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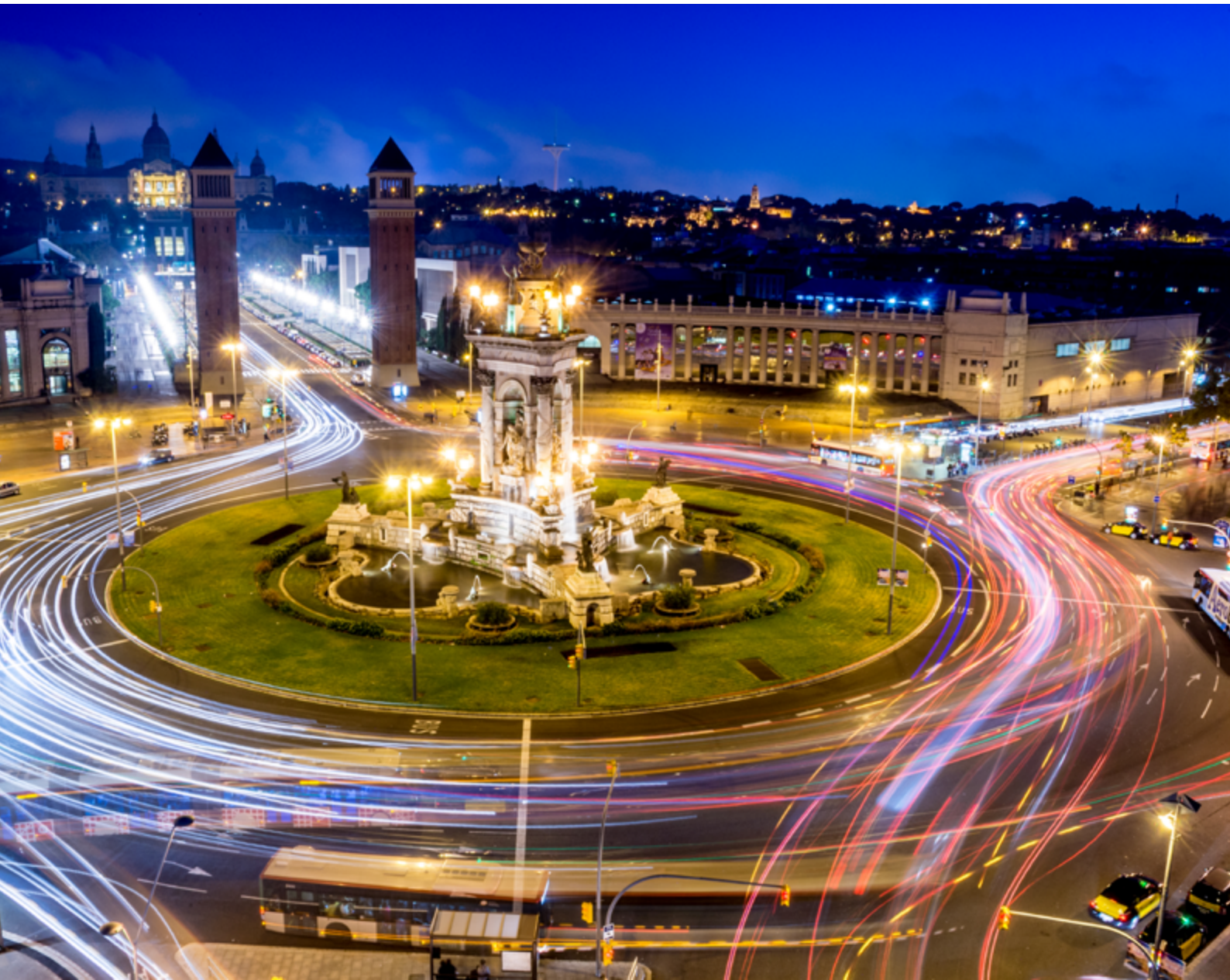
The Global Employer: Spain 2021



The Global Employer

Spain Guide 2021

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**Trench Rossi Watanabe and Baker McKenzie have executed a strategic cooperation agreement for consulting on foreign law*

About the guide

This guide is intended to provide employers and human resources professionals with a comprehensive overview of the key aspects of Spanish employment law. It covers the entire life cycle of the employment relationship from hiring through to termination, with information on working terms and conditions, family rights, personnel policies, workplace safety and discrimination. The guide links to our global handbooks, which include information for Spain on immigration and data privacy. The guide also contains information on the employment implications of share and asset sales.

Save where otherwise indicated, law and practice are stated in this guide as at October 2021.

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1 Overview

1.1 General overview

Traditionally, Spain was considered a pro-employee jurisdiction; however, since 2010 Spain has passed a number of amendments to employment and labor laws that have substantially favored employers. The most significant set of amendments were passed in 2012 and substantially lowered severance costs, increased employers' rights to modify existing employment conditions (including previously agreed salary, job duties and job location) and curtailed the power of unions in negotiating collective bargaining agreements.

Faced with severe financial difficulties since 2010, Spain's unemployment grew steadily from 8.26% in 2006 to a high of almost 25.8% throughout most of 2012 and 2013. Since 2014, unemployment has been on a slow decline and was around 14% in August 2021. As a result of the financial and real estate crisis, pro-employer legal amendments and unemployment, average salaries in Spain have dropped by anywhere from 10% to 20% since 2010. Lower salaries and an available workforce, coupled with generally favorable legal trends, have made Spain a much more pro-employer jurisdiction over the last few years.

The current government has announced its intention to revoke some of these pro-employer amendments that were passed in recent years, but we are yet to see the extent to which such amendments will revoke the prior legal provisions.

In addition, an enormous number of royal decrees were passed by the government in 2020 and 2021; most of them are aimed at dealing with the consequences of the health crisis caused by the COVID-19 virus and many were aimed at establishing and extending the relevant furlough schemes.

However, one must also highlight the other laws that were passed, such as the new law on teleworking (an area that was hitherto largely unregulated), the regulations passed on equal pay, equality plans and wage registers, as well as the new law on "riders" (home delivery workers) in light of the social debate that has arisen in relation to their services and the decisions passed by the Spanish courts (which declared that such delivery people are actually employees). The foregoing resulted in the government passing Royal Decree Law 9/2021, dated 11 May 2021, which amends the Spanish Employment Act and establishes that product delivery or distribution work, if performed within the framework of digital platforms, is presumed to be employment.

1.2 General legal framework

1.2.1 Sources of law

The main sources of Spanish labor law are the Spanish Constitution of 1978, treaties, conventions, laws and government regulations that implement the treaties and conventions.

Another source of law is case law, although technically case law in Spain is only created when two Supreme Court cases decide the same issue in the same way. While single Supreme Court cases and appellate-level court decisions are extremely persuasive to lower courts, they are not, in principle, binding. Therefore, decisions tend to be more inconsistent than may be expected in common law countries.

Individual employment agreements are also a source of law in terms of being the legal basis for the employer/employee relationship.

1.2.2 Collective agreements

Collective bargaining agreements (CBAs) are detailed, binding agreements negotiated between unions (and/or other employee representatives) and employers' associations (and/or employers).

Many CBAs have been negotiated for a specific industry and apply throughout the entire country, to the extent that all companies in Spain that belong to that specific industry will automatically be bound by the rules established in the nationwide CBA. Other agreements apply only to a specific province or limited geographical area, or, if the agreement is negotiated at a company level, to a specific company (or part of it), as may be agreed by the negotiating parties. Almost all companies in Spain are subject to a CBA and they should know about and comply with the applicable agreement's rules. Legal amendments that became effective on 12 February 2012 curtailed the restrictive nature of industry-level CBAs in three basic ways: first, local company-level CBAs will prevail over industry-level agreements in a long list of matters, including salary and benefits, overtime, work hours, annual vacation planning, job categories, etc.; second, it is possible for employers to opt out of and substitute key aspects of the industry-level CBAs for economic, productive, organizational or technical reasons; and third, reduced expiration dates were introduced for CBAs that are being renegotiated.

1.2.3 Court framework

Employment-related claims are heard by the Spanish labor courts. Disputes that arise within a single regional autonomous community are heard by the labor courts of first instance and the appellate level court for that autonomous community. Issues that impact two or more autonomous communities are heard by the National Tribunal of first instance. Appeals from the regional autonomous community courts as well as the National Tribunal of first instance are heard by the Spanish Supreme Court and, when a constitutional issue is involved, also by the Spanish Constitutional Court.

1.2.4 Litigation considerations

Individual disputes and collective disputes

In general, individual disputes are those that arise between an employee and an employer over the individual's subjective rights. Collective disputes arise only when collective interests are at stake, but not where the interest is exclusively an individual interest that happens to affect more than one employee individually.

Mediation, arbitration and conciliation

In both individual and collective disputes, Spanish law imposes an obligation to attempt conciliation with the labor authorities before filing any claim in labor courts. Conciliation is a procedure that aims to encourage an agreement between the parties with the ultimate goal of avoiding judicial proceedings. Mediation proceedings may be initiated at the request of the parties in dispute for the appointment of an impartial mediator. If the settlement proposed by the mediator is accepted, it has the same binding effect as a collective agreement. Arbitration is a procedure for settlement of labor disputes characterized by the intervention of a third party, the arbitrator, whose decision is binding. Mediation and arbitration procedures are typically initiated for collective disputes and rarely used in individual disputes.

1.3 Types of working relationship

Individuals who provide their service broadly fall into the following main groups: employees, "economically dependent" independent contractors and agency workers. The status of an individual is important because this determines whether the protective labor law or the more flexible commercial law applies, whether the labor or civil courts have jurisdiction, which social security regime applies and what the company's social security contributions are, among other things. The table below provides more information on these groups.

Types of working relationship	
Employees	An employment relationship is defined as the willing rendering of services by an individual (the employee) for consideration and for the benefit — within the

Types of working relationship	
	organization — and under the direction of another entity or individual (the employer). Significant factors in determining the existence of an employment relationship are the dependence of an individual on another in carrying out the contracted services and the individual's place in the company's organization. Consequently, providing the individual with the necessary work tools, specific instructions (e.g., work schedules, policies and work standards), position within a reporting line, workplace, etc. are basic characteristics of the employment relationship, regardless of whether the employer is located in Spain or abroad. Ordinary employment relationships should be distinguished from defined-term employment relationships, which are limited in duration and permitted in only specific circumstances. The law regulates these special defined-term contracts in detail, establishing specific conditions for their use, special severance terms and restrictions on their repeated use — see **5.2** below for more details on these and other types of employment contracts. Ordinary employment relationships also need to be distinguished from special types of labor relationships, which are governed by special laws enacted to address the specific issues that arise in such cases. Special labor relationships include employment relationships with executive staff (top executives) in limited cases, family domestic service, prisoners in penal institutions, professional athletes, performance artists, commercial agents (in certain cases) and lawyers who render services for individual or collective law firms. The top executive legislation that regulates this type of special relationship applies to executives due to the significant degree of trust between the company and the top executive and the increased negotiating power of the executive versus an ordinary employee. Specifically, the legislation applies to personnel who exercise the employer's authority with full autonomy and responsibility over all aspects of the business and whose authority is limited only by the direct instructions of the board of directors. Normally, only a country manager or general manager will be considered a "top manager" or "top executive."
Economically dependent independent contractors	Spain's law on independent contractors (ICL) aims to regulate the contractual, social security and health and safety issues that directly affect independent contractors. In doing so, it also indirectly affects companies who deal with independent contractors. The ICL introduces the concept of economically dependent independent contractors (EDICs). EDICs are independent contractors who, despite their functional autonomy, render their services with a strong, and almost exclusive, financial dependence on a single client. Financial dependence in this respect is defined as receiving from a single client at least 75% of the independent contractor's income. There are certain other criteria that must also be assessed to determine whether an independent contractor qualifies as an EDIC. For example, a contractor will not be considered an EDIC if it employs people, or contracts or subcontracts part or all of its work to third parties.

Types of working relationship	
	The ICL establishes a number of new rules that affect companies that have contracted EDICs, such as the need to formalize a contract in writing, specific rules on termination (including compensation for damages) and the requirement to provide a minimum of 18 working days' holiday per year. Companies dealing with independent contractors should review the status of their contractors to determine whether any of them qualify as EDICs. If they do, the company should consider whether it should enter into contracts with the EDICs. The contracts should set out the duration of the relationship between the parties and the consequences of prior termination and should be registered with the labor authorities. Companies should also: • ensure that the EDICs do not fulfill any of the principle criteria for being considered employees • consider the possible consequences that health and safety and social security regulations could have on their dealings with EDICs
Agency workers/temporary employees	Duly authorized temporary employment agencies may offer employees to companies who do not wish to assume the costs of selecting and training individuals. The law provides that employees lent by temporary agencies should have the same essential fixed and variable salary conditions and other work and employment conditions as if they had been directly contracted by the company for which they work, as well as the same conditions in terms of protection for pregnancy, nursing, equality and discrimination. The law also clarifies that temporary agency employees are entitled to use the transportation, nursery and other services of the company where they work and more notably, the law establishes the employee's right to be informed of job vacancies at the company where they are working. Nonetheless, employees may only be hired through such temporary employment agencies on a temporary basis and only for the following reasons: • to perform a job or service that by its nature is limited in time • for circumstantial needs of production, excess orders or accumulation of work, even if it is the ordinary work of the company • to substitute employees on leave who have the right to have their job position reserved • to temporarily cover a job position during an employee selection process or promotion process • to render services under training contracts (on-the-job training agreements and work-study agreements) Temporary employees cannot be hired to substitute employees on strike, to perform certain dangerous activities, or to fill job positions that are vacant due to the fact that the employer dismissed another employee unfairly (or through

Types of working relationship	
	a constructive dismissal) in the previous 12 months. Nor can they be hired to work for another temporary employment agency. Employees from temporary agencies enjoy special protection in terms of health and safety in the workplace. Temporary employees are also entitled to be represented by the employee representatives at the company where the work is performed. The company at which the temporary employee's services are provided is jointly liable for the employee's salary and social security obligations (including the payment of severance compensations in the event of termination of employment), such that if the temporary agency does not pay, the company hiring the temporary agency will be liable. If, however, the employment contract does not comply with the specified legal requirements, the company receiving the services will be jointly and severally liable for any salary and social security obligations (including the payment of severance compensations in the event of termination of employment). Should a temporary employee continue working after the agreed term of their contract with the third-party company has expired, the employee will be considered to be an employee of the third-party company for an indefinite term. Only duly authorized temporary agencies should be used to hire employees. Lending of employees, other than through authorized temporary employment agencies, may result in the illegal transfer of employees. The illegal transfer of employees may, in turn, result in: (i) the employee's right to claim permanent employment in the company of their choice (among the two companies involved in the illegal transfer of employees); and (ii) administrative fines being imposed on the companies involved in the illegal transfer of employees and in extreme cases, criminal liability. Temporary employment agencies, which previously could only exclusively perform temporary agency services, are now authorized to serve as placement agencies.

1.4 On the horizon

The current government has announced its intention to revoke some of the pro-employer amendments that were passed in recent years (see further at **1.1**), but we are yet to see the extent to which such amendments will revoke the prior legal provisions.

Watch this space in relation to:

- equalization of pay and other working conditions between employees of subcontractors and those of client companies. This would likely have the effect of increasing personnel costs for contractors, but it could also increase the potential liability of companies receiving the services of contractors in the event that contractors do not comply with obligations to their employees.
- a switch to sector-level CBAs having supremacy over company-level CBAs in relation to certain issues (including salary amount, working hours, overtime, etc.)

- an increased expiration period for CBAs (currently one year from the day any of the signatory parties denounce the agreement, unless otherwise agreed)
- a potential brand new Labor Act

With regard to these potential labor reforms, the government has also announced its intention to unify temporary employment contracts, which would imply the elimination of certain types of such contracts that currently exist. The aim is to restrict the use of temporary contracts and limit some aspects such as duration, cases where they can be used, etc. with a view to promote the utilization by companies of indefinite term contracts. There are also expected changes in the substantial modification of working conditions procedure and to promote the use of furlough schemes with reduction of working hours instead of putting in place a collective dismissal or other redundancy measures.

In addition, reforms regarding the national pension system and retirement benefits are currently undergoing parliamentary procedure, so we are not yet aware of the full extent of these reforms either. However, we expect that changes are going to be made to early retirement, delayed or postponed retirement, and forced retirement schemes to encourage employees to retire at the established retirement age or sometime thereafter.

The government also plans to remove the maximum cap to social security contributions and to further increase minimum wages. These measures would have a significant impact on the employer's social security and salary costs.

The EU Whistleblowing Directive (EU) 2019/1937 has not yet been implemented but we expect it will be transposed to Spanish law in the near future (the Spanish government has until the end of 2021 to implement it).

2 Hiring employees

2.1 Key hiring considerations

The general right and freedom to work in Spain means that employees are entitled to work wherever they choose. In hiring employees, it is advisable for companies to bear in mind the following rules:

- Full capacity to enter into a binding employment relationship is reached at the age of 18. Individuals between the ages of 16 and 18 are entitled to work but require a parent's or guardian's consent to have complete contractual capacity. Individuals under the age of 16 cannot, as a general rule, enter into employment relationships. In addition, individuals under the age of 18 are not allowed to work overtime or night shifts.
- The Spanish government, on an annual basis, establishes discounts on social security contributions for companies that hire certain types of individuals, such as long-term unemployed individuals, employees who have recently been on maternity leave and disabled individuals — see further at **6.12**. Employee candidates can be sought from the National Institute of Employment, which maintains a database of unemployed individuals.
- The concept of "at will" employment is not recognized in Spain. Employment contracts are as a general rule either ordinary, indefinite contracts (requiring cause for termination) or defined-term contracts, by nature limited in time if certain conditions are met that justify the defined term.

2.2 Avoiding the pitfalls

Discrimination claims in the hiring process are not common in Spain, but it is important to comply with all data protection requirements in the hiring process. Special care should also be taken to ensure that any new employment contracts comply with the requirements of the type of employment contract

being used. Given that there is no at-will employment in Spain, the use of trial periods is especially important when an employment relationship begins and companies should ensure that such trial periods are correctly formalized.

2.3 Procedural steps and key documents in recruitment

Claims of discrimination in the hiring process are relatively rare in Spain. Nonetheless, it is advisable to ensure that:

- any advertisements for job positions are drafted neutrally, so as to not reflect any unjustified and discriminatory preferences
- questions asked in the job interviews are not directly or indirectly discriminatory (for example, a prospective employer should not, as a general rule, ask a women whether she is pregnant or expects to have children)
- candidate resumes, notes from interviews, related hiring documentation and any resulting databases should comply with all data protection requirements

3 Carrying out pre-hire checks

Although pre-hire checks are permitted in Spain, care should be taken in conducting them to ensure compliance with specific regulations.

3.1 Background checks

Prospective employers can and should verify the candidate's identity, but the normal means of identification is the national ID card, foreigner's residence card and/or passport. There are no public databases or services to check identity/social security information in Spain.

The candidate can be asked to provide their educational background information or such information can be verified directly with the educational institution. Nevertheless, the educational institution will likely require documentary evidence of the candidate's consent to disclose the information. Notice and consent is required.

Background checks regarding credit history or criminal records are generally not conducted in Spain and are only allowed for certain positions in specific sectors (e.g., security or education sector). For example, in the case of employees who are in direct contact with minors, employers are obligated to require the employee to submit their criminal records.

As such, credit or criminal background checks may be conducted in some circumstances, but only if such information is directly related to the job position at issue. Any credit checks should not be excessive in light of the purpose of the check, since data processing should always be proportionate and legitimate.

3.2 Reference checks

The candidate can be asked to provide a list of prior employers. With the employee's notice and consent (which is required), the prospective employer can call such prior employers to confirm whether or not the candidate has worked for them and for what period of time, and inquire as to the candidate's performance.

3.3 Medical checks

During the recruitment process employers are not entitled to request health checks for the candidates (including drug analysis). Likewise, upon hiring, health checks are voluntary for the employees, as a general rule, and the only information that is collected by the employer from said health checks is

limited solely to the information that is necessary for the employer to assess the effects of the working conditions of the employees (e.g., whether the employee is suitable/unsuitable for the job position).

There are some exceptions to these general rules, for example:

(i) when the job position to be covered poses the risk of professional illnesses/accidents (e.g., the employee is exposed to chemical substances, radiation, etc.)

(ii) where there is risk for third parties (e.g., pilots in the aviation sector)

(iii) when it is established as a legal obligation in relation to the protection of specific risks and activities of special danger

In these cases, employers may rely on the execution of the employment contract as a legal basis for this processing.

4 Immigration

Please refer to our handbook, The Global Employer: Focus on Global Immigration and Mobility, which is accessible HERE, for information about the immigration system that applies in Spain.

5 The employment contract

5.1 Form of the employment contract

As a general rule, employment contracts can be either written or oral. However, employees are entitled to have their employment conditions established in a written contract if they so request, even if their employment has commenced. Companies hiring employees under certain types of employment relationships must also enter into a written contract with the employee. The government has established model form contracts that should be used, although additional clauses may, of course, be added.

The types of contracts that must be made in writing include the following:

- definite-term employment contracts, including training contracts (on-the-job training agreements and work-study agreements); contracts for the performance of a specific, limited job or service; substitute contracts; or contracts due to unusual, increased circumstances of production with a duration that exceeds four weeks or that is entered into on a part-time basis
- contracts with temporary employment agencies
- contracts that are governed by the special legislation applicable to commercial agents
- subsidized contracts/contracts that entitle employers to pay reduced social security contributions
- contracts for part-time employment, including partial retirement contracts
- permanent seasonal work contracts (also called “fixed intermittent contracts”)
- contracts for employees who work from home

Failing to establish the contract in writing does not invalidate the contract, but it does create a presumption that the contract has been entered into for an indefinite term and on a full-time basis. A number of contract clauses must also be in writing to be effective, such as noncompetition clauses and trial period clauses. The employer should inform the employment authorities and the employee representatives of the basic terms of the contract.

Regardless of whether the employment agreement is made orally or in writing, if the duration of the employment relationship exceeds four weeks, companies must inform the employee of certain employment conditions in writing. The information required includes the following: identity of the parties; company domicile, workplace location; date of commencement of employment (and, in the case of a temporary contract, its estimated duration); job category or summary of job position; amount of salary, components of salary and number of salary payments; work hours and schedule; vacation; prior notice applicable upon termination; and the applicable CBA. If the employee is hired to work abroad, additional information must be provided. The company must also inform the employee in writing if any of the above conditions are modified.

5.2 Types of employment contract

Aside from the ordinary employment contract that has an indefinite duration, Spanish law regulates a number of specific types of employment contracts individually, establishing specific requirements for each type. These special types of contracts can be grouped into special employment agreements as set out in the table below.

Types of employment contract	
Part-time employment agreements	Part-time employment contracts are defined as contracts with an employee who works fewer hours (a day, week, month or year) than a full-time employee who works in the same company and work site, with the same contract and similar job position. Part-time contracts can be subscribed either for an indefinite term or for a fixed term, if and only if the requirements for a fixed-term contract are met. Work-study contracts, however, may not be entered into on a part-time basis. Part time employees cannot perform overtime, unless the overtime is required due to exceptional urgent circumstances. However, part-time employees can agree to perform what are called “complementary” work hours, so long as their regular work hours are at least 10 hours per week on an annual average. These complementary hours are similar to overtime, but they are not subject to the salary and social security supplements required for overtime. These complementary hours can offer an employer substantial flexibility in organizing its human resources. In this respect, part-time employees may agree to perform up to 30% of their regular work hours as complementary hours. If agreed, then the employer will be entitled to require the employee to work this extra time by providing the employee with only three days of notice. By CBA, the 30% may be increased to up to 60% of the employee’s regular part-time work hours, and the required notice may also be reduced. In addition to any such previously agreed complementary hours, employers may request part-time indefinite-term employees to work up to 15% of their regular work hours as additional complementary hours. The employee is free to either agree or refuse to work these additional complementary hours. By CBA, these “voluntary” complementary hours may be increased to 30% of the employee’s regular work hours. Please note that special tracking requirements apply to the performance of complementary hours. Failure to comply with these tracking requirements can result in claims that the employee has become a full-time employee, and so it is advisable to adhere to all such requirements. Employers may qualify for reductions in their social security contributions if they hire certain types of

Types of employment contract	
	individuals as part-time employees for training purposes, specifically, if they hire unemployed persons aged under 30 who have no work experience or fewer than three months of experience, or who meet certain other conditions. In these cases, the employer's social security contribution rates for the part-time employee will be reduced for 12 months — extendable to an additional 12-month period — by 75% if the employer has over 250 employees, or by 100% if the employer has up to 250 employees. A "relief" employment agreement is a part-time agreement entered into with an unemployed individual or an employee with a fixed-term contract, for the purpose of substituting part of another employee's work hours; this other employee enters what is known as "partial retirement" and receives a proportional part of their retirement pension. That is, an employee working full time can reduce their work hours by 25% to 75% and partially retire if they qualify to do so; simultaneously, the company can hire another employee on a part-time or full-time basis to work during the hours the original employee no longer works. This "relief" agreement can have an indefinite duration or can be entered into for the time remaining until the partially retired employee reaches official retirement age.
Definite-term employment agreements	An employment contract is generally presumed to be entered into for an indefinite period of time and all contracts should be for an indefinite term unless sufficient cause exists for the contract to be entered into on a temporary or definite basis. The causes that justify a definite-term contract are specified by law and must be real, otherwise an allegedly definite-term contract will be considered fraudulent. If the contract is fraudulent, the company may be subject to fines and the employee will be entitled to continue working indefinitely. There are various categories of standard definite-term employment agreements: • agreements for a specific, limited service or job: The purpose of this type of agreement is to hire employees to perform a specific service or task. The duration is limited by nature, even if the specific duration cannot be determined in advance. CBAs can define what kinds of jobs or tasks can be covered using these types of agreements. The agreement will expire when the service or task is completed. However, the maximum term of these agreements must not exceed three years or four years — the latter only if extended by CBA. • agreements for extraordinary production requirements: These contracts are entered into in situations where market circumstances, workload or an accumulation of orders in the ordinary course of business of a company requires a temporary increase in the workforce. The maximum duration of these agreements is six months within any 12-month period, unless otherwise established in the CBA. • interim agreements: These agreements can be used to either (i) temporarily replace employees who have the right to have their job reserved while they are on leave, or (ii) temporarily fill an open job position while the recruitment process is being carried out, for up to a

Types of employment contract	
	maximum of three months in this latter case. The contract ends when the employee on leave is reinstated or when the vacancy is filled. • employment agreements for training or work-study employment — see further details below • contracts concluded through temporary employment agencies Most permitted types of definite-term contracts are subject to a general time limit, such that if an employee has worked in the same or a different job position at the same company (or group company) for over 24 months in any 30-month period, under two or more definite-term contracts, then the employee will automatically be considered to be an indefinite-term employee, subject to all provisions regarding termination indemnities, including possible severance compensation for unfair dismissals. Such provision is not applicable for interim agreements, training contracts or substitute contracts. This limit in the repeated use of fixed-term contracts was suspended on 31 August 2011. However, the rule became effective again on 1 January 2013 (although the period between 31 August 2011 and 31 December 2012 does not compute in a calculation). The maximum duration of definite-term contracts may also, depending on the type of contract, be further limited by an applicable CBA. Therefore, the CBA applicable to the company should always be checked before entering into definite-term contracts.
Training contract/on-the-job training employment agreement	This type of training contract has a fixed duration. The purpose of this type of training contract is to allow employees with a degree (university or medium to high-level training or any equivalent recognized degree, qualifying under government regulations) who have a so-called “certificate of professionalism” (*certificado de profesionalidad*), to develop their theoretical skills and acquire certain practical experience in their field within the five years following the completion of their studies, or seven years in the case of disabled employees. The employee should provide the employer with a photocopy of the degree held and the contract should be made in writing, specifying the degree that the employee has, the duration of the contract and the job or jobs that the employee will be carrying out in training. The contract may include a trial period of up to one month for employees with a medium-level degree and two months for those with a higher-level degree, unless otherwise established by the applicable CBA. The permitted duration ranges from six months to two years, although it can be longer for different job positions if the degree or certificate of professionalism differ. Salary will be determined according to the collective agreement, but may not in any case be: (i) less than 60% (during the first year) or 75% (during the second year) of the salary established in a collective agreement for a permanent employee who carries out the same or similar job; or (ii) less than the general legal minimum wage. If the contract lasts longer than one year, the employer must notify the employee 15 days prior to the contract’s termination. If notice is not provided

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	(or if notice is provided but is insufficient in length), the employee will be entitled to continue to receive their salary for the period during which they should have, but did not in fact, receive notice. Upon termination, the employer should provide the employee with a record of the tasks carried out, positions held and duration of the contract. Companies that hire persons under 30 years of age under an on-the-job training agreement will benefit from a reduction in the employer's social security contribution rates related to common contingencies as follows: (i) 50% during the entire term of the contract; and (ii) 75% if the employee is carrying out an internship at the time they are hired. For the companies to be entitled to such reductions, employees are required to have completed their studies (there is no time limitation as to when they must have completed such studies, as opposed to the general rule that this type of contract must be entered into within five years of completion of studies).
Training contract/work-study agreements	This type of training contract has a fixed duration. The purpose of this type of contract is for employees to acquire the theoretical and practical training necessary to carry out a career or job position that requires a certain level of qualification. The employee must lack the required degree or certificate of professionalism for an "on-the-job" training contract and, as a general rule, must be between the ages of 16 and 25. No age limits apply to disabled employees. Employment time is divided into theory-based training and working hours. Working hours cannot exceed 75% during the first year — or 85% during the second and third years of the term of the contract — of the maximum permitted employee working hours established in the applicable CBA or, if there isn't one, of the legal maximum working hours. Training may take place at a specialized training center or at the company. The contract duration may range from a minimum of one year to a maximum of three years. However, the applicable CBA can establish a different duration, although the minimum period for the contract cannot be less than six months, nor can it exceed three years. The contract can be extended twice for a minimum of six months per extension and is capped at three years. Repeated use of the contract with the same employee is permitted at the same company for different professions.
Remote working agreement	A new Royal Decree Law was passed on 22 September 2020 to regulate remote working in Spain. Prior to March 2020, when the COVID-19 pandemic arose, remote working and working from home was relatively unusual in Spain; thus, it was largely unregulated. The new regulations are designed to bridge the regulatory gap in key aspects of remote working; it regulates the basic rights and obligations of both employees and companies in more detail and gives collective bargaining a major role in configuring this type of work. However, certain aspects related to the implementation of this law will have to be revisited by legislators in the future or be addressed by case law.

Types of employment contract	
	Here are further points to bear in mind: • **Definition of remote work:** Remote work will be considered to exist when, in a three-month period, a minimum of 30% of the employee's working hours are performed at home or at another place chosen by the employee (i.e., an employee regularly working outside the office two days out of five was previously not considered remote working but under the new regulation it is). • **Written agreement with mandatory minimum content:** Said agreement must include, among other aspects, the mandatory compensation that the company must pay for the expenses that arise from remote work. The regulation refers to what is established by CBAs or covenants reached with employees' legal representatives (ELRs) but few such agreements currently contemplate this issue. • **Adaptation of pre-existing situations or agreements to the new regulation**: Individual agreements or existing situations that are not based on CBAs or covenants must be reviewed and amended within a period of three months from the enactment of the new regulation. Remote working situations regulated by CBAs or covenants must also be amended once they expire. If such agreements do not stipulate a term, the new regulation establishes a term of one year from its enactment date to comply, unless the parties agree on a longer term, which cannot be more than three years. • Adaptation of company policies on the use of electronic devices, data security and protection, the right to disconnection and involvement of ELRs: It will be necessary for companies to review (and, where appropriate, amend) their corporate policies on equal treatment and opportunities for women and men, data protection, timekeeping, digital disconnection and the use of digital devices, among others. To such end, the company is required to involve the employees' legal representatives. • **Voluntary/reversible:** The voluntary and reversible nature of remote work has been reinforced, according to the terms that are negotiated collectively. Said reversibility is one of the points that may generate the most conflict. • **Working hours:** Certain rights are established that will have an impact on working hours (flexitime, timekeeping and digital disconnection). • **Review and amendment of equality plans/anti-harassment protocols:** The specific features of remote work must be taken into account when designing the measures and plans for gender equality and protection against sexual or gender-based harassment. • **Occupational hazard prevention:** The assessment of hazards and the planning of prevention activities must be adapted to the specific features of remote work and to the new procedures established for assessing the employee's workplace.

Types of employment contract	
	• **Claims:** Special judicial proceedings have been established for claims regarding access to, reversal of or changes in remote work. Judgments may not be appealed, except in certain specific situations.

5.3 Language requirements

The validity of employment contracts and other agreements with employees is not subject to any specific language requirements. Nonetheless, to avoid any employee claims that the language was not correctly understood, it is normally advisable to formalize all documents in Spanish or other local language.

6 Working terms and conditions

The law establishes basic minimum rights and conditions, which in some cases may be modified by CBAs and which may always be improved in favor of the employee by CBAs and/or individual employment contracts. Some of the minimum conditions are discussed in this section. Please note that these conditions are subject to a number of legal exceptions, as well as the provisions of the applicable CBA.

6.1 Trial periods

Subject to the provisions of the applicable CBA, employers and employees may agree to a trial period. During the trial period, both the employer and the employee are bound by the terms of the employment contract but may terminate such contract without having to provide prior notice of termination, cause for the termination or any type of severance compensation. The termination should be notified in writing.

To be valid, the trial period clause must meet the following requirements:

- It must be agreed in writing.
- It must not exceed certain time limits.

Regarding the latter, unless otherwise specified in the applicable CBA, the maximum trial period permitted in ordinary indefinite-term employment agreements is two months for unqualified employees, unless the company has fewer than 25 employees, in which case the maximum is three months; and six months for highly qualified employees. For executive staff (see further at **1.3**), the trial period can be up to nine months if the contract has an indefinite duration.

Definite-term contracts may have shorter trial periods, which should be confirmed depending on the circumstances. However, the trial period for fixed-term contracts lasting less than six months may not exceed one month, unless otherwise established in the applicable CBA. If the time limits are surpassed, the clause as a whole may be deemed null and void and offer no protection at all, even if the employee is dismissed within a period of time that would otherwise have been lawful.

It must serve as a real “trial” between parties who do not know if the employment relationship will be satisfactory; therefore, if the employee has already carried out the same job with the company in the past, independent of the type of employment contract under which similar services were provided, the clause may be deemed null and void.

The regime governing the interruption of trial periods (which effectively stops the clock on the trial period in prescribed circumstances) has been updated and extended to other absences related to

maternity, breastfeeding and paternity (risk during pregnancy, risk during breastfeeding and paternity in addition to those that already existed such as temporary sick leave or maternity leave). For example, where a pregnant employee is unable to continue working due to a health risk to her baby, the trial period will be suspended and will only be restarted when she is fit to return to work.

A trial period cannot, in principle, be used to disguise discrimination. Any termination within the trial period that is in fact based on discrimination or any other limitation of the employee's fundamental rights or public freedoms may be deemed null and void. Finally, please note that terminating the contract of a pregnant employee during the trial period will be deemed null and void unless the employer proves that there are grounds unrelated to pregnancy or maternity.

6.2 Working time

As of 12 May 2019, all companies are obliged to keep a daily record of working hours to ensure that certain limits are observed in relation to working hours (e.g., mandatory rest periods, maximum working hours, etc.) and to enable monitoring by the labor inspection authorities, in particular regarding overtime performed (and whether said overtime is properly compensated). Such record, which must indicate the specific start time and finish time of the working hours of each employee, must be kept for a period of four years and be available to the employees, their representatives and the labor inspection authorities.

As to recording methods, the law allows companies to freely choose any system they wish (paper or electronic) to record working time, provided that the system is reliable, and the data cannot be changed or manipulated by the employer. Such methods must be negotiated with the employees' legal representatives, although unilateral policies are accepted in the absence of a CBA or if there is no employee representative. Such recording systems must also comply with the regulations for data protection and digital rights.

This new obligation can have a significant impact on companies who were not compensating overtime performed properly.

Maximum annual working hours: As a general rule, the maximum working week for employees is an average of 40 hours over a reference period of a year. According to case law, the annual maximum based on 40 hours per week is 1,826 hours and 27 minutes. Most CBAs have decreased the maximum number of hours permitted and often set the maximum at 1780 hours. Any time worked in excess of the ordinary work hours is considered overtime (see further at **6.5**).

Maximum daily working hours: As a general rule, employees may not work more than nine hours per day, unless otherwise provided by the CBA. Any time worked in excess of nine hours will be considered overtime (see further at **6.5**). Minors (under the age of 18) cannot work more than eight hours per day. These limits are subject to any higher or lower limits set out in the applicable CBA. They are also subject to certain legislative exceptions increasing or decreasing maximum hours for specific types of work (including work involving environmental risks, work with refrigeration, underground construction work and work carried out in isolated locations).

Breaks during work shifts: If an employee's shift lasts more than six hours, they are entitled to a minimum 15-minute break. Minors are entitled to a 30-minute break if their shift lasts more than 4.5 hours. The break time may be considered actual work time and payable depending on the applicable CBA.

Minimum rest periods between work shifts: The law, as a general rule, requires that employees enjoy a minimum of 12 hours' rest between work shifts, with at least one rest period per week of 1.5 days. However, these rules can differ in relation to certain types of employees (e.g., employees who work in isolated locations, employees who work at their own home or at the home of a third party, employees on call, etc.)

Work time distribution: By virtue of a CBA, or, in its absence, through agreement between a company and its employee representatives, an irregular distribution of employee work hours throughout the year can be established. However, in the absence of any agreement with employee representatives, employers can unilaterally distribute up to 10% of employees' work time irregularly throughout the year. The employee is entitled to five days' notice of the date and time they will be required to work. The regime governing compensation for the difference between the hours worked and the hours agreed will be determined by a CBA or, in its absence, by an agreement between the company and the worker representatives, stating that in the absence of an agreement, the difference will be compensated within a period of 12 months from when it takes place.

According to new regulations enacted in March 2019, employees have the right to request the company to adapt their working hours (without having to request a reduction of their working hours and salary) to balance work and family life, including requests to work remotely. The adaptation of working hours must be reasonable and proportionate in relation to the employee's needs and the company's organizational and production needs.

The company will only be able to refuse the request if there are organizational grounds to justify refusal and it is obliged to enter into a 30-day negotiation period with the employee before refusing the employee's request. In other words, when an employee applies for the adaptation of their working hours, the company has to initiate a negotiation process for a maximum term of 30 days, following which it must — in writing — notify either the acceptance of the application, provide an alternative proposal that enables conciliation or refuse it, in the latter case stating the objective reasons for its decision.

If no agreement is reached, the employee may file a claim with the labor courts under a special (and urgent) process.

6.3 Wage and salary

The parties to an employment contract are free to agree to the salary they wish, within the limits prescribed by law and the applicable CBA as discussed below. Typically, salary is paid on a monthly basis, with two additional salary payments being made in December and July of each year (extraordinary payments), unless otherwise provided by the applicable CBA (e.g., it may require payments in more installments, permit the employer to pro-rate the extraordinary payments, etc.).

The general restrictions regarding salary are the following:

- Minimum wage under law: The minimum salary for 2021 is EUR 965 per month, which on an annual basis, including the two extraordinary salary payments, equals a minimum annual amount of EUR 13,510. This minimum wage must be paid in currency and cannot be substituted in part with salary in kind.
- Multi-purpose Public Indicator of Income (IPREM): The IPREM serves to set social security benefits and pension entitlements. It is usually adjusted once a year, in January. The IPREM for 2021 is EUR 18.83 (per day); EUR 564.90 (per month); and EUR 7,908.60 (per year, including the two extraordinary salary payments).
- A minimum wage under a CBA (CBA): The CBA may set out the job categories and the corresponding minimum salary for each category, as well as any annual minimum salary increases.

With respect to discrimination, all clauses in collective agreements or employment contracts that contravene the requirement of equal pay on grounds of sex or marital status are void. In addition, employers are required to provide "equal pay for equal work" with no possible grounds for sex discrimination. Pay is widely defined as including not only base salary, but also all bonuses, commissions and other salary components.

Please note that, as of 8 March 2019, companies are obligated to keep a wage register of the average salaries by professional category and gender that should be available for employee representatives to review. The content must be accessible to employee representatives at least once a year and to the employees themselves through their employee representatives. In addition, for employers with more than 50 employees, companies will be obliged to provide justification when the average pay for employees of one gender is at least 25% or above that of the other.

6.4 Making deductions

Employers are required to give employees an itemized pay statement detailing all salary payments and itemizing all deductions made (e.g., for tax, social security and contributions to employee benefit plans, etc.).

6.5 Overtime

As a general rule, overtime is limited to 80 hours per year, although overtime spent to prevent or repair damages caused by natural disasters or other extraordinary events will not be taken into consideration when calculating the maximum overtime permitted.

Overtime must be compensated by pay (at no less than the ordinary hourly rate) or by time off (the amount of which cannot be less than the time worked as overtime). CBAs can and often do establish additional rules on overtime and provide how it should be compensated, and surcharges of 50% or more are common. Contracts between the parties also establish additional rules, although they are always subject to the law and the applicable CBA. Unless otherwise agreed by contract or CBA, any overtime will be understood to require compensation with time off to be enjoyed in the subsequent four months.

6.6 Bonus and commission

Many employees are paid a bonus or commission (or both) as part of their remuneration. Bonuses and commissions may not be left entirely to the discretion of the employer and so it is advisable to clearly establish the conditions that may entitle the employee to a bonus (or commission) and that will determine the amount of any bonus (or commission). Even if bonuses and commissions are granted unilaterally and for a limited period of time, they can become acquired rights, so care should be taken in implementing any such schemes.

Bonuses and commissions form part of remuneration and are therefore subject to tax and national insurance in the normal way. They will also be taken into consideration in the calculation of any severance pay that may be required.

6.7 Benefits in kind

Benefits in kind are not required by law but some CBAs may require certain types of benefits, such as limited life or accident insurance.

Contractually agreed benefits in kind take various forms and often vary according to the size of the employer and seniority of the employee. Typical benefits in kind include: company cars, medical and disability insurance, life assurance and occupational pensions.

Even if benefits in kind are granted unilaterally and for a limited period of time, they can become acquired rights, so care should be taken in implementing any such schemes.

Benefits in kind form part of remuneration and are therefore subject to tax and national insurance in the normal way. They will also be taken into consideration in the calculation of any severance pay that may be required.

6.8 Equity incentive plans

Employee share ownership is not common in local Spanish companies, but they are common at Spanish subsidiaries of multinational companies. Income received by employees for equity incentive plans, even if that income is provided by the parent company of the Spanish employer (and not by the employer directly), is considered employment income and subject to tax and social security contributions. As employment income, it is also taken into consideration for severance purposes and, in some cases, can have a significant impact on severance costs.

Like with other types of income, equity incentives may not be left to the entire discretion of the employer, and so it is advisable to clearly establish the conditions that may entitle the employee to any grants. Even if equity incentive plans are granted for a limited period of time, unilaterally and/or by the parent company (as opposed to the employer) and they can become acquired rights, so care should be taken in implementing any such schemes.

Note too that significant case law exists on equity plan provisions that provide for the forfeiture of equity rights upon termination of employment. In cases of unfair dismissal, courts have in the past invalidated forfeiture provisions and in some cases actually granted the ex-employee the right to the equity benefits, despite the fact that the equity plan clearly and expressly established that the equity benefits would be forfeited upon termination of employment. Special care should therefore be taken in drafting and implementing any such equity incentive plans in Spain.

6.9 Pensions

There are two types of pension provision in Spain — private pensions and state social security pensions. Private pensions have developed in part because of the low level of provision made by the state, although the vast majority of employees in Spain are not subject to any private pension scheme and rely mainly on state pensions.

6.9.1 Private pensions

Private pensions can either be arranged through a scheme set up by an employer (employee pension schemes) or on an individual basis (personal pension schemes).

Private employee pension schemes provide two basic types of benefit:

- Defined benefit (which includes “final salary” schemes): In defined benefit schemes the benefit the member will eventually receive is set out at the outset. The employer takes the ultimate risk of the investment performance of the scheme.
- Defined contribution (or “money purchase”): In a defined contribution scheme a specified level of contributions is payable to the scheme, but the eventual benefits are not known until retirement. The employee takes the investment risk.

Given the risks of defined benefit schemes, these types of schemes have become relatively uncommon in Spain in recent years.

Employee pension schemes in Spain are subject to a general rule of non-discrimination, which means that if an employer establishes a pension scheme for its employees, all employees should be entitled to participate in the scheme. Active participation can, however, be made subject to certain conditions, and differences for different groups of employees can be established within pension schemes, so the requirement of non-discrimination does not mean that all employees must be entitled to equal pension rights.

6.9.2 State social security pensions

Individuals will be eligible to receive the basic state social security retirement pension if they have paid sufficient social security contributions during their working life.

6.10 Annual leave

Vacation must be no less than 30 calendar days per year, which is often considered to be the equivalent of 22 workdays. CBAs tend to establish rules on when vacation should be enjoyed.

Public holidays in Spain are generally limited to a maximum of 14 per year: Christmas Day (25 December), New Year's Day (1 January), Labor Day (1 May) and National Day (12 October) are standard holidays, while All Saint's Day (1 November), Constitution Day (6 December), Immaculate Conception (8 December) and Good Friday are typically national holidays as well, although they may vary from year to year. The remaining holidays tend to be established annually by the local authorities (autonomous communities or municipalities). Holidays that fall on a Sunday will be moved to a Monday and holidays that fall during the week can be moved by the government to a Monday, although it is somewhat uncommon to do so. In fact, at companies with relatively flexible work arrangements, holidays that fall on a Tuesday through Thursday often lead employees to take a day of vacation and enjoy what is known as a "bridge" or *puente*, whereby the holiday is joined with the weekend to form a four-day or five-day weekend.

Employees are entitled to carry forward leave entitlement when they have been unable to take their entitlement due to sickness, provided that the carried forward leave is taken within a maximum term of 18 months from the end of the year in which the leave accrued.

6.11 Sick leave and pay

In cases of sick leave due to illnesses unrelated to the job, the Spanish social security system does not provide any coverage for the first three days of illness. The employer during those first three days will typically bear the cost of the employee's full salary. As from the fourth day of sick leave, however, the employee is only entitled to receive a temporary disability pension, unless the employer and employee have contractually agreed that the employer will complement the employee's temporary disability pension, or unless specifically required under the applicable CBA.

The amount of the social security temporary disability pension for employees is 60% of the employee's social security basis of contribution from the fourth to the 20th day of sick leave, and 75% of the employee's basis of contribution from the 21st day to the date of recovery or through the date the temporary disability becomes a permanent disability.

From the fourth to the 15th day of illness, despite the fact that the 60% payment is considered a social security benefit, the employer is required to bear the costs of the 60% temporary disability pension. Subsequently, from the 16th day of illness onward, social security bears the cost of the respective 60% and 75% temporary disability payments (i.e., 60% from the 16th day through the 20th day and 75% from the 21st day onward). Payments continue throughout the period of temporary disability or sick leave, which under social security rules generally lasts up to 12 months, or in certain exceptional circumstances up to 18 months.

Payment of the difference between the social security sick pay and an employee's normal remuneration is at the employer's discretion unless required by the CBA or otherwise agreed. Please note that many CBAs do require such a payment.

6.12 Taxes and social security

Companies must register their employees with the Social Security System before they commence work. Failure to do so will result in liability. In addition, companies must inform the National Institute of

Labor every time they enter into a new employment contract, and certain types of employment contracts must be registered. As a general rule, these and other hiring formalities in Spain are handled either by internal HR departments in large companies or by external payroll companies. Companies starting up in Spain should also consider their tax liabilities and corporate and data protection obligations.

Employers are obliged to pay a certain level of social security contributions or taxes for each employee on a monthly basis. In addition, employers should withhold from the employee's salary an additional amount that the employee is required to pay to social security. Therefore, on a monthly basis, the employer is responsible for withholding the amounts to be contributed by each employee from their payroll, for filing the necessary documentation and for depositing both the employer's portion and the employee's portion of the social security contributions. Should the employer fail to withhold the employee's portion of the required social security contributions, or withhold the incorrect amount, the employer will be liable for the employee's contribution, or the excess as the case may be, and subject to possible surcharges and fines.

The obligation to contribute arises as of the date work starts, continues even in situations of temporary incapacity during trial periods, and is only terminated when the employee ceases to render services and the Provincial Office of the General Social Security Treasury is notified of that fact within the statutory time limit.

The list of remuneration in kind items that are subject to social security contributions has been extended, which could imply an increase in social security costs for companies. The list now includes the following items, which were previously fully or partially exempt: transport and long distance allowances; granting of company shares or quotas; lunch vouchers; infant education vouchers; pension plans; and medical insurance.

The maximum amount or basis of contribution for the year 2021 was EUR 4,070.10 per month. The minimum monthly basis of contribution varies from EUR 1,050 to EUR 1,466.40 depending on the contribution group the employee holds.

The rates of contribution that need to be applied to the monthly basis of contributions under the general social security scheme for 2021 are as follows:

Contingency	% Company	% Employee	% Total
Common risks	23.6	4.7	28.3
Unemployment	5.50	1.55	7.05
Wage guarantee fund	0.2	-	0.2
Vocational training	0.6	0.1	0.7
Total	29.90	6.35	36.25 (not including % for industrial/work accidents)

Spanish law provides a number of inducements to encourage employers to enter into contracts of indefinite duration, particularly with certain types of individuals, such as individuals who are unemployed and those who are disabled, or particular types of contracts. To qualify for the reductions, an employer must be up to date with all tax and social security payments, must not have been precluded from receiving such benefits as a result of a sanction, and must not have unfairly dismissed employees who qualified for similar social security discounts in the previous 12 months, or used a collective dismissal procedure in relation to such employees.

In addition, there are certain specific requirements provided for each reduction with which the employer must also comply. Furthermore, an employer is not entitled to benefit from social security discounts in relation to any of the following individuals, even if such persons fulfill the rest of the criteria:

- individuals who occupy management positions within the company or are members of the board of directors or other governing body of the company
- family members to the second degree of the employer or of any person falling into the category above
- employees hired under a special type of employment relationship

Various types of discounts are available and are modified periodically, such that before hiring individuals, it is advisable to check for available discounts, as savings can be substantial.

Finally, please note that individual reductions may not be accumulated. In the event that an employee qualifies for more than one reduction, the employer should choose which reduction it would like to apply.

7 Family rights

7.1 Time off for antenatal care

Employees are entitled to take time off to attend prenatal testing and childbirth preparation courses that have to take place during working hours.

7.2 Maternity leave and pay

Employees are entitled to 16 weeks' maternity leave (plus one additional week for each additional child in the case of multiple births or if the child is disabled). The period of maternity leave is independent of any leave to attend medical examinations or leave due to a health risk during pregnancy. The mother may choose to begin enjoying maternity leave before the child is born (up to four weeks), although at least six of the entitled weeks must be enjoyed immediately after the birth without interruptions and on a full-time basis. The remaining 10 weeks can be taken at any time during the 12 months following the birth in a continuous manner or with interruptions in weekly periods, and can be taken either on a full-time or part-time basis if agreed between company and employee. Minimum advance notice of 15 days must be given to the company before the leave is due to begin.

When the two parents who exercise this right work for the same company, the company may limit their simultaneous exercise for well-founded and objective reasons, duly motivated in writing.

Employees on maternity leave are not entitled to receive their salary, unless otherwise agreed with their employers or required by the CBA. Normally, employees qualify for a maternity allowance from the public social security system. The level of maternity social security allowance is equivalent to 100% of the regulatory base rate applicable to the employee. Any employee who wishes to receive a maternity allowance must apply to the relevant authorities. In practice, employers usually increase this

public allowance so that employees receive their full salary during the leave (collective bargaining can also oblige an employer to increase the allowance to full salary).

The employer is required to reserve the mother's job position during the period of maternity leave, such that when the leave ends, she is entitled to return to work under her previous employment conditions.

7.3 Paternity leave and pay

Over the past few years, paternity leave has progressively been extended to put it on equal footing with maternity leave. In fact, paternity leave has been extended from four weeks in 2017 to 16 weeks in 2021; consequently, maternity and paternity leave are now the same length (16 weeks). Both parents must take the first six weeks immediately after the child's birth without interruptions and on a full-time basis. The remaining 10 weeks can be taken at any time during the 12 months following the birth (the mother and father have 10 weeks to use each). These remaining 10 weeks may be taken in a continuous manner or with interruptions in weekly periods and can be taken either full time or part time if agreed between company and employee. Minimum advance notice of 15 days must be given to the company before the leave is due to begin.

When the two parents who exercise this right work for the same company, the company may limit their simultaneous exercise for well-founded and objective reasons, duly motivated in writing.

Paternity leave can be increased in the case of multiple births by one extra week per additional child. It is also extended by one additional week if the child is disabled. Employees on paternity leave are not entitled to receive their salary, unless otherwise agreed with their employers or required by the CBA. Normally, employees qualify for a paternity allowance from the public social security system. The level of paternity social security allowance is equivalent to 100% of the regulatory base rate applicable to the employee. Any employee who wishes to receive a paternity allowance must apply to the relevant authorities. In practice, employers usually increase this public allowance so that employees receive their full salary during the leave (collective bargaining can also oblige an employer to increase the allowance to full salary).

The father may also be entitled to take a portion of the mother's maternity leave, if she so agrees — see further at **7.2**.

7.4 Parental leave and pay

The concept of "parental leave" does not apply in Spain. Paternity leave is independent to maternity leave.

However, parents or guardians of children under 12 may request the company to reduce their working hours by a minimum of one-eighth to a maximum of one-half of their previous working hours for childcare reasons, accompanied with a pro-rated reduction in salary. The reduction can only apply until the child turns 12, unless otherwise specified by the applicable CBA. Employees who take care of a child or adult with a physical or mental disability may also enjoy this reduction in work hours, so long as the person cared for does not work. In these cases, the reduction is not limited to 12 years and can be enjoyed indefinitely. Unless otherwise established in the CBA, employees must give 15 days' notice of the employee's intention to reduce working hours, and 15 days' notice of the employee's intention to resume their regular work hours.

7.5 Adoption leave and pay

As of 2021, both parents who adopt or foster children will be entitled to 16 weeks' leave in the following situations:

- They adopt or foster a child under 6 years of age.

- They adopt or foster a child over 6 years of age who is disabled, or who finds it difficult to adapt socially and with the family due to either their personal circumstances or the fact that they come from a foreign country.
- **As of 1 January 2021** both parents will enjoy 16 weeks of parental leave. Six weeks out of the total 16-week leave should be enjoyed immediately after the court/administrative resolutions granting the adoption/guardianship without interruptions and on a full-time basis. The remaining 10 weeks can be taken at any time during the 12 months following the court/administrative resolutions granting the adoption/guardianship in a continuous manner or with interruptions in weekly periods and can be taken either full time or part time if agreed between company and employee.

This leave is extended in the case of multiple adoptions or foster care (by one additional week per child for each parent). It is also extended by one additional week for each parent if the child is disabled.

In the case of an international adoption that requires the prior travel of the parents to the adopted child's country of origin, up to four weeks of the leave can be enjoyed in advance, before the decision determining the adoption, guardianship or fostering is taken.

When the two parents who adopt or foster children and exercise this right work for the same company, it may limit the simultaneous enjoyment of the 10 voluntary weeks for well-founded and objective reasons, duly motivated in writing.

Employees on adoption leave are not entitled to receive their salary, unless otherwise agreed with their employers or required by the CBA. Normally, employees qualify for an allowance from the public social security system.

7.6 Other family rights

7.6.1 Limited reduction in work hours for nursing (paid leave)

After the mother and father return to work, both of them are entitled to be absent from work for one hour each day for the purposes of nursing until the child is 9 months old with no reduction in salary. The right to this reduction in working hours for childcare purposes can be extended until the child is 12 months of age (instead of nine), provided that both parents use this reduction in working hours at the same time. In this case, working reduced hours between months nine and 12 involves a proportional reduction in salary and the worker's right to receive a social security allowance from the ninth to the 12th month. The company cannot refuse the request unless both mother and father work at the same company, in which case it may limit the simultaneous enjoyment for well-grounded and objective reasons, duly justified in writing.

This one hour may be divided into two shorter periods (two 30-minute breaks) or, at the father's/mother's request, their working hours can instead be reduced by half an hour per day. Alternatively, the parents may accumulate the nursing leave in complete working days pursuant to the terms set forth in the applicable CBA or agreement between the employer and employee. This right now extends to cases of adoption and guardianship and to both parents (to be enjoyed indistinctly by either one of them). Unless otherwise established in the CBA, employees must give 15 days' notice of their intention to reduce working hours for nursing purposes, indicating the period during which the employee will work with reduced hours.

7.6.2 Post-maternity unpaid leave of absence

Employees are entitled to take up to three years' unpaid leave of absence to care for a child, including adopted children or children under guardianship, from the date of birth or court resolution. The employee is entitled to reinstatement during the first year of the leave and thereafter has the right to

return to a position within the same job category if such a position is available. The time spent on leave counts for purposes of seniority, and the employee is entitled to be notified of and attend company training courses during the period of leave. The right to reinstatement will be extended to 18 months when both parents take this leave.

7.6.3 Adjustment of working hours to benefit work-life balance

According to new regulations enacted in March 2019, employees have the right to request the company to adapt their working hours (without having to request a reduction of their working hours and salary) to balance work and family life, including requests to work remotely. The adaptation of working hours must be reasonable and proportionate in relation to the employee's needs and the company's organizational and production needs.

The company will only be able to refuse the request if there are organizational grounds to justify refusal and it is obliged to enter into a 30-day negotiation period with the employee before refusing the employee's request. In other words, when an employee applies for the adaptation of their working hours, the company has to initiate a negotiation process for a maximum term of 30 days, following which it must — in writing — notify the employee of the acceptance of the application, an alternative proposal that enables conciliation or refusal of the application, in the latter case stating the objective reasons for its decision.

If no agreement is reached, the employee may file a claim with the labor courts under a special (and urgent) process.

8 Other types of leave

Leave of absence includes short-term paid leaves of absence, which an employee is entitled to above and beyond their vacation and public holidays. By law, these are the following, but such paid leave is commonly regulated by CBAs and sometimes extended.

8.1 Time off for dependents

Employees are entitled to two days of paid leave in the event of the serious illness, hospitalization or death of a close relative. This is increased to four days if visiting the ill relative or the funeral requires travel.

8.2 Time off for training

Employees with one year of service are entitled to 20 hours of paid time off per year to take training courses related to the company's activity and within the company training plan.

The 20 hours can be accumulated for up to five years. The company and employee have to agree on when the training will be taken unless the CBA specifies otherwise. The employee does not have to pay for the training.

8.3 Workplace representatives

Employees are entitled to take paid time off to carry out trade union or employee representation activities as established by law or in the applicable CBA.

8.4 Public duty leave

Employees are entitled to paid leave to appear in court, serve as a jury member or a witness, vote, etc. for as long as is necessary to fulfill such obligations.

8.5 Marriage

If an employee gets married, they are entitled to a minimum of 15 days of paid leave. Couples who are not married but who are registered with a local government registry as “de facto couples” may be entitled to the same right, although the issue is still pending further clarification by the courts.

8.6 Change of residence

If an employee moves house, they are entitled to one day of paid leave.

8.7 Other types of unpaid leave

In addition, by law, employees are entitled to enjoy certain longer-term leaves of absence that are unpaid but which may, nonetheless, require the employer to reserve the employee’s job position until they return. The company may hire someone to temporarily replace the employee but in such cases of “enforced leave,” when the employee on leave returns, the employee is entitled to return to their previous job position. Unpaid leaves of absence are also regulated by collective agreements. These types of absence include the following:

8.7.1 Voluntary leave of absence without cause

Employees with over one year of seniority at a company are entitled to take a voluntary unpaid leave of absence. The leave must last a minimum of four months and may not exceed five years. At the end of the period of leave, the employee is not entitled to return to the same job position but is entitled to take up any equivalent or similar job that may become available at the end of the leave. The company’s failure to comply with the legal requirement to rehire the employee at the end of the leave when an equivalent job position becomes vacant can entitle the employee to claim for dismissal and damages.

8.7.2 Voluntary leave to care for a disabled family member

Employees are entitled to take up to two years’ unpaid leave of absence to care for a close relative who cannot take care of themselves due to age, accident, illness or disability, and who is not employed. The employee is entitled to reinstatement during the first year of the leave and thereafter has the right to return to a position within the same job group or category if such a position is available. The time spent on this leave counts for seniority purposes.

8.7.3 Enforced leave

Employees who are elected to either a public office or public service that occupies more than 20% of the employee’s working time in a three-month period are entitled to leave as required for the purposes of carrying out the public office or service.

8.7.4 Victims of domestic violence

Victims of domestic violence are entitled to take an unpaid leave of absence for an initial period of six months, which can be extended by additional three-month periods, up to a maximum of 18 months, if there is a court order reflecting a need for further protection of the victim. For other rights established specifically for victims of domestic violence see further at **14.3.2**.

9 Termination provisions and restrictions

9.1 Notice periods

Please refer to **15.5**.

9.2 Payment in lieu of notice

Where notice of termination is required by law, employers are generally allowed to substitute notice with pay and terminate employment earlier. This right is also commonly reflected in employment contracts, where applicable.

9.3 Garden leave

Technically, employees have a right to work and cannot be impeded from working by their employer, unless there is a legitimate reason or unless the employee agrees. In practice, in cases of termination, garden leave can normally be agreed with employees, unless the employee is eager to begin working at another company. In cases where an employee is suspected of misconduct, companies in practice also impose garden leave, but such imposed garden leave should be limited in time and clearly justified by the circumstances, since it can be contested as a violation of the employee's right to work.

9.4 Intellectual property

The law relating to intellectual property rights is complex but the general rule is that the employer will own the copyright, patent, unregistered designs and registered designs in works created by its employees in the course of their employment. "In the course of employment" refers to the scope of the employee's duties and not the period of employment. Nonetheless, employee moral rights cannot be waived, and employees are entitled to compensation for the creation of certain intellectual property. It is highly advisable for intellectual property rights and their specific assignment to the employer to be dealt with in all employment contracts. When an employee is in an investigative, development, manufacturing or creative role, it is highly advisable to formalize a detailed agreement on all intellectual property issues that may arise.

9.5 Confidential information

In all employment contracts, employees have an implied obligation of fidelity and good faith. This generally includes the obligation not to disclose or misuse the employer's trade secrets or other confidential information of the business.

The implied term of fidelity only has limited application once the employee has left employment. During employment, it generally covers all trade secrets and information of a confidential or commercially sensitive nature. After an employee has left, however, the implied term only covers trade secrets or confidential information akin to a trade secret — customer lists and customer requirements may not meet this threshold and therefore may not be protected.

For this reason, employers are strongly advised to have express clauses protecting confidential information and trade secrets. These are normally contained in the employment contract or in a special confidentiality agreement.

To this extent, employers are advised to indicate in the contract specifically which types of information will be regarded as confidential. In the final analysis, however, the courts will decide whether information is sufficiently confidential to be protected, taking into account the nature of the information in question, the employee's acquired knowhow, whether the employer treats it as confidential in practice, the range of people who know about the information and whether it can easily be separated from non-confidential information. While they will take account of the express terms of the contract, these will not be conclusive. If an employee breaches their obligations of confidentiality, the employer may seek an injunction restraining such acts and, where appropriate, damages.

9.6 Post-termination restrictions

The duty not to compete with one's employer during employment is considered a basic employment obligation under Spanish law. After termination, however, employees are, in principle, free to compete or to work for a competing company, unless the individual is bound by a valid post-contractual noncompete agreement. To be valid, a post-contractual noncompete agreement must comply with the following requirements:

- It must be agreed between the parties and must be formalized in writing.
- The duration of the duty is limited to a maximum of two years for highly qualified employees and six months for other employees.
- The employer must have a genuine proprietary industrial or commercial interest that requires protection.
- The employer must pay the employee appropriate compensation (in practice, for an obligation not to compete, appropriate compensation may vary from 40% to 100% of the employee's previous salary).

If the employee breaches the noncompetition obligation, the employer is entitled to claim damages before the Labor Court.

A common problem faced by companies in deciding whether to agree to a noncompete clause is that at the beginning of an employment relationship employers do not always know whether it will be in the company's interest to bear the cost of the noncompete once the employment ends. To avoid committing to the payment of the compensation, employers have in the past drafted post-contractual noncompete clauses to include a provision that allows the company the option of releasing the employee from their noncompete obligations and releasing the company from having to pay the agreed compensation. Thereby, the company tries to ensure that, if at termination the company has no interest in enforcing the noncompete clause, no compensation would need to be paid. Note, however, that the Supreme Court has held that companies cannot unilaterally decide whether or not the noncompete clause is required. Consequently, opt-out provisions that allow the company to unilaterally release the employee from their restrictions and allow the company to not pay the employee the agreed compensation are considered null and void. As a result, the company may be required to pay the compensation established for the noncompete, regardless of whether it has released the employee from their restrictions and regardless of whether a reasonable notice period has been provided to the employee.

If an employer is not certain whether or not it will want to assume the obligation of paying the compensation for the noncompete at termination, a number of alternatives may be considered (e.g., providing specific compensation for the option, designating a third party to decide whether the noncompete will be required, and defining specific terms and conditions for the noncompete to be required). Although there is no case law on the enforceability of such provisions, they may provide a viable alternative for companies who do not want to commit to payment for a noncompete clause they may later find they do not need.

Non-solicitation of employees, suppliers or customers

The obligation not to solicit employees, suppliers or customers of one's former employer is not specifically regulated under Spanish law but can be agreed between the parties and is enforceable in theory. In most cases the restriction on solicitation after termination of employment will be considered a form of noncompete clause, such that it should comply with the requirements for post-contractual noncompete clauses mentioned above, including compensation. Some authors, however, consider that non-solicitation of employees (as opposed to non-solicitation of suppliers or customers) is not a

'non compete' restriction, such that restrictions against soliciting employees arguably need not comply with the requirements of post-contractual noncompete clauses.

9.7 Retirement

The government has approved the possibility of including clauses in CBAs that make it possible to terminate employment contracts once the employee has reached the legal age for retirement, as set out by the Social Security Regulations subject to certain provisions. These provisions include the following:

(a) The employee in question meets the requirements established by the social security to receive 100% of the ordinary pension according to their contributory scheme.

(b) Said measure is linked to coherent employment policy objectives in the CBA, such as improved job stability through the transformation of temporary contracts into indefinite-term contracts, new employee hiring, generational renewal or any other measures aimed at improving the quality of employment.

10 Managing employees

10.1 The role of personnel policies

There are very few legal requirements on employers to have written policies. For the most part, policies set out in a staff handbook are there as a matter of good practice to set out standards expected of employees, to help the running of the business and to reduce legal risk by ensuring employees and managers understand the legal rights and responsibilities in the employment context.

An employment contract will also sometimes cross-reference related terms set out in a handbook, policy or on the company intranet, which is becoming common.

For policy terms and conditions to be enforceable against the employee, the company will need to be in a position to prove not only that the policy was in place, but that the employee knew about it, understood it and, where necessary, accepted it. It is therefore often advisable to have all policies signed as received and accepted by the employee in the local language.

10.2 The essentials of an employee handbook

The table below shows the policies and procedures that are, in general, required by law, and the main, recommended policies.

Policies required by law	Recommended policies
Health and safety plan	Equality plan (for companies with less than 50 employees)
An equality plan is mandatory only for companies with more than 50 employees. However, companies with 50-100 employees have until March 2022 to comply with this obligation. Companies with 100-150 employees should have complied by March 2021; and those with more than 150, by March 2020 (see further at **14.3.1**).	Code of conduct (anti-bullying and harassment, bribery and whistleblowing)
Data protection	Policy on recording of working time. The company is obliged to establish a system to

Policies required by law	Recommended policies
	record working time on a daily basis but the company does not need a policy. However, the policy can clarify how to record working time to avoid overtime in the recording system (see further at **6.2**).
Wage register: Companies are obliged to keep a wage register of the average salaries by professional category and gender (see further at **6.3** and **14.3.1**).	Digital disconnecting from work policy (right of employees to disconnect from work-related electronic communications)
For home-working employees: Use and control of IT tools policy	For non-homeworking employees: Use and control of IT tools
	Compliance program
	Trade Secrets and Confidential Information
	Employee handbook to include the company's internal procedures/benefits

10.3 Codes of business conduct and ethics

As with policies, codes of business conduct and ethics are a matter of good practice to set out standards expected of employees, to help the running of the business and to reduce legal risk by ensuring employees and managers understand the legal rights and responsibilities in the employment context. An employment contract will also sometimes cross-refer to related terms set out in the company's code of business conduct and ethics.

For a code's terms and conditions to be enforceable against an employee, the company will need to be in a position to prove not only that the policy was in place, but that the employee knew about it, understood it and, where necessary, accepted it. It is therefore often advisable to have all policies signed as received and accepted by the employee in the local language.

11 Data privacy and employee monitoring

Please refer to our Global Privacy Handbook, which is accessible HERE, for information on data privacy and monitoring requirements in Spain.

12 Workplace safety

12.1 Overview

Employers have extensive statutory obligations to provide a safe working environment and a breach of this obligation could result in substantial liabilities and penalties. Safety involves both physical and mental health issues, and so damages caused as a result of sexual harassment or bullying in the workplace are considered a health and safety issue. The liability in cases of legal entities can be extended to directors and other representatives of the company as well as to individuals who have, by virtue of their job position or assigned responsibilities, assumed an obligation to comply with health and safety regulations on behalf of the company. Whereas damages and potential liability in other areas of Spanish employment law may be relatively low as compared to other jurisdictions, damages and liability for health and safety matters can be quite significant and should be taken very seriously.

Given the complexity and extent of the requirements, many companies enlist the external services of specialized health and safety evaluation companies.

12.2 Main obligations

The main obligation on the employer is to protect the security and health of its employees, with all the means available to the employer and in all aspects related to work, by complying with the obligations established in health and safety legislation. The employer's main general obligations include: (i) the duty to evaluate and know the risks at the company; (ii) the duty to understand how these risks can affect or are affecting employees; and (iii) in light of those risks, the duty to plan and establish measures to avoid and minimize those risks, by providing the employee with the information, training and adequate means to avoid and minimize those risks and by encouraging the employee's participation in the process.

Compliance with the general obligations above will depend on the nature of the work activity, and very specific rules exist for different sectors of activity, but basic obligations that apply to all companies include the following:

- Companies are required to prepare and implement a Health and Safety Risk Prevention Plan. Such plan should define objectives (particularly with respect to the risks that have been identified in relation to job positions), assign responsibilities and establish safe processes and procedures.
- Employers should offer employees regular medical checkups. Special rules can apply to certain employees whose health may be especially sensitive, such as pregnant women, minors and people with disabilities. Depending on the nature of the job position, special surveillance of the employee's health may also be required.
- Employers should guarantee that every employee receives comprehensive information on the labor risks inherent to their job position and in relation to the company, measures and activities implemented with regard to the detected risks, and emergency measures.
- Employers should guarantee that every employee receives sufficient and suitable theoretic and practical training on prevention of labor risks.
- The employer should analyze possible emergency situations and adopt measures with respect to first aid, fire control, evacuation, etc. and it should designate and train personnel to carry out these measures.
- First aid materials should be available and should be adequate in light of the workplace and personnel. A portable first aid kit that meets regulatory requirements is required in any case. Workplaces with over 50 employees (and in some cases 25 employees) should have a place for first aid and other possible sanitary needs. These places should at least have a cot, running potable water and a first aid kit.
- Finally, when employees of two or more companies share the same workplace, certain coordination and information obligations must be complied with.

The COVID-19 pandemic has also caused new temporary measures and obligations to arise regarding workplace health and safety that will have to be met by companies. For further information about such measures/obligations, please contact us. See Key contacts for contact details.

12.3 Claims, compensation and remedies

Liability for breaches of health and safety obligations can be extensive, as follows:

- Infringements can result in administrative fines, which can be as high as EUR 983,736. The amount of the fine depends on the specific nature of the breach and the gravity of the same. For minor breaches, fines can range from EUR 45 to EUR 2,450. For serious breaches, the fine can range from EUR 2,451 to EUR 49,180. For very serious breaches, the fine can range from EUR 49,181 to EUR 983,736.
- Employees and other parties that are damaged as a result of the company's breach of its obligations can claim civil damages. Plaintiffs can be awarded any actual damages proven and moral damages, although punitive damages are not awarded under Spanish law.
- Social security related liability can be imposed in the form of surcharges that the company will be required to pay for any sick leave pension or disability pension to which the employee may become entitled as a result of any work-related accident or work-related illness that is due to the lack of safety measures. The surcharge ranges from 30% to 50% of the employee's total pension entitlement, depending on the seriousness of the circumstances and the damages to the employee. In cases of permanent disability, these potential surcharges can be very significant, since the surcharge will apply to the employee's total pension entitlement, which can last for the remainder of the employee's life.
- Criminal liability can also exist for breach of health and safety obligations, even if no damages have been caused. For example, recklessly or intentionally failing to provide employees with the necessary means to perform their activity safely and thereby causing employees a serious danger of losing their life, health or physical integrity is a felony. This felony carries a punishment of imprisonment for six months to three years and a fine of six to 12 months. Where damages are caused as a result of the failure to comply with health and safety regulations, the employer can be liable for any variety of felonies or misdemeanors, such as, for example, negligent homicide, reckless and negligent battery, reckless abortion, reckless damage to a fetus and the failure to provide assistance to someone in need.

13 Employee representation, trade unions and works councils

Information about working with trade unions and works councils can be found throughout this guide. For more information about this subject in Spain, please contact us. See **Key contacts** for contact details.

14 Discrimination

14.1 Who is protected?

The Spanish anti-discrimination law covers all aspects of the employment relationship, including recruitment, the provision of terms and conditions of employment, promotion, training and dismissal. In principle, it also applies after the end of the employment relationship, for example, when references are provided.

Discrimination or harassment of employees on the basis of their sex, marital and civil status, pregnancy or maternity, racial or ethnic origin, sexual orientation, disability, religious or political beliefs or opinions, age, social condition or status, affiliation with a union (or lack thereof) or language is unlawful. Specifically, any act by an employer that is discriminatory is considered null and void (ineffective).

14.2 Types of discrimination

Discrimination for these purposes includes the following:

- direct discrimination
- indirect discrimination
- harassment

Generally, when reviewing discrimination cases, courts apply a three-pronged test that analyzes (i) whether the different treatment pursues a legitimate aim, (ii) whether the different treatment is sufficiently tailored to achieve that legitimate aim (or whether there are alternative non-differentiating means), and (iii) whether the different treatment is a proportional means to achieving the legitimate aim. Generally, to the extent that any different treatment can meet the three-pronged test, it may be considered justified different treatment and non-discriminatory.

14.3 Special cases

14.3.1 Equal pay

Employers are required to provide “equal pay for equal work” with no possible grounds for sex discrimination. Pay is widely defined as including not only base salary, but also all bonuses, commissions and other benefits.

However, the Royal Decree Law 6/2019, on urgent measures to guarantee equal treatment and opportunities for women and men in employment and occupation, establishes specific measures to ensure the effective fulfillment of the equal pay principle. This includes an obligation for companies to keep a wage register of the average salaries by professional category and gender that should be available for employee representatives for review at least once a year and to the employees themselves through their employee representatives. In addition, for employers with more than 50 employees, companies will be obliged to provide justification when the average pay for employees of one gender is at least 25% or above that of the other.

Before Royal Decree Law 6/2019 came into effect, only companies with more than 250 employees had to implement an equality plan to ensure achievement of equal treatment and pay between women and men. This obligation has now been extended to companies with 50 or more employees. Since March 2019, companies have the following deadlines for completing an equality plan:

- companies with 151 to 250 employees — one year from 1 March 2019 (i.e., by March 2020)
- companies with 101 to 150 employees — two years from 1 March 2019 (i.e., by March 2021)
- companies with 50 to 100 employees — three years from 1 March 2019 (i.e., by March 2022)

To prepare their equality plan, companies must carry out discussions (where appropriate) with employee representatives, which must cover:

- the recruitment process
- professional classification
- training
- professional promotion
- working conditions, including the salary audit between men and women

- the exercise of personal, family and work-life balance rights
- female underrepresentation
- remuneration
- sexual harassment prevention

Once companies have finalized their equality plan, they must register it with the newly created Public Registry for Equality Plans of Companies.

In October 2020, the government passed new regulations that established additional specific rules and specific criteria that companies should take into account when preparing their initial diagnosis of the situation in their workplaces, and when drafting and negotiating Equality Plans. Said regulations also established new requirements with regard to reporting obligations, equal pay audits, wage registers and job assessments, to ensure they are transparent and that men and women are paid equally. Thus, the companies that already have Equality Plans and Wage Registers in place must adapt them to comply with the new regulations. The deadlines for adapting such existing Equality Plans and Wage Registers to the new law are mentioned below:

Equality plans: If the Equality Plan is already in place, it must be adapted and amended to the new regulations within the revision period stipulated by the plan in question, and in any case by or before 14 January 2022 (once the relevant consultation period and negotiation process have been carried out). In other words, even if companies have already approved an Equality Plan, they will have to review it and adapt it to the new legal and consultation requirements stipulated in the Royal Decrees of October 2020 before the aforementioned date. In this regard, trade unions have been given a key role in companies whose workplaces have no employee representatives, so it is possible that the negotiation committee that the company had during the consultation period for its initial Equality Plan must be changed.

Wage registers: The deadline for adapting wage registers and job assessments to the new regulations was 14 April 2021.

14.3.2 Special rules for victims of domestic violence

There are a number of special labor law rules that aim to assist people who are victims of domestic violence. By way of example, such victims are entitled (among other entitlements) to reduce their working hours with a proportional salary reduction, to change their work schedules and to take an unpaid leave of absence for an initial period of six months, which can be extended by additional three-month periods, up to a maximum of 18 months, if there is a court order reflecting a need for further protection of the victim. At the end of the suspension, the employee is entitled to return to their prior job position under the same previous conditions.

In addition, the law provides employers with discounts on the social security contributions that will need to be paid for an employee if the employee is a victim of domestic violence or if the employee has been hired to substitute a victim of domestic violence who is on leave or who has been temporarily transferred to another work center.

Many of the aforementioned rights have been extended to victims of terrorism.

14.3.3 Positive discrimination

Spanish law provides incentives for employers to hire certain types of employees, such as unemployed individuals who are under 30 or over 45 years of age, or women in underrepresented fields, among others. In these cases, the law indirectly authorizes employers to positively discriminate as a form of affirmative action. Spanish law also requires companies with over 50 employees to have a minimum of 2% of disabled employees (or to obtain an exemption from the requirement through

alternative measures). To comply with the quota, an employer can apply positive discrimination as well.

14.4 Exclusions

The anti-discrimination legislation contains a number of exceptions permitting discrimination that would otherwise be prohibited, such as the ability to positively discriminate in certain cases as set out at **14.3.3**. Specific advice is required on other exceptions, as the case law is often inconsistent or very particular to the circumstances of the individual case.

14.5 Employee claims, compensation and remedies

If an employee considers that their employer has taken a decision against them based on discrimination, they can contest the measure and request the labor court to declare that it is null and void and therefore ineffective — see further at **15.11**.

In such a case, the employee would need to present some evidence of discrimination, and then the burden of proof would shift to the employer to demonstrate that the measure was based on legitimate rather than discriminatory reasons.

If the court finds that the dismissal was based on discrimination, or that the company did not adequately prove that it was unrelated to discriminatory motives, it will find that the dismissal is null and void, and will order that the employee be immediately reinstated with back pay; in certain cases the court can also award damages. If the court finds that the dismissal was not based on discriminatory motives, it may consider the dismissal fair or unfair, in which case the employment contract can be terminated, with the corresponding severance compensation as the case may be — see further at **14.6**. There is no cap on severance for a discriminatory dismissal.

14.6 Potential employer liability for employment discrimination

The potential employer's liability for employment discrimination can be summarized as follows:

14.6.1 Labor consequences

Should the company allow — or not take the necessary measures to stop — discrimination or harassment at the workplace, the employer could be considered to be in breach of its labor obligations. The employee can, in such cases, claim a type of constructive dismissal and request that their labor relationship be terminated with payment of the mandatory severance compensation for unfair dismissals — see further at **15.11**. Additionally, the employee could claim an additional compensation for damages — although no statutory maximum exists on the amount of damages that can be awarded, compensation amounts that courts have awarded to date have not been significant by US standards.

14.6.2 Administrative sanctions

The following acts or omissions are considered very serious employment offenses, leading to a potential imposition of fines ranging from EUR 7,501 to EUR 225,018. Offenses that may be sanctioned include the following:

- unilateral decisions of employers involving direct or indirect discrimination based on the protected grounds set out at **14.1**
- any decision of the employer that constitutes unfavorable treatment of employees in response to a claim made within the company or in reaction to a court claim that aims to require compliance with the principle of equal treatment and no discrimination

- sexual harassment when it takes place in the framework of the employment relationship, regardless of who the agent of the harassment may be
- harassment based on racial or ethnic origin, religion or beliefs, disability, age, sexual orientation and by reason of sex, when it takes place in the framework of the employment relationship, regardless of who the agent may be, if and when the employer knows of the harassment and fails to take the necessary measures to prevent it
- failure to establish an equality plan when the equality plan is required, failure to apply the equality plan or clear breach of the equality plan
- establishing conditions through advertised job offers or through any other means that constitute discrimination of any sort, with respect to access to employment

Moreover, where the equal treatment principle is infringed, the law provides for the loss of subsidies and discounts the employer may have been enjoying under public employment programs and disqualification from receiving any such subsidies and discounts for a period of six months. Courts may award the employee a compensation for damages caused.

14.6.3 Criminal sanctions

Criminal sanctions are possible for various offenses as follows:

- For “serious discrimination” in public or private employment against a person, based on grounds of ideology, religion or beliefs, or due to the person’s race or ethnicity, the corresponding sanction may be imprisonment in the most serious cases, although a punishment of imprisonment is highly unusual in practice. Racist motives can be an aggravating circumstance in any offense, with certain punishable acts, including incitement to discriminate, dissemination of abusive material, discrimination in public services and professional corporate discrimination, and the promotion of discrimination by associations.
- Incitement to “discrimination,” “hatred” and “violence,” and the use of offensive expressions against groups or associations based on certain prohibited grounds (i.e., racism, anti-Semitism, religion, ideology, race, sex, illness, etc.) is punishable by one to three years’ imprisonment and a six to 12-month fine.
- For sexual harassment, depending on the circumstances, the corresponding sanction may consist either of a fine or, in particularly serious cases, imprisonment for three months to one year. Imprisonment is highly unusual in practice.

14.7 Avoiding discrimination and harassment claims

It is very difficult for an employer to protect itself entirely against discrimination claims because it is impossible to keep control over the actions of all employees for whom the employer will be vicariously liable. However, by providing regular training to employees (particularly managers) and having strong systems in place around the key points of the employment relationship (recruitment, terms and conditions, promotion, bonuses, disciplinary action and dismissal), the risk of successful claims can be minimized.

Under Spanish law, in a discrimination case, the burden of proof will pass to the employer reasonably easily, at which point the onus will be on the employer to demonstrate that the decision/conduct at issue was not discriminatory in order to defeat the claim. To do that, it needs solid evidence disproving the discrimination. Therefore, wherever possible, it is very useful to have documentary evidence showing the reason for making decisions.

For example, at the recruitment stage, employers should think carefully about the contents of their advertisements to avoid language that could give rise to inferences of discrimination such as "youthful" and "recently graduated," target an age diverse population, have a clear job description, ask questions at the interview stage that are focused on the job description (rather than general questions about hobbies, marital status, etc., which should have no bearing on the ability to do the job) and there should be good notes on why a certain candidate is better than another (which are not tainted by a protected characteristic).

Similarly for dismissals, there should be documentary evidence showing the reason for dismissal. If the reason is performance, for example, there would ideally be appraisals or other evidence that clearly demonstrate the problems, which should be documented at each stage. If the employee is especially protected against dismissal, clearly demonstrable good cause must exist, or the dismissal will be considered null and void, and the employee will be entitled to reinstatement with back pay.

Any allegations of harassment or discrimination should be taken very seriously and investigated at an appropriate level. Managers should also be trained to be pro-active in spotting and dealing with any behavior that may constitute harassment or discrimination.

Generally, the employer should ensure that it has strong equal opportunity and anti-harassment policies in place; that all of its staff are trained in equal opportunity, harassment and discrimination issues; and that training in relation to such matters is updated every couple of years.

Disability issues should be dealt with very sensitively. Where an employer knows, or ought to know, that a candidate or an employee has a disability, it must begin thinking about whether any adjustments should be made to the working conditions or interview process. It is very important that the employer does not make assumptions about what the individual can and cannot do. Medical advice will often need to be obtained to guide the employer as to the symptoms of the condition, what impact it has on the employee's capabilities at work and the adjustments that it would be sensible for the employer to make.

15 Termination of employment

15.1 Overview

The employment relationship can be terminated for various reasons. Such reasons include, but are not limited to, mutual agreement of the parties; reasons validly established in the contract, to the extent permitted by the law; resignation; retirement; death or disability of the employee or employer; force majeure; dismissal; and constructive dismissal. The various types of terminations have different applicable rules and consequences that exceed the scope of this summary, and below we limit our discussion to the most common types of employment termination, by either the employer or the employee's decision.

There are certain additional restrictions in place regarding dismissals as a result of the COVID-19 pandemic (especially in companies that have been using furlough schemes (ERTEs)), said restrictions are due to end in February 2022. For further information about such restrictions, please contact us. See Key contacts for contact details.

15.2 By the employer

15.2.1 Termination of ordinary, indefinite-term contracts

Once any trial period has expired, ordinary employees may only be dismissed with cause (during the trial period, the contract may generally be terminated by either party freely). The basic causes for termination can be grouped into disciplinary causes and "objective" causes. Each of the two types of dismissal has its own required procedure, which is briefly covered below.

15.2.2 Disciplinary dismissals

Disciplinary dismissals may be based on grounds such as repeated and unjustified lack of punctuality or attendance at work; disobedience or lack of discipline at work; breach of good faith and abuse of confidence in performing the job; or harassment of the employer or of any person who works at the company by reason of any of the protected grounds listed in **14.1**.

The grounds for disciplinary dismissal are often regulated in further detail by the applicable CBA, which can specify the particular conduct that can be sanctioned and the degree of the applicable sanction.

Disciplinary dismissals must be notified to the employee in writing stating the facts giving rise to the dismissal and specifying the effective date of termination. The employee then has 20 days from the effective date of termination to contest the dismissal. Before the employee can file a complaint with the labor courts, however, the parties are required to attempt to settle the matter at the Mediation, Arbitration and Conciliation Office, an agency of the Labor Department. If no settlement is reached, the employee may then file a court claim. After trial, the labor court may declare the dismissal justified, unjustified, or null and void.

If the Labor Court finds that legal cause for the dismissal exists and the correct procedure has been followed, the dismissal is declared justified and no severance compensation needs to be paid to the employee.

If the alleged cause for dismissal is not satisfactorily proven or, if it is proven, but is insufficient to justify a dismissal, the dismissal may be declared unjustified. In this event, the employer has five days as of the court decision notification date to choose between reinstating the employee with back pay or paying severance compensation. If the dismissed employee is an employee representative, however, the employee representative chooses, not the employer.

For the remedies for an unjustified dismissal see **15.11**.

15.2.3 Objective dismissals

Objective dismissals are dismissals that do not have to do with the employee's (subjective) misconduct and are instead based on one or more of the following objective reasons:

- the employee's incompetence, which has come to light or arisen after the trial period has elapsed
- the employee's failure to adapt to reasonable technological developments affecting their position, so long as the company has provided adequate training for the employee to adapt to those developments and provided two months have passed from the date the new conditions were implemented or the training to adapt to those technical changes has concluded
- company requirement to phase out job positions based on organizational, productive, economic or technical grounds

With respect to the last item, economic causes will exist when the company has a negative economic situation, in cases such as current or foreseen losses or the persistent decrease in ordinary income or sales. The law specifies that, in any case, there will be a persistent decrease when ordinary income or total sales in three consecutive quarters is less than the ordinary income or sales in the same period of the previous year. Organization causes will exist, among other cases, where there are changes to the system and methods of employees' work or in the way production is organized; technical changes exist where, among other cases, there are changes in the means or instruments of production; and productive reasons exist when, among other cases, there are changes in the demands of the products or services that the company has in the market. This last type of objective dismissal may only be used

when the number of employees to be dismissed does not exceed a particular number; if the employees to be dismissed for these reasons exceed the maximum number, the procedure for collective dismissals needs to be followed (see further at **15.10**).

Causes related to the COVID-19 pandemic are not considered valid justification for an objective dismissal. This special rule, as a result of the COVID-19 pandemic, is due to terminate by the end of February 2022 (but might be extended).

With regard to the individual objective dismissal procedure, the employee must be given a letter of dismissal and provided with 15 days' prior notice or salary in lieu. At the time the letter is provided, the company must simultaneously pay the employee severance compensation of 20 days' salary per year of service, with any period of less than one month of service to be computed as a full month, up to a maximum of 12 months' salary.

As in the case of disciplinary dismissals, the employee then has 20 days from the effective date of termination to contest the dismissal. Before the employee can file a complaint with the labor courts, however, the parties are required to attempt to settle the matter at the Mediation, Arbitration and Conciliation Office, an agency of the Labor Department. If no settlement is reached, the employee may then file a court claim. After trial, the labor court may declare the dismissal justified, unjustified or null and void.

If the procedural requirements for objective dismissals are not strictly followed, the dismissal will be considered unjustified by a court. In such event, as in disciplinary dismissals, the employer is given the option either to reinstate the employee with back pay or to terminate the employment relationship, paying severance compensation. If the dismissed employee is an employee representative, however, the employee representative chooses, not the employer.

For the remedies for an unjustified dismissal see **15.11**.

15.2.4 Termination of contracts for a definite or fixed period

Unless otherwise terminated earlier, definite or fixed-term employment contracts automatically come to an end at the expiration of their fixed term. If the employment relationship continues de facto for any reason at the expiration of such term, the agreement may be deemed to have been tacitly extended for an indefinite period of time.

When the duration of a fixed-term contract exceeds one year, the party who wishes to terminate the contract must give a minimum of 15 days' notice.

In some cases, and depending on the type of fixed-term contract (e.g., fixed-term contracts for a specific, limited service or job or for extraordinary production requirements), an employee may be entitled to a severance compensation of 12 days' salary per year of service upon expiration of the fixed term.

15.2.5 Termination of top executives

The special employment relationship with top executives is set out at **1.3**.

The employer may terminate the employment relationship with top executives in the following cases:

- Without cause, the employer may terminate the employment agreement by providing a minimum of three months' notice and, in addition, paying the severance compensation contractually agreed, or, without this, a severance compensation of seven days of cash salary per year of service up to a maximum of six months' salary. If agreed, the length of notice may be extended by up to six months in indefinite-term contracts or long-term definite contracts that exceed five years in duration.

- With cause, the employer may also terminate the employment agreement through a dismissal (disciplinary or redundancy situation), as set out below. In this case, the employee may contest the termination following the same procedure as for ordinary employment contracts (that is, mandatory conciliation, court proceeding, etc.). The main difference from the general system lies in the amount of the compensation to be paid if the dismissal is declared unjustified — see further at **15.11**.

15.3 By the employee

An employee can resign from employment by giving their employer the amount of notice required by law or the applicable CBA or validly established in their contract of employment.

15.3.1 Constructive dismissal

Employees are also entitled to file a claim before the labor courts requesting the termination of their employment contract with severance in the following cases:

- when the employer introduces substantial modifications to their employment conditions without following the correct procedure or without showing good cause if those modifications negatively affect the employee's dignity
- when the employer fails to pay the employee their agreed salary or when the employer continuously delays payment of the agreed salary
- when the employer commits any other serious breach of its obligations, except in cases of force majeure, or when the employer refuses to reinstate the employee to their prior work location or other employment conditions in cases where a court has declared that the substantial modification of those employment conditions was unjustified

In these cases, if the court rules in favor of the employee, the employee will be entitled to the severance compensation for unfair dismissal.

15.3.2 Top executives

A top executive (see further at **1.3**) may resign from employment so long as they give a minimum of three months' notice, although the required notice may be extended to six months if this is set out in writing in an indefinite employment contract or in a contract with a term that exceeds five years. In cases of resignation without cause, the top manager is not entitled to any severance compensation.

A top manager may also terminate their agreement in the following cases:

- where the employer unilaterally introduces unreasonable changes to the job position
- where the employer fails to pay salary or repeatedly delays payment
- where the employer substantially breaches the contract terms
- where there is change in the ownership of the employing company, generally when there is a change in the management bodies or company management policy, provided that the top executive terminates the contract within three months of the transfer of title

In the above cases, the executive will be entitled to the agreed severance compensation and in its absence, to a severance compensation of seven days of their cash salary per year of service, up to a maximum of six months' salary.

15.4 Employee entitlements on termination

Upon termination, an employee is entitled to receive any accrued and pending salary amounts. Aside from base salary through the termination date, these amounts will normally include a pro-rata portion of the standard July and December extraordinary salary payments (or any other similar extraordinary salary payments). The employee will also normally be entitled to accrued commissions and other accrued variable payments. Although arguable, especially when bonus plans provide otherwise, employees could be entitled to a pro-rata portion of annual or quarterly bonuses (or similar variable compensation plans), especially if the termination has been caused exclusively by the employer (as would be the case with unfair dismissals).

To the extent that notice is required for the specific type of termination (e.g., objective dismissals and certain fixed-term contracts), payment in lieu of any notice will also be due upon termination. Likewise, to the extent that the specific type of termination requires severance compensation, the severance compensation will be due upon termination, unless the law requires payment at the time that the employee is notified of the dismissal (as is the case in objective dismissals).

In any case, upon termination, and especially in cases of unfair termination, it is always advisable to consider possible pending amounts or rights that the employee may have in order to ensure that any waiver and releases signed are complete and effective in barring any possible future employee claims.

15.5 Notice periods

As a general rule, employers cannot terminate employment contracts by simply providing notice. Nonetheless, notice does apply in certain cases. Fixed-term contracts will terminate at the end of their term, but if they last over one year, the employer will be required to provide the employee with 15 days' notice of termination. Objective dismissals require 15 days' prior notice as part of the required procedure. Notice can be substituted with pay.

Employees in cases of resignation are required to provide their employer with notice. The law provides that the notice should be the customary notice in the industry. Most CBAs specify what that notice should be, and typically it is established as 15 days for ordinary employees.

By contract, the parties may establish a longer notice period for any cases of termination, but longer notices agreed to by the employee may arguably be unenforceable.

Top executives, who are subject to special legislation, can have their contracts terminated by the employer without cause and by simply providing notice along with any agreed severance compensation (or in lack thereof, the statutory severance compensation). The notice required in these cases is three months, unless the parties have validly agreed otherwise. Top executives can likewise terminate their contracts by providing the same amount of notice (three months, unless validly agreed otherwise) — see further at **15.2**.

15.6 Terminations without notice

Spanish law does not regulate any specific type of termination without notice per se. Spanish law does, however, allow employers to terminate employment for disciplinary reasons, in which case no notice will be required (unless otherwise agreed contractually). In the case of fixed-term contracts under one year in duration, the contract can also terminate at the end of its agreed term without notice.

Employees should provide notice of termination in cases of resignation. If the employee fails to do so, however, the termination will still be effective, without prejudice to any consequences the employee's breach may have. Typically, the applicable CBA will provide that if the employee fails to comply with

their required notice, the employee will forfeit an equivalent number of days of salary or the accrued portion of extraordinary salary payments.

15.7 Form and content of notice termination

The letter must be clear and unambiguous about the termination and the length of the notice (if any). It should include a detailed explanation of the reasons for the employee's dismissal. The amount of severance compensation paid when the letter is given to the employee should also be reflected in the letter — see further at **15.9**.

The employer should meet with the employee and give the employee the letter of dismissal with the severance compensation (if any). Two copies of the letter should be printed and signed by a duly authorized representative. Payment of the statutory severance (if any) can be made by bank check or by bank transfer on the day of the meeting with the employee, in which case a copy of the bank transfer order should be provided to the employee at that meeting.

The employee should sign to acknowledge receipt of the letter and of the bank check, if applicable, if payment is being made by bank check. Having two people present at the meeting (or one present and another readily available) is advisable; this is because if the employee refuses to acknowledge receipt of the letter (and/or check, if any), these two people should sign the letter as witnesses that the employee received it (and the bank check, if any). The company should arrange for delivery of the letter to the employee's home by *burofax* (a Spanish form of certified mail).

15.8 Protected employees

The following employees are especially protected against dismissal:

- pregnant employees
- employees on childbirth leave (or leave related to adoption or foster care)
- employees who have returned from childbirth leave (or leave related to adoption or foster care) up to a maximum of twelve months from the date of birth, adoption or foster care of the child
- employees who have requested or are working reduced hours to care for a child under 12 years of age or to care for another dependent family member as defined by law
- employees who have requested or are enjoying a leave of absence to care for a child or other dependent family member as defined by law
- employees who are victims of gender-related violence and who have exercised their right to reduce or reorganize their work hours, to workplace relocation or to a leave of absence as regulated by law
- works council members and members of similar representative bodies, from when they are included on the list of candidates to 12 months after their term of office ends
- members of the electoral board during the term of their role and for 12 months after election

These employees can be terminated like other employees, but if the court finds that insufficient cause existed for the dismissal or that the wrong procedure was used, the dismissal will automatically be considered null and void, instead of simply unfair (see further at **15.11**). Therefore, unless the employer is in a position to prove that the dismissal is fair and unrelated to the pregnancy or other special circumstances, the dismissal will be declared null and void and the employee will be entitled to reinstatement with back pay. In addition, in relation to employee representatives, if their dismissal is considered unfair, then the employee representative will have the right to opt between (i)

reinstatement with back pay or (ii) termination with the additional severance compensation that has to be paid for unfair dismissal.

15.9 Mandatory severance

In the case of an objective dismissal (see further at **15.1**), the company must pay the employee severance compensation of 20 days' salary per year of service, with any period of less than one month of service to be computed as a full month, up to a maximum of 12 months' salary.

The employee's salary for these purposes includes fixed and variable salary, as well as benefits in kind and equity benefits. Certain benefits that are considered "social" in nature, such as complementary healthcare schemes, pension schemes and life insurance coverage, should be included when calculating dismissal severance compensation.

15.10Collective redundancy situations

The collective dismissal procedure must be used when in any 90-day period or consecutive 90-day periods, a company intends to dismiss the following number of employees for economic, technical, productive or organization reasons:

- six or more employees if the company will be closed
- 10 or more employees in a company with up to 100 employees
- 10% or more of the total employees in a company with 100 to 300 employees (both inclusive)
- 30 or more employees in a business with over 300 employees

If the number of dismissals does not meet these thresholds, the dismissals are subject to the objective (individual) dismissal procedure described above.

Spreading out the dismissals over consecutive 90-day periods to avoid the collective procedure (and instead, to qualify for the more simple objective procedure) could lead a court to declare the dismissals fraudulent and consequently null and void. In addition, significant case law exists on (i) which types of dismissals compute for the purposes of the threshold and (ii) how the 90-day periods and/or consecutive 90-day periods should be counted. These rules are extremely important and should be considered carefully prior to any dismissal to avoid the dismissal(s) being declared null and void and having to reinstate the employee(s) with back pay. Finally, special rules can apply on which employees the company must dismiss first and which have "last to go" rights (e.g., employee representatives have "last to go" rights).

The collective dismissal procedure can be divided into the following stages:

- Constitution of a worker negotiating committee

The employer should inform the employees of its intention to initiate a collective dismissal procedure prior to starting the consultation period so that the employee can set up one negotiating committee, which will consist of the employees' representatives of all the work centers affected by the collective dismissal. In the case of one work center affected by the collective dismissal, the negotiating committee will have a maximum of three members per party. If several work centers are affected, the maximum number of members is 13 representatives per party.

The law grants seven days for the committee to be set up, unless there are work centers affected that do not have worker representatives, in which case the period will be 15 days. If the company has no employee representatives (i.e., works council or employee delegates) in one or all of the work centers affected by the collective dismissal, a worker representative committee must be set up prior to the commencement of the consultation period.

- Notice of the commencement of the procedure

The collective dismissal procedure requires the employer to notify the employee representatives of the company (or, as the case may be, the employees) of the commencement of a consultation period and then file a copy of that notice with the labor authorities.

The notice must be accompanied by a number of supporting documents explaining the grounds for the dismissals. The documents should include economic and legal documentation setting out the reason(s) for the dismissals, information on the company's employees and the employees affected, the timing of the intended redundancies and the criteria applied to designate the affected employees. The documents should also include the minutes of the constitution of the negotiating committee or, as the case may be, the failure to constitute such a committee within the legally established period of time.

If the termination affects more than 50% of the workforce, the employer must also notify the employees and labor authorities of any sale of the company.

15.10.1 Consultation period

The consultation period can last up to a maximum of 15 days in companies with fewer than 50 employees and up to a maximum of 30 days in companies with 50 employees or more.

During the consultation period, the company and employees discuss the reasons for the dismissals and the possibility of avoiding or reducing their negative effects on the employees through measures such as relocation or training to attempt to increase employees' employability.

The labor authority is entitled to provide suggestions and issue warnings during the consultation period that would not entail a suspension of such period but may play a crucial role if the procedure is finally challenged before a labor court.

The law offers the possibility to replace the consultation period with alternative dispute resolution procedures, such as mediation or arbitration, if the parties so agree.

15.10.2 Notice to the labor authority of the outcome of the consultation period

The consultation period may conclude with or without an agreement with the employee representatives. The company must in any case formally inform the labor authority of the final outcome. If an agreement has indeed been reached, the company should provide the authorities with a copy of such agreement. If no agreement has been reached, the company must notify the labor authorities and the employee representatives of its decision regarding the collective dismissals and the conditions that will apply to the dismissals.

Individual dismissal notification

Dismissals cannot take place until 30 days have elapsed since the company notified the labor authority of the commencement of the consultation procedure.

The company can proceed with the individual dismissals by providing the employees with a minimum of 15 days' notice plus the statutory severance compensation of 20 days' salary per year worked, capped at 12 months' salary (or whatever amount may have been agreed with the employee representatives).

The failure to reach an agreement with the works council does not impede the company from proceeding at the reduced severance compensation rate.

The mandatory costs deriving from the collective dismissal are the following.

- Severance compensation: There is a mandatory minimum severance compensation of 20 days' salary per year of service, with any period of less than one month of service to be computed as a full month, up to a maximum of 12 months' salary. However, the parties may agree a higher severance compensation.
- Outplacement: If the company dismisses more than 50 employees, the company must offer the affected employees an external job placement plan of no less than six months through authorized placement agencies, which must include training action, support in searching for a new employment position, etc.
- Special Covenant with Social Security: Companies carrying out a collective dismissal that affects employees over the age of 55 are obliged to bear the cost of the Special Covenant with the Social Security (*Convenio Especial con la Seguridad Social*), which approximately equals the cost of the social security contributions for those employees until they reach the age of 61. This equates to approximately EUR 11,400 (approximately USD 12,640) per year maximum. As of 1 January 2013, this obligation was extended until employees reach the age of 63 unless the cause alleged for the economic redundancy was economic.
- Financial contribution to the Spanish Treasury: Companies carrying out a collective dismissal affecting employees over the age of 50 will also have to make a financial contribution to the Spanish Treasury provided the following conditions are met:
    - The percentage of employees aged 50 or over that are dismissed (as compared to the total number of employees dismissed) is greater than the percentage of employees aged 50 or over who remain employed (as compared to the total number of employees who remain employed) — for the purposes of calculating the percentage of employees aged 50 or over who are dismissed, certain prior and future dismissals may need to be taken into account.
    - The company (or group of companies) has more than 100 employees.
    - The company is profitable as defined in regulations — for these purposes, profitability before and after the collective dismissal procedure must be taken into account under the regulations.
    - The affected employees over the age of 50 have not been employed within the six months following the date of termination of their employment.

The contribution is roughly calculated according to the amount of the public unemployment benefits and subsidies to be paid to affected employees over the age of 50, including social security contributions made by the Unemployment Office. Pursuant to current legislation, in a worst-case scenario (an employee with a high salary, children, etc.), the contributions should amount to no more than approx. EUR 121,000 (approx. USD 146, 958) per employee over 50 years old.

After the dismissals are implemented, both the employees and the employee representatives are entitled to contest the causes for the dismissal, lack of compliance with the collective redundancy procedure or the validity of any agreement that may have been reached. If the court finds that insufficient causes for the redundancies exist, in most cases, the employees will be entitled only to the statutory severance for unfair dismissal. However, if the redundancy procedure was not used when it should have been, if the company did not comply with the formalities of the collective redundancy procedure, if the company fails to provide for the required consultation period, if the company does not provide the worker representatives with the legally required documentation, if the agreement with the employee representatives during consultation was reached by means of fraud, or if the decision to

terminate the contracts breaches fundamental rights and public freedoms, the dismissals will be considered null and void.

15.11 Claims, compensation and remedies

The compensation for disciplinary and objective dismissals is set out below.

15.11.1 Disciplinary dismissals

Save for as follows, the severance compensation for an unjustified disciplinary dismissal is calculated on the basis of 33 days' gross salary per year of employment with a maximum of 24 months' salary.

For employees hired prior to 12 February 2012, severance compensation is calculated as the sum of (i) 45 days' gross salary per year of employment up to 11 February 2012, plus (ii) 33 days' gross salary per year worked from 12 February 2012. In cases where employees were hired before 12 February 2012, the total severance compensation is subject to a maximum of the greater of the following caps:

- 720 days of total salary
- 45 days' gross salary per year of employment up to 11 February 2012, capped at 42 months' salary

15.11.2 Objective dismissals

The severance compensation set out above applies equally to objective dismissals with the following exceptions:

- The mandatory 20 days' salary per year of service is deducted from this severance.
- If the employment contract at issue was a special indefinite-term contract, the amount of indemnity for an unjustified objective dismissal will exclusively be calculated on the basis of 33 days' salary per year of employment, up to a maximum of 24 months' salary, such that under these special types of contracts, no part of the severance will need to be based on the 45 days' salary per year of service formula, regardless of when the employee was originally hired.

15.11.3 Dismissals of top executives

The severance compensation will be computed on the basis of 20 days' salary for each year of employment up to a maximum of 12 months' salary, unless otherwise agreed contractually.

15.11.4 Provisions applicable to both disciplinary and objective dismissals

The employee's salary for these purposes includes fixed and variable salary, as well as benefits in kind and equity benefits. Traditionally, it did not include certain benefits that are considered "social" in nature, such as complementary healthcare schemes, pension schemes and life insurance coverage, but under more recent case law, these amounts should arguably be included.

Severance compensation for unfair dismissal, whether disciplinary or objective, has traditionally been tax exempt. However, severance compensation paid as from 1 August 2014 will continue to be exempt provided that it does not exceed the amount of EUR 180,000 (approximately USD 199,580). Also, the tax reduction that could be applied to any severance compensation excess paid on top of the statutory amounts for employees with seniority greater than two years has been reduced from 40% to 30% (such reduction is, however, still limited to a maximum base of EUR 300,000/approximately USD 332,634).

Note that if the employee is an employee representative and the dismissal is considered unjustified, the employee representative has the right to decide whether they are reinstated with back pay or whether they terminate their employment. If the employee representative opts for termination of employment, then aside from the standard severance compensation, the employee representative will be entitled to the so-called interim salary, which is the employee's salary from the date of termination up to the date on which the court's judgment is notified. This interim salary depends on how long the court takes to hear the case and reach a decision but it can amount to three to six months' salary.

15.11.5 Void dismissals

Apart from a possible finding of justified or unjustified dismissal, the labor court can alternatively find that the dismissal is null and void. The labor court will declare the dismissal null and void in a number of specific cases, which primarily include those set out at **15.8** above. Additional cases include:

- when the dismissal is based on discrimination prohibited by the Spanish Constitution or by law, or the dismissal violates the employee's fundamental rights or public freedoms (such as cases of retaliation against the employee for legitimately exercising their rights)
- when the collective dismissal procedure should have been, but was not, used
- where the dismissal is in retaliation for having exercised rights that exist to protect employees who are victims of gender-related violence

If the labor court declares the dismissal null and void, the company is required to immediately reinstate the employee with back pay. The employer does not have the option, as in the case with ordinary unjustified dismissals, to request the labor court to declare the relationship terminated and simply pay the employee severance compensation. Given the costs of having to reinstate and the increased difficulties of dismissing the employee afterward, prior to any dismissal, the company should carefully consider surrounding circumstances to ensure that no causes for a finding of a null and void dismissal exist.

15.12Waiving claims

Most employee claims can be waived under settlement, waiver and release agreements.

Typically, unless the employee is especially protected or has reasonable grounds to claim discrimination or retaliation, a settlement, waiver and release can usually be obtained in exchange for the additional severance compensation that would apply for an unjustified dismissal (see further at **15.11**), providing that the company pays all other outstanding salary amounts (such as any pro-rata part of an annual bonus, etc.).

16 Employment implications of share sales

16.1 Acquisition of shares

A transfer of shares is not considered a transfer of an undertaking for employment law purposes and therefore will not involve the transfer of employees but simply a change in the ownership of the employer (not a change in the employer per se). As such, all rights, duties and liabilities owed by, or to, the employees of the target company continue to be owed by, or to, the target company and the purchaser inherits all those rights, duties and liabilities by virtue of being the new owner of the target company.

However, if there is a merger or integration through a transfer of assets or key personnel of the target company's business with the purchaser's business post-acquisition, this may constitute a transfer of undertaking, and the considerations set out below will be relevant.

16.2 Information and consultation requirements

Employee representatives do not per se have any right to be informed of the sale of their employer's shares or the acquisition by their employer of the shares of another company. Employee representatives do, however, have a general right to be informed of the company's financial situation and probable evolution of its activities, as well as the sales and production plan. Employee representatives also have the general right to be informed and consulted (and the right to issue a report on) any company decisions that could cause relevant changes to the organization of work and employment contracts at the company. They also have the right to be informed of the company financial documents and other documents that the company gives its partners in the same manner as the partners are informed. Other information and consultation rights apply as well.

In light of the above, even if there is no specific information or consultation requirements regarding the sale of shares, as a result of the sale's circumstances or consequences, the share sale may trigger information and/or consultation requirements under the general information and consultation rules.

In this respect, note that if the sale of shares impacts employee benefits, the rules on modification of employment conditions could be triggered, and under these rules, information and consultation could be required with employee representatives prior to modification of the employee benefits. This could be the case, for example, if the target company has an equity incentive plan that applies to its employees, but the equity incentive plan is based on the equity of the target's parent company. When the target's shares are sold to a third party, the target will cease being a subsidiary of the parent company that runs the equity incentive plan, and so the target presumably will cease participating in the plan. The employees of the target will, under the plan rules, likely cease participating in the plan and may forfeit certain equity rights previously granted under the plan. In these cases, given the impact on the employees' salary, the rules on substantial modification of employment conditions may need to be followed. Under these rules, information and consultation with the employee representatives will be required in order to implement the change to the employees' right to participate in the parent company's equity incentive plan.

17 Employment implications of asset sales

17.1 Acquisition of assets

The European Acquired Rights Directive was implemented in Spain by Article 44 of the Worker's Statute ("**Article 44**"), which governs the transfer of undertakings. The automatic transfer of employees in an asset sale takes effect pursuant to Article 44, provided that the asset sale comprises the sale of an undertaking, for example a sale of a business (or an identifiable part of a business). For Article 44 to apply, the transferred business must:

- have the capacity to function autonomously or independently
- continue to function without a significant interruption to business activity before and after the transfer
- involve the transfer of some form of title to property (as opposed to simply being a transfer of pure activity)

As to the final point, in late 2005, the Spanish Supreme Court changed its position on the requirement that title to property should transfer and held that if the nature of the activity was predominantly based on human resources, the transfer of undertakings rules could be triggered without the transfer of property, if (and only if) the acquiring company hired an essential (in number and competence) part of the personnel of the acquired company.

If the requirements for an automatic transfer under Article 44 exist, the transferee will automatically take over the employment rights and obligations of the transferor.

Likewise, if a company merges with another company, a transfer of undertakings will likely occur and the affected employees will automatically transfer to the resulting company. If a company implements a spin-off and transfers a group of assets that function independently and that permit continuity in the business and services after the transaction, a transfer of undertakings will likely occur and the affected employees will automatically transfer to the purchaser company.

If the transaction does not meet the requirements to qualify as a transfer of undertakings, the employees will not automatically transfer to the other company, and each employee will either need to consent to their transfer to the different entity or will remain employed by the transferor.

17.2 Automatic transfer of employees

Where there is a transfer of an undertaking, the contracts of employment of those employees employed by the transferor automatically transfer to the transferee on their existing terms. The transferee effectively steps into the transferor's shoes with regard to the transferring employees. Save for some exceptions, all of the transferor's rights, powers, duties and liabilities under or in connection with the transferring employees' contracts pass to the transferee (whether or not the transferor has assumed these voluntarily or involuntarily, by CBA, by execution of an individual contract or by any other actions whether express or implied) and any acts or omissions of the transferor before the transfer are treated as having been done by the transferee.

Employees of the seller's business have the right to refuse to transfer to the purchaser but, if they do so, their contracts of employment will terminate by operation of law on the transfer date and there will be no dismissal. Effectively, they are treated as having resigned without entitlement to severance compensation and, consequently, will have no remedy against either the seller or purchaser. The employee(s) nonetheless may attempt to contest the transaction alleging that the requirements of Article 44 have not been met and, therefore, that the transaction does not result in their automatic transfer to the new owner. Such employee allegations would need to be proven in court to prevent the transferee from becoming their new employer.

17.3 Changes to terms and conditions of employment

Any changes to terms and conditions of employment are, as a general rule, regulated by the general provisions of the Spanish law on modification of employment conditions.

17.4 Information and consultation requirements

17.4.1 Information requirements

Companies are obliged to inform the employees or their representatives about the transfer and, depending on the circumstances, may need to consult with the employee representatives. The transferor and transferee should provide the following information to the employee representatives (i.e., employee delegates or works council) of the employees that are affected by the change of ownership:

- scheduled date of the transfer
- reasons for the transfer
- legal, economic and social implications of the transfer for the employees
- measures planned with respect to the employees

If no employee representatives exist in the company or work center, then the information should be provided to the employees directly.

With regard to timing, the information should be provided sufficiently in advance of the transfer. What is sufficient may depend on the particular circumstances, but in practice it is generally considered that the information should be provided no fewer than 15 days in advance of the transfer.

Where there is a merger or company spin-off, the relevant information should be provided when the shareholders' meeting is called to pass the relevant resolutions.

17.4.2 Consultation requirements

If the transferor or transferee intends to implement "labor measures" by reason of the transfer, the employee representatives should be consulted regarding the nature of the intended measures and their consequences for the employees. What is considered a "labor measure" is not entirely clear but we consider that dismissals, relocations and other relatively significant changes in employment conditions would constitute labor measures and, as such, would require a consultation period.

Again, no specific length of consultation period is established; it will depend on the circumstances. It is often considered that the consultation period should commence no less than 15 days before the implementation of the labor measure. If, however, the specific measure requires a longer consultation period under the regulations applicable to that measure (as could be the case, for example, in a collective dismissal procedure), the applicable longer period should be complied with.

17.4.3 Penalties

Failure to comply with a works council's information and consultation rights on a transfer will result in an administrative sanction and a fine of between EUR 751 and EUR 7,500 may be imposed on the company by the labor authorities either as a consequence of the authorities investigating the transaction under their own initiative or as a consequence of a complaint from the works council.

17.5 Protections against dismissal

It is common for the purchaser to request the seller to dismiss all or some employees that would otherwise be transferred to the purchaser before the transfer. However, recent case law has declared that such dismissals are null and void and the seller acted fraudulently by impeding the employees' automatic transfer to the purchaser by virtue of law. The courts can order reinstatement of employees with back pay.

After the transfer of undertakings has effectively taken place, the purchaser can decide to make all or some of the transferred employees redundant, following the specific dismissal process established by law. Depending on the number of employees to be made redundant, it will have to follow the collective redundancy process (which involves consultation with the employees' representatives or, in their absence, with the employees — see further at **15.10**) or take the individual dismissal route (which does not require consultation).

17.6 Other considerations

17.6.1 General employees

The transfer does not give rise to any severance rights or obligations under law. The transferee assumes all previously existing rights and obligations of the transferor with respect to the employees. The employee becomes an employee of the transferee automatically, whether or not the employee consents to this.

The transferee becomes jointly and severally liable with the transferor for a period of three years for all those obligations unsatisfied prior to the transfer in respect of existing employees, including:

- compliance with all relevant court decisions
- past salaries due
- any outstanding social security payments
- any fines for breach of applicable regulations
- pension plan obligations

However, liability for social security taxes owed to the Social Security Administration are subject to a four-year statute of limitation, and other statutes of limitations may also apply depending on the specific liability involved.

With regard to obligations to employees arising after the transfer, both the transferor and the transferee are held jointly and severally liable the day after the transfer if the transfer is subsequently declared a felony. Otherwise, only the transferee is held liable for obligations arising after the transfer.

Unless otherwise agreed, any CBAs applicable to the affected employees are automatically transferred to the transferee until either its date of expiry or the day a new collective agreement is applied to that business unit.

Employee representatives of the transferor will maintain their representative status only if the transferred business unit maintains its autonomy.

17.6.2 Senior executives

Senior executives who qualify for the application of the special employment rules may terminate their contracts upon a business transfer or where there is a significant change in the ownership of the employer that results in either a change in the company's board of directors or a change in the main company's activity or approach to the activity, as long as the executive exercises this right during the three-month period following the changes. If that is the case, the executive is entitled to the severance compensation agreed in their contract or, in the absence of any relevant contractual provisions, to compensation equal to seven days' salary for each year of service up to a maximum of six months' salary.

17.7 Other information and consultation obligations

The law establishes a list of matters on which employee representatives must be informed and consulted about. In addition, the applicable CBA may establish additional information and consultation obligations. Please refer to our handbook, The Global Employer: Focus on Trade Unions and Works Councils, which is accessible HERE, for information about this subject in Spain.

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