AUGUSTA ABOGADOS

INFORMATION NOTE[1]

ROYAL DECREE-LAW 32/2021, ON URGENT MEASURES FOR LABOUR MARKET REFORM

The Official State Gazette (BOE) of 30/12/2021 has published Royal Decree-Law 32/2021, of 28 December, on urgent measures for labour market reform, the guarantee of employment stability and the transformation of the labour market (hereinafter, the "**RDL 32/2021**" or the "**Reform**").

The Reform reflects the agreement between the Government and the Social Partners, introducing significant changes with regard to **recruitment**, **internal flexibility**, **collective bargaining** and **subcontracting**, among other issues.

To this end, it amends the Workers' Statute ("**WS**")[2], the Law on Infractions and Sanctions in the Social Order ("**LISOS**") [3]or the General Law on Social Security ("**LGSS**")[4], among other regulations, repealing those that contravene the proposed reform.

It should be noted that other significant new legislation has recently been passed which should be borne in mind in order to understand the true scope of the labour market reform approved by the Government, such as Law 20/2021, of 28 December, on urgent measures to reduce the temporary nature of public employment, **Law 21/2021, of 28 December, on guaranteeing the purchasing power of pensions and other measures for the financial and social sustainability of the public pension system**, or Law 22/2021, of 28 December, on the General State Budget for 2022.

It should be noted that the Reform does not introduce any changes to the compensation regime for unfair dismissal, nor does it introduce any changes in relation to substantial modifications of working conditions or collective dismissals, maintaining the current regime unchanged.

In spite of this, the list of approved regulations aims to undertake a decisive change in the existing model of labour relations in Spain, identifying in its Explanatory Statement some of the aims pursued, such as:

(i) modify a weak industrial relations model in the face of unforeseen downturns in economic activity;
(ii) a certain instability that could be called structural, centred on competitiveness based on wage cuts rather than increases in productivity and high value-added work;
(iii) inequalities generated by the high rate of temporary employment, with a greater impact on vulnerable groups (e.g., unemployed women and youth);

[1] **It is not a source of advice and does not establish a lawyer-client relationship of any kind.**
[2] Royal Legislative Decree 2/2015 of 23 October.
[3] Revised text approved by Royal Legislative Decree 5/2000, of 4 August.
[4] Revised text approved by Royal Legislative Decree 8/2015, of 30 October.

(iv) high rate of turnover with serious detriment to all stakeholders, e.g., unemployed people consuming benefits, companies having to pay severance pay and train new workers, and

(v) high costs for the Public System in terms of consumption of benefits and loss of human capital.

The Explanatory Statement to the Reform also warns about the worrying precariousness of employment as a result of the current system of subcontracting with an identified use of subcontracting for the sole purpose of reducing costs.

Finally, the Reform incorporates a firm commitment to internal flexibility mechanisms and training/professional retraining as appropriate measures to address situations of sectoral or business crisis and a turnaround with respect to some of the collective bargaining reforms addressed in the last major reform of the WS in 2012.

Beyond considerations on the overall scope and assessment of the Reform, we believe it is important to highlight these objectives in order for the reader to understand the context in which the changes introduced are framed.

It is set to **enter into force** on a staggered basis. Thus, it will generally enter into force on the day following its publication in the Official State Gazette (**31/12/2021**), with the exception of certain precepts for which a *"vacatio legis"* of 3 months (until **31/3/2022**) is envisaged, to facilitate the adoption of the necessary management measures. The Reform also clarifies the legal regime applicable to existing contractual or conventional situations at the entry into force of the Reform.

Let us now look at the main new features introduced by RDL 32/2021 and their practical implications for companies.

TRAINING CONTRACTS (ART. 11 WS)

It comes into force on **31 March 2022**. In the meantime, traineeship and training and apprenticeship contracts may continue to be concluded in accordance with the regulation prior to the Reform.

There is a change of model in these contracts, which is divided into two modalities *(i) work-linked training (alternating training) and (ii) obtaining professional practice.*

a) Contract for work-linked training (alternating training)

- **Purpose and requirements.** To make paid work activity compatible with the corresponding training processes in the field of vocational training, university studies or the Catalogue of training specialities of the National Employment System in accordance with the following rules:

  - ✓ It replaces training and apprenticeship contracts and dual university training contracts.

  - ✓ It may be concluded with persons who do not have professional qualifications recognised by the qualifications or certificates required to conclude a training contract for professional practice (current traineeship contracts).

Contracts linked to vocational training or university studies may also be made with people who have another qualification, provided that they have not had another previous training contract in a training course of the same level of training and in the same productive sector.

- ✓ If the contract is signed within the framework of level 1 and 2 certificates of professionalism, and training programmes in alternating employment-training, which form part of the Catalogue of training specialities of the National Employment System, the contract may only be concluded with persons up to 30 years of age.

- ✓ Only 1 work-linked or alternating training contract may be concluded for each Vocational Training cycle and university degree, certificate of professionalism or specialised training pathway. However, alternating contracts may be concluded with several companies on the basis of the same training, provided that these contracts relate to different activities linked to training and that the maximum duration of all the contracts may not exceed a maximum of 2 years.

- ✓ **Tutors.** The obligation is established for the worker to have two tutors, one appointed by the training entity centre itself and the other appointed by the company. Coordination between the two tutors must be guaranteed. The tutor appointed by the company must have the appropriate training or experience.

- ✓ **Duration.** A minimum of 3 months and a maximum of 2 years. Under a single non-continuous contract, over several annual periods coinciding with the studies, if established in the training plan or programme. *When the contract has been concluded for less than the maximum legal duration and the qualification, certificate, accreditation, or diploma associated with the training contract has not been obtained, it may be extended by agreement until it is obtained, without exceeding the maximum duration.*

- **Effective working time.** It must be compatible with training activities at the training centre:

  - ✓ **1st year:** Up to 65% of the maximum working day provided for in the agreement applicable in the company, or, in the absence thereof, of the maximum legal working day.

  - ✓ **2nd year:** Up to 85 % of the maximum working day.

- **Training plan.** The vocational training centres, training entities and university centres will draw up individual training plans specifying the content of the training, the calendar and activities and the tutoring requirements for the fulfilment of their objectives, with the participation of the company.

- **Prohibitions.**

  - ✓ It may not be concluded when the activity or job corresponding to the contract has already been carried out previously by the worker in the same company, under any modality for a period of more than 6 months.

  - ✓ They may not work overtime or extraordinary hours, except in cases of force majeure.

- ✓ They may not perform night work or shift work. Exceptionally, it is allowed when the training activities for the acquisition of the training plan's learning cannot be developed in other periods, due to the nature of the activity.

- ✓ No probationary period may be established for such contracts.

- **Remuneration.** That established for these contracts in the collective bargaining agreement. In the absence thereof, it may not be less than 60% in the first year or 75% in the second year (with respect to that established in the collective agreement for the professional group and pay level in the duties performed, in proportion to the effective working time). In no case may it be less than the minimum wage in proportion to the effective working time.

b) Training contract for obtaining professional practice

- **Requirements to conclude the contract.** It may be entered into with those who hold a university degree or an intermediate or higher degree, specialist, professional master's degree, or certificate from the vocational training system[5] or an equivalent qualification in artistic or sporting education from the education system, which qualifies them for employment. ***It replaces internship contracts.***

- **Time limit for conclusion.** The employment contract for obtaining professional practice must be concluded within the 3[6]years following the completion of the studies. It *may not be signed with anyone who has already obtained professional experience or who has carried out training activities in the same activity within the company for a period of more than 3 months, without counting curricular internships.*

- **Duration. It** may not be less than 6 months or exceed 1 year. Within these limits, collective agreements may determine its duration, taking into account the characteristics of the sector and the professional practices to be carried out.

  Employment shall not be possible in the same or a different company for a longer period than the maximum periods foreseen, on the basis of the same professional qualification or certificate. Nor for the same job (for a longer period than the maximums foreseen, even ion the basis of a different qualification or certificate).[7]

- **Probationary period.** A probationary period may be established, which may in no case exceed one month, except as provided for in the collective agreement.

- **Training plan, tutor, and certificate.** The company will draw up the individual training plan specifying the content of the internship and will assign a tutor with appropriate training or experience. At the end of the contract, the worker will be entitled to certification of the content of the internship.

[5] According to the provisions of Organic Law 5/2002, of 19 June, on Qualifications and Vocational Training
[6] 5 years if arranged with a person with a disability.
[7] In the case of university studies and for the purposes of these limitations, bachelor's, master's, and doctoral degrees shall not be considered to be the same qualification, unless the worker already holds the higher qualification in question at the time of being hired for the first time.

- **Remuneration.** The remuneration for the effective working time will be that established in the collective agreement applicable in the company for these contracts or, where appropriate, that of the professional group and remuneration level of the duties performed. *In no case may the remuneration be less than the minimum remuneration established for the contract for work-linked (alternating) training or the minimum wage in proportion to the effective working time.*

- No overtime may be worked, except in cases of force majeure. *It does not prohibit additional hours (overtime for part-time contracts).*

RULES COMMON TO TRAINING CONTRACTS

- The protective action of the Social Security shall cover all protectable contingencies and benefits, including unemployment and FOGASA coverage.

- Situations of temporary incapacity, birth, adoption, foster care, risk during pregnancy, risk during breastfeeding and gender violence shall interrupt the calculation of the contract's duration.

- The contract must be formalised in writing and must include the individual training plan text specifying the content of the placement or training and the tutoring activities for the fulfilment of its objectives. It shall also include the educational cooperation agreements and conventions text.

- Companies that are applying some of the internal flexibility measures regulated in Articles 47 and 47 bis (ERTE) may enter into training contracts as long as they do not replace duties or tasks usually carried out by the persons affected by the suspension or reduction of working hours.

- If the person remains with the company upon termination of the contract, a new probationary period cannot be arranged[8], and the duration of the training contract shall be counted for the purposes of seniority.

- **Training contracts in violation of the law or where the company fails to comply with its training obligations shall be considered to be standard indefinite contracts.**

- The age and maximum duration limits do not apply when the contract is signed with people with disabilities or groups in a situation of social exclusion as per art. 2 of Law 44/2007.

- Sectoral agreements may determine the jobs, activities, levels, or occupational groups that may be carried out by means of a training contract.

- Companies that intend to sign training contracts may request in writing to the public employment service ("SEPE"), information regarding whether the persons they intend to hire have been previously hired under this modality and the duration of these contracts. This information must be transmitted to the WLR and shall be valid for the purposes of not exceeding the maximum duration of this contract.

[8] It only applies to the contract for professional practice (the alternance contract does not allow for a probationary period)

INFORMATION TO THE WLR

- The company shall inform the workers' legal representatives ("WLR") of the educational or training cooperation agreements that provide for training contracts, including information regarding individual training plans or programmes, as well as the requirements and conditions under which the tutoring activity will be carried out.

- In the case of signing several contracts linked to a single cycle, certificate or pathway, the company must provide the WLR with all available information regarding these contracts.

FIXED TERM CONTRACTS[9] (ART. 15 WS)

- As a preliminary issue, the main objective of the modification of article 15 of the WS is the consolidation of the permanent contract as a general rule, avoiding the segmentation of the labour market between permanent and temporary workers. The new regulation comes into force on **31/3/2022**, establishing a transitional regime for contracts signed previously.

- The temporary contract must specify precisely [10] the qualifying cause, the specific circumstances that justify it and its connection with the duration (generic formulas are not allowed). ***Persons recruited in breach of these requirements shall acquire the status of permanent employees.***

- **The contract for a specific work or service disappears and the temporary contract due to market circumstances, accumulation of tasks or excess orders is significantly reformulated.**

They may only be concluded in 2 modalities[11]: *Due to production circumstances and Due to replacement of the worker*[12].

1.- CONTRACT DUE TO PRODUCTION CIRCUMSTANCES

This modality is further divided into sub-modalities2:

a) Due to occasional[13] unforeseeable increases and fluctuations in activity.
b) To deal with occasional, foreseeable situations of a short and limited duration.

(a) For occasional and unforeseeable increases and fluctuations.

- **Justification.** Occasional and unforeseeable increases and fluctuations in activity which, even in the case of the company's normal activity, generate a mismatch between the stable staff and the staff required, even in the case of the company's normal activity.
  The fluctuations expressly include those resulting from annual leave.

[9] RDL 32/2021 uses "fixed-term contracts" and "temporary contracts" interchangeably.
[10] The obligation to identify the cause was already in RD 2720/1998, which implements article 15 of the WS.
[11] The contract for "specific work or service" disappears.
[12] It replaces the current interim contract.
[13] Occasional: Punctual, occurring only on a one-off basis as opposed to the usual (DRAE).

- **Duration.** Maximum of 6 months, extendable to 1 year by sectoral collective Agreement[14].

Work of a seasonal nature or seasonal activities and intermittent work in certain periods of performance (determined or undetermined) must be covered by the permanent-discontinuous contract (art. 16.1 ET).

When concluded for less than the maximum permitted duration, the initial contract may be extended only once and by agreement between the parties, without the total duration exceeding the maximum permitted duration[15].

b) To deal with occasional, foreseeable situations of a short and limited duration.

- **Justification.** To deal with occasional, foreseeable situations with a short and limited duration (e.g., a specific commercial campaign).

- **Duration.** Companies may only use this contract for a maximum of 90 days in the calendar year, on a discontinuous basis (no minimum number of days of interruption is specified).

- During this period, as many persons as necessary may be hired on each of these days to deal with the specific situations which must be duly identified in the contract.

- **Information.** In the last quarter of the year, companies must inform the WLR of the annual forecast of the use of these contracts. Such a duty to provide information is not a requirement for the validity of contracts.

Work within the framework of contracts, subcontracts, or administrative concessions, when they constitute the usual or ordinary[16] activity of the company, may not be used as a justifiable reason for concluding contracts for production circumstances. However, contractors, subcontractors and concessionaires may enter into such contracts if the production circumstances described above are met.

2.- REPLACEMENT CONTRACT

a) ***For the replacement of a worker entitled to the reservation of a position.***

- The provision of services may begin before the person being replaced leaves, coinciding the necessary time for the proper performance of the position, with a maximum of 15 days of simultaneous service.

- The contract must state the name of the person being replaced and the reason for replacement.

[14] Therefore, the sectoral Agreements will have to regulate this possibility, and the regulations currently contained in collective agreements regarding temporary contracts will not be of any use for this purpose.
[15] Fixed-term contracts with a maximum duration, including training contracts, concluded for less than the maximum legal duration, shall be understood to be automatically extended up to that term when there is no explicit complaint or extension and the worker continues to provide services (art. 49.1 c ET).
[16] Following the criterion set out in the SC Judgment (Plenary) of 29/12/2020.

b) ***To complete the reduced working hours by another worker.***

- When this reduction is based on legally established causes or regulated in the collective agreement. This does not include when the working day is reduced by individual agreement.

- The contract must state the name of the person being replaced and the reason for replacement.

c) ***For the temporary coverage of a post during the selection or promotion process <u>for its definitive coverage by means of a permanent contract</u>***.

- Maximum duration of 3 months (or shorter period fixed in the collective agreement). Once the limit has been reached, a new contract for the same object may not be concluded.

All persons recruited on a temporary basis shall acquire permanent status....

a) Business infringement.

- Contracts concluded in fraud of law and/or in breach of requirements.

- Those who have not been registered with the Social Security, after a period equal to that legally established for the probationary period, has elapsed [17].

b) Concatenation of contracts.[18]

- **Of the Person**. - When, in a period of **24 months, they** had been employed for a period of more than **18 months**[19], by means of 2 or more contracts <u>due to circumstances of production</u>, with or without continuity, for the same or a different job, with the same company or group of companies, directly or through a temporary employment agency ("ETT").[20] It also applies to business succession or subrogation.

- **On the Position. -** The person holding a **job position** that has been **filled**, with or without continuity, for **more than 18 months in a period of 24 months**, through contracts for circumstances of production, either directly or through temporary employment agencies ("ETT").

Guarantees and rights of all persons hired on a temporary basis

a) They shall have the same rights as permanent employees, without prejudice to special provisions on termination of employment and training contracts.

[17] Provision already existing in art. 9 of RD 2720/1998, which implements article 15 WS.

[18] If the limits are exceeded, the company will provide the worker, in writing, within 10 days after the deadlines have been met, with a document justifying their permanent status in the company, also informing the WLR. The worker may also request in writing from the SEPE a certificate of the fixed-term contracts concluded. <u>The SEPE will issue the document and will inform the company and the Labour and Social Security Inspectorate ("ITSS") if it notices that the maximum time limits have been exceeded.</u>

[19] The collective agreements may reduce these limits.

[20] It moves from 24 months in a period of 30 months to 18 months in a period of 24 months.

b) Where a right or condition of employment is acquired on the basis of seniority (because this is determined by law or collective agreement) it shall be calculated on the same basis for all employees.

c) The company shall inform them of vacancies in permanent positions.[21]

d) The company must notify the WLR of the contracts made under the types of contracts provided for in art. 15 WS (due to circumstances of production and due to replacement), when there is no legal obligation to provide a basic copy of the same.

Infringements and penalties with regard to temporary employment

The LISOS is amended, tightening up the penalty system: individualisation of the infringements (***an infringement is considered for each fraudulent temporary contract***) and an increase in the amounts.

Infringement	Classification	Penalty (€)	
		Grade	Amount
Failure to inform employees of permanent vacancies in the company[22].	Minor (art. 6.5)	MINIMUM MEDIUM MAXIMUM	70 a 150 151 A 370 371 a 750
Transgressing the regulations on fixed-term contracts, with their use in fraud of the law or with respect to persons, purposes, circumstances, and limits not foreseen in the regulations or agreement.	Serious (art. 7.2)	MINIMUM MEDIUM MAXIMUM	1.000 a 2.000 2.001 a 5.000 5.001 a 10.000

Infringements committed before the entry into force of the Reform will be sanctioned in accordance with the previous amounts and liability regime.

Entry into force and transitional regime[23] .

- **Contracts concluded before 31/12/2021[24].**

  - Contracts for works and services[25], in force on that date, will continue to apply up to their maximum duration (up to 3 years or if4 extended by collective agreement), in the terms prior to the Reform.

  - Temporary contracts due to market circumstances, accumulation of tasks or excess of orders and interim contracts, concluded before 31 December 2021, will remain in force up to their maximum duration (in temporary contracts up to 6 months or 12 months if the collective agreement extends it).

[21] By means of a public notice "in a suitable place in the company or workplace" or by other means provided for in collective bargaining "that ensure the transmission of information". The WLR shall also be informed.
[22] It adds to the minor infringement the failure to inform persons with training contracts or fixed-term contracts of vacancies (fulfilling the duty to inform part-time and remote workers).
[23] Third Transitional Provision of RDL 32/2021
[24] Training contracts in force on 31.12.2021 shall continue to apply until their maximum duration.
[25] And permanent construction contracts signed under Article 24 of the 6th State Construction Agreement.

- **Contracts concluded in the transitional period (between 31/12/2021 and 30/3/2022).**

  - Contracts for works and services and temporary contracts concluded during this period shall be governed by the legal or contractual regulations in force on the date on which they were concluded, i.e., the one prior to the current reform, **however their duration may not exceed 6 months.**

  - Although the regulation does not specify so in the transitional regime, we consider that training contracts with the pre-Reform conditions and interim contracts can continue to be concluded until 30 March 2022.

- **Concatenation of contracts (Art. 15.5. WS).**

  - The new rule will apply to contracts concluded from 31/3/2022.

  - For contracts concluded before 31/3/2022, only the contract in force on 31/12/2021 will be taken into consideration.

DISINCENTIVES TO VERY SHORT-TERM CONTRACTS

- Temporary contracts of less than 30 days will have an additional social security contribution of 26.57 euros at the time when the employee is deregistered from social security.

- This implies an increasing penalty depending on the number of short contracts (the higher the number of short contracts, the higher the penalty).

- Exceptionally, this contribution does not apply to the special schemes for agricultural employed workers, domestic workers, coal miners or replacement contracts.

PERMANENT-DISCONTINUOUS CONTRACTS (ART. 1 6 WS)

The amendments regarding temporary employment are complemented by those introduced with regard to permanent-discontinuous contracts, giving priority to this type of contractual modality as a formula for covering business needs previously covered by the former contract for work or service[26]. This type of contract may also be an alternative to avoid the negative consequences associated with non-compliance with the regulations on temporary employment.

The new regulation **comes into force on 31/3/2022**. Until then, it will be possible to conclude contracts under the previous regulations.

- **Purpose of the permanent-discontinuous contracts.**

  - For work of a **seasonal nature** or linked to **seasonal productive activities**, or **work** which is not of a seasonal nature but which, being of **an intermittent character, has definite periods of performance** (determined or undetermined)[27].

[26] For example, activities carried out under commercial or administrative contracts.
[27] The new permanent - discontinuous contract absorbs the part-time contracts for an indefinite period of time foreseen for discontinuous jobs recurring on definite dates.

- For the performance of work consisting in the provision of services within the framework of the execution of commercial or administrative contracts which, being foreseeable, fall within the ordinary activity of the company.

- It can also be concluded between a temporary employment agency and the person recruited to be assigned to the company receiving the work (by the employee).

- **Formal requirements of the contract.**

  - It must be formalised in writing and reflect, among other aspects: *duration of the period of activity*; *working hours and their distribution* (although the latter may be indicated on an estimated basis and specified at the time of the call).

- **Call-in regime.**

  - By collective agreement or, in its absence and innovatively, by means of company agreements, the objective and formal criteria by which the call-in must be governed will be established.

  - The call-in must be made adequately in advance, in writing or by any other means that allows the person concerned to be duly notified with precise indications of his or her conditions of joining.

  - The company must send the WLR, sufficiently in advance and at the beginning of each calendar year, a calendar with the annual or half-yearly call-in forecasts. The company must provide the WLR with the data on the actual hiring of the permanent-discontinuous persons when they occur.

- **Non-compliance concerning to the call-in.**

  - Workers may take appropriate action in the event of non-compliance concerning with the call-in.

  - The time limit for bringing the action (e.g., the 20-day time limit for dismissal) starts from the moment of non-call-in or from the moment when the permanent-discontinuous persons became aware of it.

- **Contracts, subcontracts, and administrative concessions.**

  - In permanent-discontinuous recruitment under contracts, subcontracts or administrative concessions, ***periods of inactivity may only occur as waiting periods for relocation between subcontracts***.

  - The **maximum period of inactivity** between subcontracts shall be **3 months** unless the sectoral Collective Agreement provides for a different period.

- If the maximum period of inactivity has elapsed **without the call-in having taken place**, the company will take the appropriate[28] *"temporary or definitive measures*".

- **Rights in permanent-discontinuous contracts.**

  - **Seniority.** It must be calculated taking into account the entire duration of the employment relationship (and not the time of services actually rendered)[29]. Conditions that require other treatment due to their nature, following criteria of objectivity, proportionality, and transparency, are not included.

    What about calculating severance pay? The Supreme Court (STS 30/6/2020) has already said that the severance pay for dismissal of permanent discontinuous workers is not calculated on the calendar years in which they have been in the company but on the periods of activity, in which the worker has actually provided services.[30]

  - **Conciliation.** They may not suffer prejudice due to the exercise of conciliation rights, absences with the right to job reservation and other justified causes based on rights recognised by law or collective agreements.

  - **Professional training.** They will be considered a priority group for access to the training initiatives of the professional training system for employment in the workplace during periods of inactivity.

- **Information duties.**

  - The company must inform the permanent-discontinuous employees and the WLR about the existence of permanent vacancies of an ordinary permanent nature, to enable them to request voluntary conversion, in accordance with the procedures set out in the sectoral collective agreement or, otherwise, the company's agreement.

- **Sectoral collective agreements.**

  - They can set up a **sectoral employment exchange** into which permanent-discontinuous persons can be included during periods of inactivity, in order to encourage their recruitment and further training.

  - Where the particularities of the sector's activity justify it, they may allow the conclude **part-time permanent-discontinuous** contracts and the obligation for companies to draw up an **annual list** of permanent-discontinuous staff.

  - They may establish a **minimum annual call-in period**.

[28] Suspension measures (art. 47 WS), if the cause is circumstantial, or termination (art. 51 and 52 c) WS) if the cause is structural. The loss or definitive reduction of a contract may determine the organisational and productive cause that justifies a termination for objective causes.

[29] Economic rights [seniority bonuses] and professional promotion rights [promotions], according to STS/1/2021.

[30] The SC states that "there is no discrimination against permanent discontinuous workers". "A permanent discontinuous worker will receive the same severance pay as a full-time permanent worker who has provided employment services for a period of time equal to the sum of the periods of employment of the permanent discontinuous worker and who receives the same salary regulating the dismissal. In both cases, the services actually rendered for this purpose are taken into account. "

- They may establish **an amount for the end of the call-in** when it coincides with the termination of the activity and there is no immediate new call-in. This is *a compensation different from the compensation that may be due for the definitive termination of the contract.*

CONTRACTING AND SUBCONTRACTING (ART. 42 WS)[31]

According to the Explanatory Statement of RDL 32/2021, "outsourcing must be justified on business grounds that are unrelated to the working conditions reduction of the contracting companies' employees". Despite this statement, it should be noted that the resource to outsourcing of activities under the freedom of enterprise remains unchanged.

To this end, the Reform amends Article 42.6 WS[32], which is worded as follows:

> *The collective bargaining agreement applicable to contractors and subcontractors shall be that of the sector of the activity carried out in the contract or subcontract, regardless of its corporate purpose or legal form, unless there is another applicable sectoral collective agreement (...).*
>
> *However, when the contractor or subcontractor has its own collective agreement, this shall apply, in the terms resulting from Article 84 WS.*

What does the new regulation entail?

- **It ensures that there is always a sectoral collective agreement applicable in the absence of an own collective agreement.** This closes the legal loopholes that have existed up to now[33].

- In the absence of an own collective agreement, the sectoral collective agreement applicable by the contractor shall be (i) that of the sector of the activity carried out in the contract or subcontract[34] or (ii) a different sectoral collective agreement, when so established by the sectoral collective bargaining.

The sectoral collective agreement of the activity carried out by the contractor or subcontractor in the main company shall apply, regardless of its corporate purpose or legal form. However, the sectoral collective agreement itself may refer to the regulation of a different sectoral collective agreement, depending on the activity.

[31] Article 43 WS, which prohibits the illegal transfer/assignation of workers, remains unchanged. Among the indications considered to determine an illegal assignment is the absence of technical autonomy in contracts for auxiliary services for which no special technical knowledge is required.
[32] The 27th A.D. establishes that art. 42.6 WS shall not apply in cases of contracts and subcontracts signed with special employment centres.
[33] It follows the path set out by the **STS 11/6/2020**, which states: "in the absence of an own collective agreement specific to the multiservice company (...), labour relations will be regulated by the sectoral collective agreement whose functional scope includes the activity carried out by the workers within the framework of the contract (...)".
[34] It is not equivalent to the collective Agreement applicable in the main company.

- As regards wages[35], the contractor's own company collective agreement may only be applied if it provides for better **wage conditions** than the applicable[36] sectoral agreement.

Regarding wage matters, it is possible that the contractor applies the sectoral collective agreement for the activity carried out in the contract, while the rest of the working conditions will be governed by the company's own collective agreement.

INTERNAL FLEXIBILITY MEASURES (ART. 47 AND 47A WS)

The reform of employment regulation procedures (ERTE), in general terms, includes some of the measures established for ERTEs linked to Covid-19, encouraging and facilitating the use of this internal flexibility measure. On the other hand, a new flexibility and stabilisation mechanism is created which, according to the Explanatory Statement, aims to be an alternative to the destruction of employment and the high level of temporary employment.

a) ERTE ETOP (Reduction of working hours or suspension of the contract for economic, technical, organisational or production reasons).

- ERTEs for the reduction of working hours and suspension of contracts are unified.
- The consultation period is reduced to **7 days** for companies with less than 50 employees, subject to the constitution of the representative committee (for all other companies, it remains at 15 days).
- The maximum period for setting up the representative committee shall be within 5 days of the employer's notification, unless one of the workplaces to be affected by the procedure does not have a WLR, in which case the period shall be within 10 days.
- The employer's communication from the labour authority to the unemployment benefit management body (SEPE) is abolished.
- **The possibility of extending ERTE ETOPs during their term is established.** During the duration of the working hours reduction or suspension of contracts by ERTE ETOP, the company may communicate to the WLR a proposal to extend the measure. The need for this extension must be discussed in a consultation period lasting a maximum of 5 days, and the company's decision will be communicated to the labour authority within 7 days, taking effect from the day following the end of the initial period of working hours reduction or suspension of the employment relationship.

b) ERTE due to force majeure.

- In addition to the "traditional" temporary force majeure, the impediment or limitations to normal activity due to decisions of the governmental authority are added as a specific cause.

[35] Amount of basic salary and salary supplements, including those linked to the company's situation and results.

[36] Unless the company collective bargaining agreement is preferentially applicable for being the agreement in force prior to the agreement, in the terms established in art. 84.1 WS.

- They will require a mandatory report from the Labour Inspectorate (except in cases of temporary force majeure ERTE due to impediments or limitations in the activity in which the request for a Labour Inspectorate report is discretionary).

- The labour authority must decide within 5 days, with positive silence.

- No extensions are allowed in these ERTEs.

- The reduction in working hours will be between 10 and 70 % (as in ETOP ERTEs).

- During the term of the ERTE, workers may be affected and disaffected (as in the case of ETOP ERTEs), after informing the WLR and notifying the General Treasury of the Social Security.

ASPECTS COMMON TO ETOP ERTS AND FORCE MAJEURE ERTS

A number of novel elements are incorporated, some drawn from the experience of the pandemic:

- The possibility of affecting or disaffecting, after informing the WLR and notifying the SEPE and the General Treasury of the Social Security. Depending on changes in the justifying circumstances, increasing the flexibility of ERTEs.

- The possibility of obtaining rebates on social security contributions [37] and financing if they develop training activities for workers in ERTE, in addition to exemptions from social security contributions (related to maintaining employment for 6 months).

- During the ERTE, no overtime, new outsourcing of activities or new employment contracts [38] may be arranged. The classification of these breaches is incorporated into the LISOS.[39]

- Insofar as this is feasible, the adoption of measures to reduce working hours will be prioritised over the suspension of contracts.

- The company must communicate to the labour authority: (i) the period within which the contract suspension or reduction of working hours is to be applied; (ii) the identification of the workers included in the ERTE; and (iii) the type of measure to be applied in respect of each of the workers and the maximum percentage of reduction of working hours or the maximum number of days of contract suspension to be applied.

[37] The fee exemptions in ERTE ETOP apply exclusively in the case that the company carries out the training actions set out in the regulation.

[38] This prohibition does not apply when the persons on suspension or reduction who provide services in the workplace affected by new hires or outsourcing are unable to perform the duties entrusted to them (due to training, qualification or other objective and justified reasons), after informing the WLR.

[39] It is classified as a very serious infringement (art. 7.14 of the LISOS) to formalise new employment contracts in breach of the prohibition established in art. 47.7. d) WS, with a penalty of between a minimum of 1,000 euros and a maximum of 10,000 euros. One infringement will be considered for each person hired.
The establishment of new outsourced activities in breach of the prohibition established in art. 47.7. d) of the WS is classified as a very serious infringement (art. 8.20 of the LISOS), with a penalty of between a minimum of 7,501 euros and a maximum of 225,018 euros.

c) Employment Flexibility and Stabilisation RED Mechanism.

- It must be activated by the Council of Ministers (which is responsible for opening the door but not for deciding whether individual companies are eligible), with the participation of the most representative trade union and employers' organisations in the case of the sectoral modality.

- Once activated, it will allow companies to apply for measures to reduce working hours and suspend employment contracts. It will be processed in accordance with the provisions for force majeure ERTEs (art. 47.5 WS), following a consultation period under art. 47.3 WS, with the specific features established in art. 47 bis WS.

- The report of the Labour Inspectorate is mandatory.

- The labour authority shall issue a decision within 7 days of the consultation period conclusion's communication. Silence is positive.

- The labour authority will give the green light if the company has carried out a consultation period and if there is a concurrence of causes, therefore, the reasons must be justified.
- The possibility of extension provided for ETOP ERTEs applies to this Mechanism.

Two types of RED Mechanism are established:

Cyclical. When there is a general macroeconomic situation that makes it advisable to adopt additional stabilisation instruments "to avoid immediate dismissals in the wake of the shock", with a maximum duration of 1 year.

- Companies may suspend the contracts or reduce the working hours of their workers while the Mechanism is activated.

- During this period of suspension or reduction of working hours, the training of workers shall be encouraged.

Sectoral. When there are permanent changes in a sector of activity that generate retraining needs and professional transition processes for workers, with an initial duration of 1 year and the possibility of two extensions of 6 months each.

- Companies may suspend or reduce working hours while this Mechanism is active and improve the employability of workers in their current company or in other companies or fields of activity.

- The application must be accompanied by a plan for the re-qualification of the persons concerned.

EXEMPTIONS FROM SOCIAL SECURITY CONTRIBUTIONS

During the application of ERTE (ETOP, Force Majeure or RED), companies may voluntarily avail themselves, when the conditions and requirements are met, of the following exemptions from Social Security contributions [40]:

ERTE Exemptions:

20% ERTE ETOP

90% Temporary force majeure ERTE

90% IMPEDIMENT OR LIMITATION

CYCLIC RED MECHANISM:

60% In the first four months of activation

30% in the immediately following four-month period

20% in the next four months

SECTORAL RED MECHANISM: 40%

RED Mechanism exemptions are bound to training actions

Source: Ministry of Labour and Social Economy

- The exemptions in the ERTE ETOP and RED Mechanism are bound to the company developing **training actions** under the terms established in the regulation.

- The contribution exemptions will be conditional on the **affected workers remaining in employment for 6 months following the end of the ERTE period.**

- Companies which fail to comply with this commitment shall reimburse the amount of the contributions for which they were **exempted in respect of the person for whom this requirement was not complied with**, together with the corresponding surcharge and interests.

- This commitment shall not be considered non-compliant when the employment contract is terminated due to disciplinary dismissal ruled as fair, resignation, death, retirement or total, absolute, or severe permanent disability of the worker.

    i. Nor is the end of the call-in of persons with a permanent-discontinuous contract considered to be non-compliant when this does not involve a dismissal but an interruption of the contract.

    ii. In the case of temporary contracts, this requirement shall not be deemed non-compliant when the contract has been formalised in accordance with the provisions of Article 15 WS and is terminated due to the end of its cause or when the activity for which the contract was entered into cannot be carried out immediately.

[40] On the employer's contribution for common contingencies and joint collection concepts.

COLLECTIVE BARGAINING (ART. 84 AND 86 WS)

- **The priority of application of the company agreement in wage matters is eliminated** [41], avoiding agreements that break the wage level of sectoral agreements with a transitional regime for pre-existing agreements to which the new provisions will be applied when they lose their validity and at the latest from 31/12/2022 onwards.[42]

- A period of 6 months is included to adapt the text of the existing agreement to the changes in Article 84 .2 WS from the time the new regulations are applicable to the specific area of the agreement.[43]

- This innovation cannot be neutralised by means of compensation and absorption mechanisms, without prejudice to the possibility for companies to use the mechanisms for non-application (" opt-out ") provided for in the legislation in force.

- **Indefinite ultra-activity is restored.** In other words, the conditions laid down in a collective agreement will remain in force even after the end of its explicit validity, except for possible provisions that may be incorporated in the collective bargaining.

  To this end, Article 86.4 WS is amended to read as follows:

> *One year after the collective agreement has been terminated without a new agreement having been agreed upon, the parties shall be subject to the mediation procedures regulated in the state or regional interprofessional agreements provided for in Article 83, in order to effectively resolve the existing discrepancies.*
>
> *Furthermore, provided that there is an explicit agreement, prior or contemporaneous, the parties shall be subject to the arbitration procedures regulated by these interprofessional agreements, in which case the arbitration award shall have the same legal effect as collective agreements and shall only be subject to appeal in accordance with the procedure and on the grounds set out in Article 91.*
>
> *Without prejudice to the development and final solution of the aforementioned mediation and arbitration procedures, in the absence of an agreement, when the bargaining process has elapsed without an agreement being reached, the collective agreement shall remain in force.*

******

AUGUSTA ABOGADOS
January 2022

[41] Established by Law 3/2012.
[42] 6th Transitional Provision of the Reform.
[43] Same as above.