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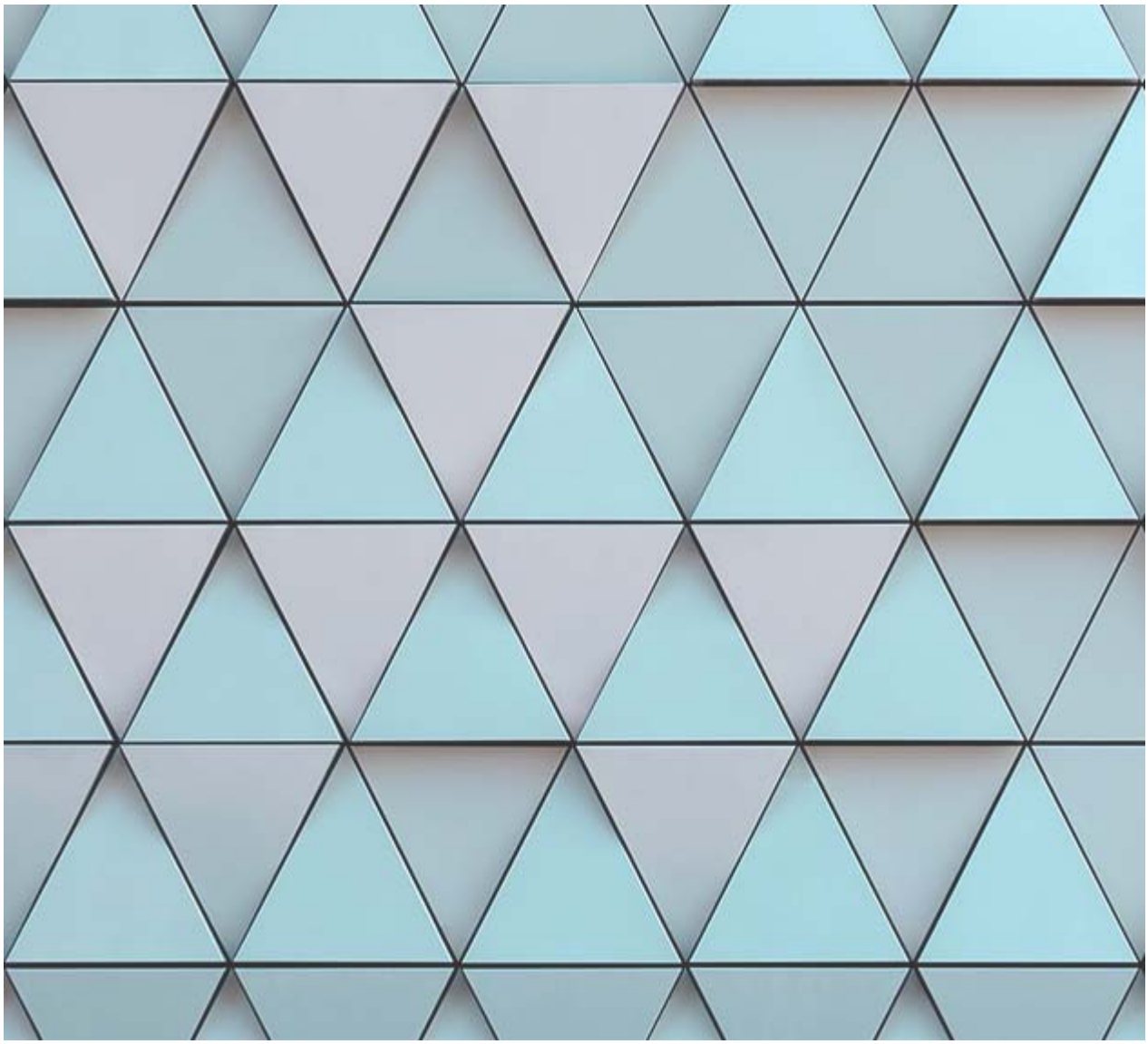
# Labor and Employment Newsletter



First quarter 2022 | April 20, 2022

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# NEW DEVELOPMENTS REGARDING ERTE AND COVID-19

On March 31, 2022, the final extension of temporary redundancy plans ("ERTE") on the grounds of COVID-19 expired. From now on, companies wishing to suspend employees' contracts or to temporarily reduce their working hours must follow the legal procedure for **ERTE regulated in article 47 of the Spanish Workers Statute** ("WS"), whether for objective reasons (based on economic, technical, organizational, or production grounds) or on the grounds of *force majeure*, the procedure for which is significantly different, as are the exemptions applicable to companies in either case.

The Official Gazette of the Spanish State of April 1 published the government resolution enabling travel agencies and tour operators to apply a new type of ERTE known as **RED Mechanism for companies in the travel industry**. Under this measure, travel companies that submit a request and are granted authorization can continue to temporarily suspend employment contracts, or to reduce employees' working hours and limit labor costs from April 1 to December 31, 2022. This sectoral RED Mechanism grants special exemptions on social security contributions, imposes requirements on companies and offers advantages to affected employees. This internal flexibility system, which is subject to more precise processing requirements, may be adopted in other sectors, such as the automotive industry.

# NEW RESTRICTIONS ON DISMISSAL ON THE GROUNDS OF THE WAR IN UKRAINE

Royal Decree-Law 6/2022, of March 29, adopting urgent measures within the framework of the **National Plan to respond to the economic and social impact of the war in Ukraine**, which entered into force on March 31, introduces several labor-related measures aimed at guaranteeing the effectiveness of the state aid approved under this regulation and preventing job destruction.

- On the one hand, companies benefiting from direct aid provided under the regulation—aimed at mitigating the detrimental effects of the energetic crisis—**cannot justify objective dismissals** on the grounds of the increase in **energy costs** until June 30, 2022. Companies that do not comply with this obligation will have to repay the aid received. Direct aid is granted to companies operating in the gas-intensive industry, those

engaged in road transport and rail transport, milk producers, and operators in the agriculture and fishing industries.

- On the other hand, companies benefiting from ***state aid*** that, for reasons related to the invasion of Ukraine, apply any of the **ERTE regulated in article 47 WS** (whether on the grounds of *force majeure* or on ETOP grounds) and reduce working hours or suspend employment contracts, cannot use these grounds to justify objective dismissals. Once again, the regulation does not clarify important aspects regarding these restrictions on dismissals, such as how dismissals in breach of the law would be qualified, or the meaning of *state aid* for these purposes.

# APPLICATION OF THE REGULATION ON PROFESSIONAL ARTISTS

Royal Decree-Law 5/2022, of March 22, adapts the special employment relationship of persons engaged in artistic activities, as well as technical and ancillary activities necessary for artistic activities. It entered into force on March 31, 2022.

- The most significant development is that this new regulation applies not only to professional artists, but also to **technical and auxiliary staff required to carry out artistic activities**, as long as they are not part of the permanent structure of companies in the industry.
- Royal Decree-Law 5/2022 also regulates **new artistic employment contracts** given the sector's specific needs and the intermittent nature of the activity. These contracts will become indefinite after a number of successive temporary contracts, as provided under article 15.5 WS, or if the contract is entered into in breach of this regulation.
- The minimum compensation for the termination of a fixed-term contract is 12 days' salary per year of service for all professional groups. This increases to 20 days' salary per year of service when the length of the contract exceeds 18 months.

# EQUALITY: JOB ASSESSMENT TOOL

A *job assessment tool* is provided by the Ministries for Labor and Social Economy, and for Equality, to identify and shed light on the pay gap between women and men. The assessment of jobs is necessary for companies to comply with their obligation to draft an equality plan and carry out an audit as part of their diagnosis for equal remuneration, and to specify in their remuneration register the arithmetic mean and the median salary perceptions of jobs of equal value.

Since March 7, 2022, all companies with more than 50 workers are required to have an equality plan.

# SIGNIFICANT JUDGMENTS

## Minimum wage increase

*Supreme Court, Fourth Chamber, January 26, 2022 (Appeal 89/2020); March 29, 2022 (Appeal 162/2019); and March 29, 2022 (Appeal 60/2020)*

The substantial minimum wage increases in recent years (the minimum wage is currently set at €1,000 per month in 14 payments) have raised doubts as to how this should apply to wages paid to affected staff. More specifically, this has led to discussions on whether the new amounts should be considered the basic salary on which to calculate bonuses (e.g., seniority, physical arduousness and danger), as the literal wording of *Royal Decree on minimum wage increases* appears to imply.

In three judgments handed down in the first quarter of this year, the Supreme Court's answer to this question has been negative. It states that "to ensure the effective payment of the guaranteed minimum wage, it is necessary to comply with the provisions of the collective bargaining agreement, including any bonuses, unless a rule with force of law would lead to another conclusion, or the collective bargaining agreement itself clearly specifies otherwise."

The first of the above judgments explains that any wages received as a bonus for seniority are part of the salary that must be compared with the new increased minimum salary; the second judgment extends this rule to all salary benefits (including variable pay); and the third judgment states that non-salary compensation is excluded from this rule.

## Collective dismissal v. ERTE

*Supreme Court, Fourth Chamber, March 22, 2022 (judgment no. 168/2022, plenary session)*

In the event of structural ETOP grounds, rather than grounds resulting from temporary effects, even if they are related to COVID-19, companies must carry out a collective dismissal instead of applying temporary measures such as the suspension of employment contracts, the length of which do not fit into the temporary nature of the above grounds. Therefore, external flexibility measures may be adopted in cases where internal flexibility measures are unable to solve the corporate crisis.

## Negotiation of equality plans

*Supreme Court, Third Chamber, March 28, 2022 (judgment no. 383/2022)*

The Supreme Court validates the possibility of calling upon the most representative trade unions and representatives in the sector—provided under article 5.1 of Royal Decree 901/2020—in cases where, in the absence of workers' legal representatives (in any or all the work centers), the company has to negotiate an equality plan (obligatory since March 7, 2022, in companies with over 50 workers). Therefore, companies in this situation must take the necessary precautions and call on the appropriate trade unions to make sure the equality plan is valid and can be registered in the registry for collective agreements and gender equality plans.

## ERTE on the grounds of *force majeure* and cyberattack

*Court of Appeals, Labor Division, March 22, 2022 (judgment no. 37/2022)*

The Court of Appeals upholds the grounds of *force majeure* in an ERTE submitted by a company belonging to the hotel sector as a result of a cyberattack (infecting its network with ransomware), which was notified to the Spanish Data Protection Authority and resulted in the company's vital information being held at ransom, which seriously affected its operation and over a thousand employees. Although the Chamber has revoked the labor authority's resolution because it was handed down after the deadline, it delves deeper into the matter, concluding that it contains all of the elements that cause *force majeure*: incapacity, the existence of a causal link between the breach of the contractual obligation and the fact preventing its fulfillment, lack of imputability and unpredictability or (at least) inevitability of risk. To assess the unpredictability or inevitability of the damage, it is necessary to take into account all of the security measures adopted by the company to avoid this type of attack (e.g., antivirus systems, cybersecurity policies and procedures, and ISO standards), all of which comprise adequate precautionary measures within the level of effort and expense that can be expected of an "orderly and diligent business person." For further details, please see our *Labor Law Blog*.

## Remote working agreement

*Court of Appeals, Labor Division, March 22, 2022 (judgment no. 44/2022)*

The Labor Division of the Court of Appeals has declared the nullity of certain remote working clauses unilaterally drafted by a company belonging to the telemarketing sector. Specifically:

- a clause on the reimbursement of expenses, which refers to the provisions set out in the applicable collective bargaining agreement, which has not regulated this issue;
- a clause obliging the worker to give the company a personal email address and telephone number "in case it needs to contact the worker if urgent service-related issues arise," considering that this goes against the obligations imposed under the Act on Remote Working, as the company is required to make these means available to the worker;

- a clause on digital disconnection—as there are no provisions to this effect in the collective bargaining agreement and no agreement has been reached with the workers' legal representatives—which obliges the worker to be connected in "justified emergency situations," defined as "situations that could cause damage to the company or business, the temporary urgency of which requires the worker's immediate response or attention";
- a clause under which the worker would allow the company's risk prevention service to access his home to assess the health and safety conditions of his workspace, giving at least seven days' prior notice; and
- a clause restricting the worker's right of reversibility and the previous waiver of rights in the event that the business owner exercised its right of reversibility.

# UPCOMING NEWS

The *draft bill* regulating the protection of persons who report regulatory breaches and the fight against corruption, transposing *Directive (EU) 2019/1937*, known as the *Whistleblowing Directive*, the transposition deadline of which was December 17, 2021, and under which companies with more than 50 employees are obliged to implement an internal whistleblowing reporting channel, also allowing for anonymous reports. The draft bill has yet to be approved by the Spanish Council of Ministers and submitted to Parliament for parliamentary processing.

For additional information, please contact our *Knowledge and Innovation Group lawyers* or your regular contact person at Cuatrecasas.

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