envisaged. The maximum term of the contract will be 6 months, extendible to up to 1 year if so envisaged in the collective bargaining agreement for the sector. If a shorter term than the maximum one is established, it will only be possible to extend it once, respecting the maximum term at all times.
- ii. Contract for “foreseeable” production-related circumstances: to address occasional, foreseeable situations with a short, defined term, and that will have to be duly identified in the contract. Companies will only be able to use this contract for a maximum of 90 days each calendar year, regardless of the number of employees required on each of those days in order to cover such situations, and, what is more, the 90 days cannot be used on a continued basis.

The execution of work under a contractor arrangement or administrative concessions (which constitute a usual or ordinary activity of the company) will not constitute legal grounds for formalising this kind of temporary hiring.

The legal representatives of the employees must be informed, in the last quarter of the year, on the forecast for the use of this type of contract for the following year.

### 1.2. Substitution Contract

It is envisaged in 3 scenarios:

- i. To replace an employee entitled to return to his/her position, with the possibility for the contract to start before the person to be substituted has left, so that this employee and the substitute can perform their functions simultaneously for “*the time necessary to ensure the job is done properly*” (with a maximum of 15 days);
- ii. To make up for the reduced working hours of another employee, when the reduction is due to legally established grounds or others regulated in the collective bargaining agreement; and
- iii. To provide temporary cover for a position during the selection or promotion process designed to cover it definitively with a permanent contract, with a maximum duration of 3 months or a shorter term established in the collective bargaining agreement, and without the possibility of signing a new contract for the same purpose once the maximum term has been exceeded.

### 1.3. Common rules

- The following will become permanent employees:
  - those whose temporary contract is non-compliant with the applicable legal regime;
  - those employees who, within a term of 24 months, were hired for longer than 18 months, on a continued basis or otherwise, for the

same or a different position, with the same company or group of companies, by virtue of 2 or more contracts due to production-related circumstances, whether directly or having been supplied by temporary employment agencies; or

- those employees who hold a position that had already been held, on a continued basis or otherwise, for longer than 18 months over a period of 24 months by virtue of other contracts due to production-related circumstances, including supply contracts with temporary employment agencies.

In these cases, the company will provide the employee with a document attesting to the acquisition of permanent status within a term of 10 days, and will supply that information to the legal representatives of the employees.

- Collective bargaining agreements may establish plans to reduce temporary employment, including general criteria regarding the appropriate relationship between the volume of the temporary hiring and the total staff of the company, as well as setting maximum temporary employment percentages.
- The severance of 12 days' salary per year worked at the end of the temporary contract is maintained, not applicable to training contracts and the substitution contract.
- An increase to Social Security contributions is established in the event of the termination of an employee with a fixed-term contract with a term of less than 30 days (not applicable to substitution contracts or those affecting specific collectives).
- The employee representatives will have to be informed of the fixed-term contracts signed, when there is no legal obligation to supply a basic copy of the same.
- The new regulations on fixed-term contracts will enter into force on 30 March 2022. However, contracts for a specific work or service, contingent contracts and interim contracts in force prior to the entry into force of the RDL will be governed by the regime preceding that of the RDL until the end of their maximum term. However, contracts for a specific work or service and contingent contracts entered into between 31 December 2021 and 30 March 2022, will not have a duration of more than six months.

## **2. Permanent seasonal contracts**

- The legal regime for permanent seasonal contracts is modified, being envisaged for:
  - i. the performance of seasonal work or work related to seasonal production activities;
  - ii. the performance of intermittent work that, without being seasonal, has certain periods of execution (determinate or indeterminate);
  - iii. the provision of services in the context of commercial or administrative contractor arrangements that, being foreseeable, are part of the company's ordinary activity; or

the labour relationship between a temporary employment agency and an employee hired in order to be assigned.

- The contract must be formalised in writing, setting out the term of the period of activity, the working time and the distribution of the hours, although these latter details may be estimated and can be specified when the employee is called.
- Collective bargaining agreements or company agreements will establish the objective and formal criteria governing how the employee is called. Moreover, the company will provide the employee representatives, prior to the start of each calendar year, a calendar with a forecast of the annual or half-yearly calls.
- In the case of permanent seasonal contracts due to contracting arrangements or administrative concessions, the inactive period will be limited to the waiting terms for placement between contracting arrangements. Sector-specific collective bargaining agreements can determine the maximum term of inactivity between contracting arrangements which, where not established in such agreements, will be 3 months.
- Collective bargaining agreements may (i) allow part-time permanent seasonal contracts; (ii) require the preparation of an annual census of permanent seasonal employees; (iii) establish a minimum annual call period and (iv) establish an amount to be paid to employees at the end of the call, when this coincides with the end of the activity and there is no new call immediately after.
- The length of service of permanent seasonal employees will be calculated taking into account the duration of the labour relationship and not only the time of services actually provided.
- Permanent seasonal employees and the employee legal representatives must be informed of the existence of vacant ordinary permanent positions.
- The new regulations on permanent seasonal contracts will enter into force on 30 March 2022.

### 3. Training contracts

The RDL creates a new single training contract, with two formats:

#### 3.1. Work-linked training contracts (CFA)

- Object: the CFA is designed to make paid employment activities compatible with a range of training processes (professional training, university studies or training specialities in the National Employment System). The activity to which the contract refers must be directly related to the training activities that justify the hiring.
- Directed at: people in training processes in general who do not have the necessary qualifications to enter into a training contract in order to obtain a professional career. The maximum age is 30 for hiring in certain programmes or professional qualifications.
- The term of the contract will be at least 3 months up to a maximum of 2 years and may run in various yearly periods coinciding with the corresponding studies. If the contract is entered into for a term that is

less than the legal maximum allowed, it may be extended until the qualification is obtained, without exceeding the maximum of 2 years.

- The effective time worked will not exceed 65%, during the first year, or 85%, during the second, of the maximum working time that applies in the company.
- CFAs cannot be used for an activity or position that was performed by the employee in the past under another contract format and for longer than 6 months.
- The CFA will not include a trial period and does not allow for supplementary hours, overtime, night work or shift work.
- Collective bargaining agreements will establish the remuneration for the CFA, and in the absence of the same, the remuneration will not be less than 65% the first year and 75% the second, with regard to that set in the collective bargaining agreement for the professional group and level of remuneration corresponding to the functions performed, also respecting the Minimum Inter-professional Salary (always in proportion to the time actually worked).

### 3.2. Training contract for obtaining the appropriate professional practice for the level of studies (CTP)

- Object: this type of contract can be entered into with persons holding a university degree or a medium- or high-level qualification, specialist, a professional master's or certificate from the professional training system, or other equivalent qualification, and will have to be executed within 3 years following completion of studies (5 years for disabled people).
- Term: this contract will have a minimum term of 6 months and a maximum term of 1 year. These limits apply to all companies hiring the employee by virtue of the same professional qualification or certificate and to the same company for the same position, even if the qualification is different.
- A trial period may be established, not exceeding 1 month.
- Employees with a CTP cannot work overtime.
- The remuneration will be that set in the applicable collective bargaining agreement for these contracts or, failing that, that of the professional group and level of remuneration corresponding to the functions performed, also respecting the minimum remuneration established for the CFA or the Minimum Inter-professional Salary in proportion to the time actually worked.

### 3.3. Common rules

The following rules common to both types of training contracts are worth highlighting:

- a) The contract must be formalised in writing and will have to include the text of the individual training plan. Part-time contracts are possible
- b) Situations of temporary disability, birth, adoption, custody for adoption purposes, fostering, risk during pregnancy, risk during breast feeding and gender violence will interrupt the calculation of the contract term.

- c) If, at the end of the contract the employee continues in the company, the term of the training contract will be included when calculating length of service in the company.
- d) Training contracts that constitute fraud or that fail to comply with training obligations will be considered to be standard permanent contracts.
- e) A variety of information duties are established with regard to the employee representatives in relation to the use of this type of contract.

The new regulation of training contracts will enter into force on 30 March 2022. Internship and training and learning contracts in force prior to the entry into force of the RDL will be governed by the previous regime until the end of their maximum term.

#### **4. Subcontracting works and services**

The collective bargaining agreement applicable to contractor and subcontractor companies will be that of the sector of the activity involved in the contracting or subcontracting arrangement, unless there is another applicable sector-specific collective bargaining agreement or if the contractor company has its own collective bargaining agreement.

#### **5. Contract suspension or reduction of working time for economic, technical, organisational or production-related reasons or because of force majeure (ERTE)**

- The procedure for contract suspension or reduction of working time for economic, technical, organisational or production-related reasons (**ETOP**), which must be of a temporary basis, is streamlined. The maximum term of the consultation period is reduced from 15 to 7 days in companies with less than 50 members of staff; and the term for establishing the representative committee is reduced from 7 to 5 days (from 15 to 10 days when there are no employee legal representatives), regardless of company size.

During the term of the ERTE, the company can negotiate an extension of the measure with the employee legal representatives, opening a consultation period of up to 5 days, following which the company will notify the labour authority of its decision on the extension, which will take effect as of the day after the end of the period initially established.

- Force majeure ERTes are regulated in greater detail. It is initiated by an application made by the company to the labour authority, which must adopt a decision within 5 days, merely confirming the existence (or otherwise) of force majeure. In the absence of a decision, the application is deemed authorised under the silence is consent rule. The decision takes effect as of the date of the event giving rise to the situation and lasts until the date set in the decision. If the force majeure situation continues to exist at the end of the period established in the decision, a new authorisation must be applied for.

The RDL includes a temporary force majeure scenario where the company's normal activity is prevented or limited as a result of decisions adopted by the competent public authority, including those

designed to protect public health. In this case, the company has to prove the impediment or restriction of its activity.

- Common rules of ETOP and force majeure ERTes: (i) the working time can be reduced by at least 10% and at most by 70%; (ii) the reduction of the working time must be given priority over the suspension of contracts; (iii) the company's communication of its final decision to the labour authority must indicate the period during which the measure will apply, the people affected and the type of measure to be applied to each employee; (iv) the company may apply, and cease to apply, the measure to employees based on changes in the circumstances that justify the measure, which must be notified in advance to the employee representatives and to the Administration; and (v) during the term of the ERTE no overtime may be worked, no new outsourcing of activity may be arranged and no new hiring can be carried out, unless the employees affected by the ERTE cannot carry out the required work (due to education, training or other justified objective reasons).
- The RDL regulates benefits relating to social security contributions and linked to ERTes, which will be voluntary for the company:
  - Reduction of 20% of the company's social security contribution due to common contingencies, in the case of ETOP ERTes, provided that the company implements training measures; and
  - Reduction of 90% of the company's social security contribution due to common contingencies, in the case of force majeure ERTes.

These benefits are subject to maintaining employment of the affected employees for six months following the end of the ERTE. This commitment will not be considered to have been breached in the case of termination due to fair disciplinary dismissal, resignation, death, retirement, Permanent Disability (*incapacidad permanente total/incapacidad permanente absoluta/gran invalidez*), due to the end of the term of a temporary contract or due to the end of the call-in process of permanent seasonal employees.

- ERTes due to the impediment or restriction of activity due to COVID-19 will continue to be governed by the provisions of COVID-19-related legislation until 28 February 2022.

## **6. RED Employment Flexibility and Stability Mechanism**

- The so-called "RED Employment Flexibility and Stability Mechanism" ("**RED Mechanism**") has been created, which, once activated by the Council of Ministers, will allow companies to request authorization for working time reduction and employment contract suspension measures.

The RED Mechanism has two forms: (i) cyclical, when a general macroeconomic situation is at play, with a maximum duration of one year; and (ii) sector-specific, when permanent changes can be observed in a certain sector or sectors, necessitating retraining and career transition processes for the employees, with a maximum initial



duration of one year and the option to extend the duration twice, by six months each time.

The decision by the Council of Ministers to activate the mechanism, and the justifications provided, will not in themselves be reasons that can be used to justify other employer decisions (to terminate contracts or alter conditions).

- The procedure will be started by means of an application addressed by the company to the labour authority, forwarded simultaneously to the employee representatives and requiring a consultation period in the terms established for ETOP ERTes. In the sector-specific case, the application must also include a plan to retrain the affected employees.

Once the Labour and Social Security Inspectorate has provided a report, the labour authority must issue a decision no more than seven calendar days following the end of the consultation period. If no express decision is issued in that time, the application will be deemed to have been accepted. If the consultation period ends with an agreement, the labour authority must authorise the application of the RED Mechanism. If no agreement is reached, the labour authority may accept or reject the application, though it must accept it if the documentation submitted demonstrates that the company is in the cyclical or sector-specific situation.

- Various reductions to employer contributions to social security, linked to RED Mechanism ERTes, are envisaged and will be voluntary for the company (reductions of 60-30-20% in successive four-month periods for the cyclical form, and of 40% for the sector-specific form).

These benefits only apply if the companies implement training measures and are subject to a commitment to retain employees for six months, in the terms established for ETOP and force majeure ERTes.

- A RED Mechanism-specific benefit is established for affected employees when their salary is reduced due to the suspension of their contracts or reduction of their working time, amounting to 70% of the regulatory base (average of contribution bases over the preceding 180 days) and capped at 225% of the Spanish minimum wage index (IPREM), increased by a sixth. Such benefit can be received throughout the application of the RED Mechanism. The benefit is not compatible with full-time work, but may be maintained in case of part-time employment.

This benefit will enter into force on 30 March 2022.

## **7. Collective bargaining agreements**

### 7.1. Priority application of company-level agreements

Company-level collective bargaining agreements retain their priority over higher-level agreements, except in relation to the amount of base salary and salary supplements, including those related to the company's position and financial results, for which the higher-level agreement will prevail. This new rule will apply to collective bargaining agreements signed and filed at a registry or published prior to its entry into force, only once the initial validity

period of the agreement ends and, at most, for the period of one year as from the entry into force of the RDL.

Collective bargaining agreements in force must be adapted to this rule within six months.

#### 7.2. Continued validity ("*ultraactividad*")

If no new agreement has been reached one year after the end of the term of the collective bargaining agreement, the parties must have recourse to the mediation procedures regulated in the national or autonomous region inter-professional agreements. While such procedures are underway, unless agreed otherwise, the "*ultraactividad*" system will apply, meaning that the out-of-date collective bargaining agreement will remain valid and enforceable.

This new "*ultraactividad*" system will also apply to collective bargaining agreements whose term has elapsed at the date of entry into force of the RDL.

#### **8. Termination of indefinite-term contracts for a specific work for reasons inherent in employees in the construction industry**

The RDL regulates the termination "for reasons inherent to the employee" of indefinite-term contracts for a specific work (*contrato indefinido adscrito a obra*) associated with tasks or services linked to construction works. At the end of the work the company must make a reassignment proposal to the employee, developing a training process first if necessary.

Having made the reassignment proposal, the indefinite-term contract for a specific work may be terminated in the following circumstances: (i) when the employee refuses the reassignment; (ii) when the employee is not adequately qualified for the new works that the company has in the same province or cannot be integrated therein due to an excess of employees with the necessary qualifications to carry out the same role; and (iii) when the company has no works in the same province, suitable for the employee's professional qualifications.

The employee will be entitled to a severance compensation equalling 7% of the salary accrued during the term of the contract (according to the tables included in the collective bargaining agreement).

#### **9. Amendments to the Spanish Labour Infringements and Sanctions Act (LISOS)**

As from the entry into force of the RDL, the infringement of contractual forms and temporary hiring and their fraudulent use will be assessed per employee affected when such a situation is detected (one sanction per employee) instead of per inspection. The sanction in such scenarios will be increased to between EUR 1,000 and EUR 10,000 per employee affected.

The RDL introduces a new serious infringement, sanctioned with a fine of up to EUR 10,000, for making new hires in violation of the prohibition established in the ERTE legislation. This sanction will also be applied per employee hired. Moreover, outsourcing new work in violation of the prohibition established in the ERTE legislation will be defined as a very serious infringement, sanctioned with a fine of between EUR 7,501 and EUR 225,018.

Infringement consisting of entering into new temporary employment supply agreements (*contratos de puesta a disposición*) for scenarios other than those set forth in the temporary employment agencies legislation will now be sanctioned per employee affected, with a fine of up to EUR 10,000.

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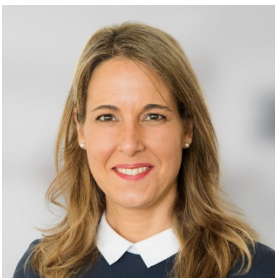
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