CHAPTER XVIII
SPAIN

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1. General overview

Labor relations in Spain are currently at a crossroads similar to other countries in our situation, one decisively marked by high unemployment rates.

The main mandatory employment and labor rules are established in the Workers Statute and the specific collective agreement that applies to each company. There is also a substantial body of legislation on employment, social security and health and safety.

Employment agreements are concluded on a permanent or fixed-term basis, and can be full or part time. From a legal perspective, the general rule is to conclude a permanent fulltime employment contract. Fixed-term employment contracts are valid, provided their temporary nature is justified on business-related grounds, which are:

- The company needs to carry out a specific task or service.
- There is an extraordinary increase in the company's production levels.
- The company needs to replace temporarily an employee who is on leave, but has the right to return to work (employees on sick leave or maternity leave).

There are also training and apprenticeship contracts for employees acquiring first-time work experience or completing their education.

The labor market in Spain is regularly questioned because of the duality that exists between workers with:

(i) indefinite contracts, higher profiles, extended careers, higher salaries, and a protection regime in the event of separation; and
(ii) a significant amount of workers with temporary contracts, lower salaries and a more precarious protection regime.

Recent labor reforms have tried to bridge the gap between both groups of workers, but the gulf between them is still huge.

Parties to an employment contract usually agree on an initial probation period, which must be specified in writing. Collective agreements often

establish fixed probation periods. If no such provision exists, the probationary period cannot be longer than six months for qualified employees, and two months for all other employees.

The maximum number of working hours per week is 40. These may be computed on an annual average basis, subject to a maximum of nine hours per day. Each hour worked over this limit is considered overtime.

The amount paid per hour of overtime cannot be below the rate paid for ordinary working hours. The ordinary minimum annual vacation period is 30 calendar days.

The Workers Statute admits several types of employee mobility to enable companies to adapt to market and economic circumstances.

- Functional mobility: employers may freely transfer employees between equivalent professional groups, provided they respect employees' dignity. Mobility between non-equivalent groups is only allowed when it is attributable to technical or organizational reasons, and must end as soon as those circumstances are resolved.
- Geographical mobility: a change in an employee's job location is allowed when it is attributable to economic, technical, organizational or production reasons. The change in location can be temporary or permanent. In the first case, employees may choose between being transferred and having their expenses reimbursed, or terminating their labor relationship with severance pay equal to 20 days' pay for each year of service up to a maximum of one year's pay. However, the employee may challenge the transfer before a labor court. If the court considers the transfer unjustified, it may determine that the employee has to be reinstated in the original place of work. If the transfer affects a certain number of employees within a specific period, the workers' representatives must be consulted.
- Substantial modification of employment conditions: the employment conditions can be substantially modified, affecting (i) working hours; (ii) working time and distribution; (iii) work shifts; (iv) remuneration system and salary; (v) working system and performance; and (vi) functions (if this exceeds the limits of functional mobility). The employer must state, and be able to produce evidence of, the economic, productive, organizational or technical reasons justifying any modification. Reasons that justify a substantial modification must relate to competitiveness, productivity, work or technical organization needs in the company.

The Spanish legal system allows decentralizing measures and considers subcontracting legal, including the use of an alternative workforce, provided the necessary requirements are fulfilled. These requirements aim to guarantee employees' rights.

Companies frequently recur to alternative workforces through a contract with another company. The purpose of this contract is to provide a service, usually by one company (subcontractor) to another company (contracting company). This service requires not only providing a labour force, but also organisation, equipment and initiative with a view to ensuring that the services are provided.

If the services provided by the subcontracting company are part of the contractor's main activity, the contractor must comply with certain requirements to ensure the subcontractor complies with all its social security and employment obligations.

The subcontractor must exercise its management powers by giving orders to its employees on when, where and how the contracted service must be carried out. In contrast, the contracting company cannot exercise these management powers over the subcontracting company's employees.

If these conditions are not fulfilled, subcontracting may be considered an illegal transfer of employees, in which case the employees of the subcontractor company are entitled to choose which of the two companies—the subcontractor or the contracting company—is their real employer.

Penalties for the illegal transfer of employees include joint liability for the subcontractors' labour and social security rights (salary and social security contributions), fines (an illegal transfer is considered to be a very serious infringement and fines range from €6,251 to €187,000) and, in very exceptional cases, even criminal liability.

Employers must maintain health and safety standards at work by (i) notifying the labor authorities that they are opening a workplace; (ii) drawing up a risk assessment and prevention plan; (iii) training workers; and (iv) monitoring workers' health. The labor authorities enforce these obligations rigorously, carrying out regular investigations into safety at work. Employers that fail to comply with these obligations could face severe sanctions.

Spanish law establishes penalties for infractions employers and employees commit in the context of extensive labor laws, including those relating to social security obligations, health and safety, labor relations, subcontracting, and temporary employment. Employers and employees are both subject to disciplinary measures. The labor and social security inspectors are in charge of monitoring that companies and employees comply with their labor and social security obligations. Fines for labor relations and employment, and social security infractions range between €60 for minor infractions and €187,515 for serious infractions. Fines for violating health and safety laws range between €40 and €819,780.

2. Current trends in Industrial Relations Law

In line with the recent reform of data protection regulations, Act 3/2018, of December 5, has been approved, which concerns personal data protection and the guarantee of digital rights. Among its articles, the act contains an interesting range of new employment rights relating to the digital world.

This act dedicates five important precepts (from article 87 to 91) to regulate issues that concern enterprises' human resources teams. These are not regulated by the legislator, but have been shaped over the years by Spanish and European case law:

1. Digital devices in the workplace

The law recognizes workers' right to the protection of privacy when using digital devices their employer provides them. It requires companies to establish the criteria for workers using these digital devices, respecting, in all cases, the minimum standards for protecting their privacy, in line with what the European Court of Human Rights has been demanding recently (case Barbulescu II). Companies must inform workers of the criteria for using these devices, which must be determined with the participation of the workers' legal representatives. The specific details on what this participation implies are still pending.

This recent law allows the company to access the content of digital devices to ensure employees fulfill their labor obligations, and to monitor the digital devices' security. If the company allows employees to use digital devices for private purposes, it must (i) specify in detail what private uses are permitted (e.g., specifying the periods in which employees may use the devices for private purposes), and (ii) put in place guarantees to preserve workers' privacy.

2. Video-surveillance and sound recording in the workplace

To monitor workers, the company can use information obtained through video systems. However, the company must inform both the workers and their legal representatives of this measure, and respecting the minimum standards for protecting their privacy, in line with what the European Court of Human Rights has demanded (case Lopez Ribalda).

There is a duty to report when an employee is caught flagrantly committing a wrongful act. In those situations, an informative notice must also be in a sufficiently visible place to identify, at least, the existence of the device, the identity of the person in charge, and the possibility of exercising rights of access, rectification, suppression and limitation.

The company is prohibited from installing cameras in places intended for rest or recreation for the workers; e.g., changing rooms, toilets and canteens. Surprisingly, there are no exceptions to this specific provision in the law.

The company can only make audio recordings at the workplace if this is justified for reasons of safety of facilities, goods and people. In all cases, the company must respect the principles of proportionality and minimal intervention.

3. Geolocation in the workplace systems

The company can monitor data obtained on geolocation systems to ensure workers fulfill their labor obligations. However, the company should clearly inform workers and, where appropriate, their legal representatives, about the existence and characteristics of these devices, and the possible exercise of rights of access, rectification, limitation of the treatment and suppression. The law does not refer to the purpose of the installation of the device between the extremes included in the duty to inform.

4. Workers' right to digital disconnection

For the first time in Spain, the so-called right to digital disconnection within the employment relationship is now legally recognized.

This is a new legal development in Spain and, because it relates to fundamental rights like physical integrity and privacy, is recognized in a *ley orgánica* (basic rights and statutes affecting individual rights and duties). Therefore, strictly speaking, it is not a labor regulation. This is not the first time a non-labor regulation has included provisions that clearly affect labor rights, highlighting the need to pay attention to any regulations that might be approved.

The regulation does not define the right to disconnection, and there is a lack of details about its contents. The Spanish legislator has opted for a clear and express provision regarding the existence of workers' rights: "Workers and public employees will be entitled to digital disconnection […]." Therefore, although a minimal legislative framework has been chosen to cover digital disconnection (which businesses can implement based on their industry and business situation), it seems difficult to argue that, because there are no guidelines on how to exercise this right, the right to digital disconnection does not exist.

The reason for its regulation is to (i) protect workers' health, as it intends to guarantee their "rest time, leaves and vacation," and (ii) protect workers' "personal and family privacy."

The regulatory provision establishes that "the ways in which the right can be exercised" will be whatever is established in the collective agreement or, in its absence, in a company agreement. The employer has the role of designing, after hearing the workers' representatives, an internal policy defining how to exercise the right to disconnection. Therefore, the company will have

to define the technical means to guarantee the effectiveness of the right to disconnection.

There is a second basic obligation for the employer, which is to carry out training and awareness-raising activities on how employees should use technological tools reasonably. Therefore, this provision seems to be based on the premise that establishing standards for good use of digital devices is not sufficient, meaning the company must provide training.

The subjective scope is broad, and the legislator intended to provide it with "general efficacy" by stating that the business policy regarding the right to disconnection must be aimed at all workers, "including those in management positions" (without specifying whether this means ordinary workers in management positions or strictly senior management).

5. Digital rights in collective bargaining

The law refers to collective agreements to establish additional guarantees of rights and freedoms related to handling workers' personal data and protecting digital rights in the workplace. Collective bargaining may improve, but not worsen, standards of protection established in the new law.

3. Trade unions and workers' representatives

Spanish labor regulation establishes a double representation of workers:

(i) the general representation of the workers inside the company through the workers' representatives; and

(ii) the union representation in the company or work center through union divisions, which integrate and represent workers affiliated to the union.

We will analyze the most important information about this double representation system in companies operating in Spain.

A. Workers' representatives (works council)

1. GENERAL COMMENTS

In Spain, works councils are the main channel of workplace employees' representation in Spain. While the structure for workplace employees' representation (personnel delegates or works council) does not depend on union involvement, unions play a central role in its configuration. The vast majority of elected representatives are proposed by unions, and approximately three quarters of them belong either to *Comisiones Obreras* (CCOO) or *Unión General de Trabajadores* (UGT), which are the two most representative unions in Spain.

Under section 62 of the Workers Statute, workplaces with more than 10 workers are entitled to elect workers' representatives. They may also be elected

in workplaces employing as few as six workers if a majority of workers decides to do so.

Employees elect workers' representatives. If the company employs 50 or more workers (as in the case at hand), workers' representatives will be organized into works councils (*Comités de Empresa*), and their composition will range from a minimum of five members, in small companies, to a maximum of 75 members in large companies.

The following limitations apply to the number of members of the works council:

- Companies with fewer than 50 workers: 3 members (individual workers' representatives)
- Companies with between 50 and 100 workers: 5 members
- Companies with between 101 and 250 workers: 9 members
- Companies with between 251 and 500 workers: 13 members
- Companies with between 501 and 750 workers: 17 members
- Companies with between 751 and 1,000 workers: 21 members
- Companies with more than 1,000 workers: minimum of 21 members, with two extra members for each 1,000 workers or fraction, with a maximum of 65 members

2. ELECTION PROCESS

Under Spanish law, most representative union organizations may call elections for members of works councils.

The promoters must notify the company and the labor authorities of their intention to hold elections at least one month before the electoral process begins. The election's promoters must accurately identify the company and the work center, as well as the date on which the process will start.

Concerning deadlines, under section 74 of the Workers Statute, companies must inform, within seven calendar days (from the date the promoters communicated their intention to start an electoral process), the employees who will be in charge of setting up the electoral council. Within that same seven-day period, companies must notify the labor census to the members of the electoral council, listing the workers who meet the requirements of age and seniority to be considered eligible electors. The electoral council is made up of (i) the president, who is the person with the greatest seniority in the company, and (ii) two ordinary members (*vocales*), who must be the eldest and youngest electors.

The electoral council controls the electoral process, chairs the voting, prepares the corresponding minutes and resolves any complaint that may arise.

Under Spanish law, employees must elect the members of the works council through a free, personal, anonymous and direct vote. All employees

in the work center who are older than 16 years of age and have seniority in the company of at least one month are entitled to elect their representatives.

Regarding the eligibility to belong to the works council, under Spanish law, an employee may be elected representative if he or she is older than 18 years of age and has seniority of at least six months in the company.

Candidates may be eligible on behalf of any union legally constituted, or coalitions consisting of two or more of them, but an employee may also become a candidate, provided he or she is supported by other workers (voters of the same work center and college, where applicable, equivalent to at least three times the number of posts that need to be filled).

If companies fail to fulfill these mandatory collaboration duties, they could be considered to have committed a very serious infringement, which could involve sanctions of between €6,251 and €187,515. Any intention to obstruct the electoral process could also entail a violation of the right to unionize (a fundamental right). Therefore, we recommend (i) providing the mandatory information established under law, and (ii) allowing the electoral council to lead the entire electoral process, avoiding any kind of greater company involvement in the process.

The duration of works council members' term of office is four years, and they may only be revoked during their mandate, at the decision of the employees who have elected them, through a meeting called at the request of at least a third of the voters through an absolute majority.

If a vacancy arises on the works council, this will automatically be filled by the next worker on the list of the person being substituted. The substitute will assume the role for the remaining time of the mandate.

Concerning works council members' prerogatives, they will be entitled to be informed and consulted by the employer concerning any issues that might affect the workers, as well as the company's situation and progress.

The company does not provide the works council with a budget. However, the company must provide the works council with certain material means and time for it to perform its duties of receiving and transmitting information.

Specifically, legal representatives are entitled to be provided with a notice board for reporting functions. They should also be provided with suitable premises, provided the work center's characteristics enable this, so they can carry out their activities and keep in contact with the workers they represent.

Works council members are legally entitled to paid time off so they can carry out their representative duties. For companies employing up to 100 workers, as in this case, workers' representatives are entitled to 15 hours of paid time off per month.

3. GUARANTEES AND HOURS CREDIT

The Workers Statute establishes for workers' representatives a time credit entitlement so they can exercise their functions of representation according to the scale established normatively, which ranges from 15 hours to 40 hours per month, depending on the staff size.

The use of the time credit is subject to general rules on using the permits the enterprise provides, meaning the notice and justification must be provided to the entrepreneur.

This time credit is incumbent for each member of the committee, not the committee itself, so the power to decide how and when to use the hours that make up the credit is exclusive those belonging to the unitary representation.

What the standard types of activities include is not specified, and case law has delimited the functions of representation under the criteria of reasonableness and normalcy, covering all the functions of representing and defending the workers' interests broadly.

4. SPECIFIC INFORMATION AND CONSULTATION RIGHTS

The following rights apply to works council activity:

A. Meetings: Periodic meetings with the company to be updated on how the business activity is developing.

B. Right of assembly: Employees' meetings in the working place may be held at the works council's request, provided the employer is informed at least 48 hours before the meeting.

These meetings may be held during working hours, but the works council must submit a proposal to ensure the meetings do not interrupt essential and urgent services.

C. Information

The company should provide certain information to the works council with a certain frequency.

Every quarter, the company should inform the works council of:

(i) the general situation of the economic sector of which the employer is a part, the situation of the employer's production and sales, its production program, and the development of the employer's employment situation;
(ii) the company's economic situation and environmental issues that could affect employment;
(iii) the employer's plans to hire new employees; and
(iv) statistics of absenteeism and its causes, as well as work-related accidents and illnesses.

Every year, the company should provide:

(i) information on the enforcement of equal treatment rights and opportunities between men and women, including data on the proportion of men and women at different professional levels, as well as measures the company has taken to promote equality between men and women in the company; and
(ii) a summarized copy of each employment contract (called a "basic copy").

Depending on the company's developments and circumstances, it will also have to provide:

(i) a balance sheet, P&L and annual report;
(ii) written employment contract templates and termination templates;
(iii) sanctions imposed for very serious infractions;
(iv) temporary employment agency retaining agreements and reasons that led to their execution; and
(v) subcontracting agreements.

Within ten days, the company must provide (i) a summarized copy of each new employment contract entered into (called a "basic copy"), and (ii) any renewals or expiry notices.

The procedure to deliver the information is informal. Disclosure usually takes place during or before a meeting is called, and the company should be ready to answer queries. However, unless the issue could have a significant impact on employment, there is no obligation to provide details or information beyond these requirements,

D. Consultation rights

The company must consult the works council if there are:

(i) any significant changes to organization at work or to employment contracts;
(ii) plans to implement preventive measures, particularly where they could place employment at risk;
(iii) collective redundancy or temporary layoff plans;
(iv) work site moves planned; or
(v) significant collective changes to employment terms (e.g., shifts, working hours, works schedule, salaries or incentive plans).

The employer is expected to play a more active role in issues that involve an obligation to consult. Therefore, the employer must submit the required information and have an open discussion to explain why the measure is justified, the extent of the measure and its impact on workers, any measures to minimize the impact on workers, and compensation.

Concerning the issues described in (iii), (iv) and (v), the employer often tries to reach an agreement with the works council. This is to avoid the risk of

the works council challenging the measure and the judge or administrative body declaring that the grounds are not justified (e.g., they are not proportional to the needs, or the company's situation does not justify the need to take the measures).

The right to information and consultation must be respected by the employer, which could be sanctioned, under Spanish law, if it infringes this right, by either not providing the information or providing it late. The company must provide some of the information mentioned in the previous sections periodically, which can be considered "preventive." The company's failure to provide this information is considered a serious breach, which could be sanctioned with penalties of between €629 and €6,250.

The other information mentioned above refers to the one required to exercise the controlling function of the workers' representatives over certain matters. This information is required to control the content and extension of valid employment contracts. The company's failure to provide this information is considered a serious breach, which could also be sanctioned with penalties between €629 and €6,250.

E. Right to provide advice

In some situations, the employer must request the workers' representatives' opinion on certain issues. Even though their opinion on these topics is not binding, the consultation could affect the company's final decision. Issues on which employers are obliged to request the workers' representatives' opinion include:

(i) restructuring plans;
(ii) reduction of working hours;
(iii) workplace relocation;
(iv) mergers, absorption and changes to corporate structures that could affect work or employment; and
(v) changes to work control, incentives or other means to control performance.

The Workers Statute establishes a 15-day deadline for the workers' representatives to issue a report from the date the employer requests it..

The Workers Statute foresees other consultation procedures in which the employer and workers' representatives may have to negotiate and reach agreements. This occurs in circumstances involving the geographical transfer of workers, substantial changes in working conditions, company transfer and collective redundancy. Representatives are also entitled to be heard if sanctioned by the company.

If the works council is entitled to submit its prior written view on a company transaction, the company must request this report from the works council and provide any necessary information and documentation in a timely and appropriate manner so that the works council can compile it correctly.

The works council report does not bind the company.

It should be noted that there is no obligation to obtain the report, but only to request it. In fact, works councils seldom submit these report.

Failure to request the report and submit the documentation is considered a breach of social rights and the company may be liable to a fine (usually ranging from €600 to €6,000).

Moreover, the company's decision could even be declared null if it is considered to damage or abuse workers' fundamental social rights to representation.

If the works council is entitled to consultation (e.g., collective workplace relocation, collective redundancy) and this has not been held, the company's decision may be rendered null for the infringement of the relevant procedure.

F. Right to give approval

The Workers Statute Act requires an agreement between the employer and workers' representatives on certain issues, such as the professional classification system, the promotion system, changes to salary receipt forms, payment date of one of the two annual extraordinary payments, irregular distribution of working time on a yearly basis beyond the minimum hours established by law. These agreements are usually only required if the issue is not agreed in the collective bargaining agreement.

The procedure may vary according to whether the agreement must be legally enforced or whether it has a contractual nature. In the first case, the party requesting the negotiation must formally call for the negotiation process, there must be an open negotiation, and a written agreement must be registered with the authorities. In the second case, the procedure is rather informal.

Failure to request the approval or ignore disapproval would annul the measure and the company would be subject to sanctions.

B. UNIONS

1. Introduction

Under the Union Freedom Act, workers' union representation may exist within the company or work center by means of so-called union divisions (*Sección Sindical*). In some cases, the union divisions may comprise union representatives, who, as highlighted in this memorandum, are subject to different regulations and not to the Workers Statute like ordinary workers' representatives.

2. Union Division (Sección Sindical)

The Union Freedom Act provides that workers affiliated to a workers' union can make up a union division in the company or work center, regardless of the number of workers the company has or the number of workers

affiliated to this union. Constituting a union division is in no way limited by the employer's recognition or acceptance, although the company must be informed in due time that it has been constituted.

2.1 Union division's rights

A union division has the following general rights under section 8.1 of the Union Freedom Act:

- Right to hold meetings, giving prior notice to the employer.
- Right to collect payments by the affiliates, through a "check-off" discount over monthly payroll.
- Right to distribute union information.

Union divisions can carry out these activities outside normal working hours and provided they do not disturb the company's normal activity.

However, section 8.2 of the Union Freedom Act provides certain rights for union divisions with a major representation in the company or that have a member in the workers' committee. The union division of CC.OO at MBNA would also qualify for these additional rights:

- Right to hold a notice board

Union divisions are entitled to have a notice board inside the work center to provide information and notices to their affiliates or other workers. The notice board must be located in an accessible place for all the workers who may be interested in consulting it.

As labor law does not specify the exact location of the notice board in the work centers, the employer can choose where to place it (fulfilling all requirements of accessibility and location inside the work center). Technical progress has resulted in this entitlement being extended to the digital workplace (such as email addresses and the intranet).

Communications posted on a notice board or sent through a company's email accounts may be addressed to the whole workforce.

With regard to the frequency of communications, as mentioned above, section 8.1.c) of the Union Freedom Act provides that they must be sent outside normal working hours and without disturbing the company's normal activity, with no other limitations or restrictions in this regard.

- Right to participate in collective bargaining

Under section 8.2 of the Union Freedom Act, union divisions may be entitled to participate in collective bargaining, subject to the requirements established under section 87 of the Workers Statute (general rules on collective bargaining).

- Union room for the meetings

Union divisions that fulfill the requirements in section 8.2 of the Union Freedom Act are entitled to use a suitable room in companies or work centers with over 250 workers.

Thus, the employer is obliged to provide the union division with this room, without taking into consideration the size of the company's facilities or the number of union members. Although labor legislation does not define the term "suitable" room, current case law specifies that the room must be equipped with the necessary furniture and material to carry out the union's activities.

3. Union Representatives

In companies with over 250 workers, union divisions that have representation in the workers' committee may be represented by a union representative.

This representative must be elected by the affiliates of the union represented in the company or in the work center by the union division.

Section 10.2 specifies the number of union representatives to be elected depending on the number of company workers and the number of votes received by this union during the workers' committee elections.

3.1 Rights and protection of union representatives

The union representative elected can be one of the members of the workers' committee or other affiliate, who is not a workers' representative.

A union representative that is not part of the workers' committee will have the same level of protection as those legally stated by the committee. This level of protection is as follows:

- Right to be heard in case of disciplinary actions based on serious and very serious infringements.
- Permanence right in case of termination of employment contracts based on economic or technical reasons.
- Right not to be dismissed or sanctioned while acting as union representative, and for one year after leaving the position of union representative.
- Right to give an opinion in matters related to the scope of representation.
- Right to hourly credit for exercising representation activities (please note that if the union representative is still a member of the workers' committee, this hourly credit cannot be added to the hourly credit granted to carry out activities corresponding to a workers' representative).

Section 10.3 of the Union Freedom Act grants the following rights to union representatives:

- Right to access the same information and documentation as those furnished by the company to the workers' committee.
- Right to attend meetings of the workers' committee and any other internal meeting of the company's representation bodies regarding health and safety at work, without a right to vote.

- Right to be heard by the company before adopting collective measures affecting workers and, specifically, the affiliates of the union they represent, especially in case of employee dismissals or other disciplinary actions.

4. Transfer of business

1. Applicable legislation. Transaction as a transfer of a business

Under Council Directive 2001/23/EC, of 12 March 2001, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, section 44.1 of the Workers Statute provides as follows with regard to the transfers of undertakings:

> *"The change of title in a business, work center or a stand-alone unit of production of a work center shall not terminate the employment relationship, the new employer being subrogated in the employment and Social Security rights and obligations of the previous employer […]".*

As a consequence, under Spanish employment law, a transfer of undertakings will take place if a transaction involves the relocation of a "*business, work center or a stand-alone unit of production,*" i.e., if it implies the transfer of a whole business or, at least, a business that may self-operate.

In other words, for Spanish regulations on transfers of undertakings to apply, a transaction must affect both the workforce and involve the assignment of property factors of a productive and economic nature (such as technical, organizational and property factors such as work materials, facilities, industrial machinery, warehouses, and computer equipment) that would qualify as a "*socio-economic unit of production*" under the Workers Statute.

However, case law from the European Court of Justice (that has been followed by Spanish courts, including the Spanish Supreme Court) has stated that a transfer of assets is not strictly necessary for the transfer of undertakings regulations to apply (and, therefore, the automatic transfer of workers to the transferee) if the business concerned is labor-intensive, as opposed to asset reliant.

In those situations, even when no specific transfer of assets takes place, an automatic transfer of undertakings may apply if the transferee employs a significant part of the transferor's workers.

Having said this, according to Spanish Supreme Court case law, which is based on the case law issued by the Court of Justice of the European Union, to determine whether the conditions for the transfer of an entity are met—and, therefore, for the transfer of workers and joint responsibility regarding

employment and social security obligations to apply—it is necessary to consider all the factors and circumstances involved in the transaction, such as:
(i) the type of undertaking or business;
(ii) whether its tangible assets, such as buildings and movable property, are transferred;
(iii) the value of its intangible assets at the time of the transfer;
(iv) whether the majority of its workers are taken over by the transferee;
(v) whether its customers are transferred;
(vi) the degree of similarity between the activities carried on before and after the transfer; and
(vii) the period, if any, during which those activities were suspended.

All these circumstances are single factors to be considered on conducting an overall assessment and cannot be considered in isolation. Therefore, to determine whether a transfer of undertakings exists, each circumstance at stake must be analyzed.

General consequences arising from a business transfer

a) Assignment of new working conditions

Under section 44 of the Workers Statute, any employment rights and entitlements of the transferor's workers, whether individual or collective, and that have been agreed to by the transferor with its workforce, must be safeguarded.

Therefore, the transferee cannot change the workers' individual working conditions, such as individually-granted job positions, salaries, benefits and seniorities. Moreover, the transferee must adhere to collective conditions enjoyed as a result of collective instruments or any other collective agreement in favor of the workers (e.g., life or medical insurance, or pension schemes).

With regard to the collective bargaining agreement applicable to the transferred workers, unless the transferee reaches an agreement with the workers' representatives when the transfer takes place, the workers' working conditions will continue being regulated by the collective bargaining agreement applicable within the transferor company prior to the transfer. This application will last until the collective bargaining agreement expires or until a new collective bargaining agreement comes into force within the transferred entity.

b) Workers' representatives

Workers' representatives' term of office will not be affected by the transfer as long as the workplace, company or business unit preserves its autonomy, in which case workers' representatives will keep their position under the same terms and conditions as before the transfer took place. In any other case, the workers' representatives' term of office will expire and they will lose their prerogatives.

c) Liabilities

Under section 44 of the Workers Statute, both the transferor and transferee will be jointly liable for three years for labor-related obligations arising before the transfer.

Moreover, both entities will be jointly responsible regarding obligations towards the social security arising before the transfer. The law does not set forth a temporary limit regarding social security liabilities, although the general four-year social security limitation period applies.

Finally, if the transmission is declared illegal,[1] both the transferor and the transferee would be jointly liable for any employment-related obligations arising after the transfer.

d) Opposition to the transfer by the affected workers

Transfers of businesses due to the application of article 44 of Workers Statute are regulated as a mandatory legal obligation and not a mere guarantee for the workers. Therefore, neither the workers' legal representatives nor the workers themselves have a veto right or any right to subject the transfer of undertaking to any conditions.

Information and consultation procedure

With regard to workers' information and participation rights, the workers' representatives of both the transferor and the transferee must be notified of the transfer of undertakings. Companies with no such representation must deliver this information to the workers.

As regards information obligations, written communication must be provided regarding the following:

- Date or proposed date of the transfer.
- Reasons leading to the transfer.
- Legal, economic and social implications of the transfer for the workers.
- Any employment-related measures envisaged in relation to the workers.

As regards timing, the information duty must be complied with "sufficient notice" before the transfer is carried out. Section 44 of the Workers Statute does not provide for a specific term of notification; however, as a matter

[1] Under section 311.3º of the Spanish Criminal Code, it would be illegal for the transferee, after the transfer, to continue carrying out the following practices previously implemented by the transferor:

(a) to deceive or take advantage of a situation of need to impose working conditions on workers that go against the rights acknowledged to them by law, a collective bargaining agreement or an employment contract; and

(b) to hire employees without a work permit as follows:(i) more than 25% in companies employing more than 100 workers; (ii) more than 50% in companies employing 10-100 workers; and (iii) all workers in companies employing 5-10 workers.

of practice, 15-30 days before the transfer would be considered sufficient. Regarding mergers and acquisitions, information must be provided by the date of publication of the summons for the general meetings of shareholders that must approve the transaction.

Latest developments on transfer of undertakings

Finally, it is worth mentioning that on September 27, 2018, the Spanish Supreme Court published a decision following the criterion set out by the European Union Court of Justice referring to the possibility of certain collective bargaining agreements limiting the transferee's liability in the event of transfer of undertakings.

In this regard, some collective bargaining agreements (especially those related to labor-intensive activities) tend to limit the transferee's liability regarding certain debts arising before the transfer. Spanish courts (and particularly the Supreme Court) had accepted this limitation (which is contrary to the statutory terms regulating transfer of undertakings under section 44 of the Workers Statute), stating that in this case, the transfer of undertakings was not based on the Workers Statute but on the applicable collective bargaining agreement. Therefore, the liabilities set forth under the Workers Statute did not apply and the collective bargaining agreement could waive their application.

However, after the European Union Court of Justice's ruling in Case C-60/17, dated July 11, 2018 (Case "Somoza Hermo"), the Spanish Supreme Court changed its previous criterion and decided that regulations of section 44 of the Workers Statute must apply and, thus, the collective bargaining agreement cannot limit or waive any of these statutory liabilities, in situations where a contracting entity has terminated the contract for the provision of services concluded with one undertaking and has, for the purposes of the provision of those services, concluded a new contract with another undertaking, which takes on, pursuant to a collective bargaining agreement, the majority—in terms of their number and skills—of the staff to which the first undertaking had assigned the performance of those services, if the operation involves the transfer of an economic entity between the two undertakings concerned.

This decision directly affects any transfer of workers regulated by collective bargaining agreements (especially those regulating private security, cleaning, maintenance, contact centers or hospitality), which must be modified to adapt to this case law.

5. Termination of employment in Spain

Termination of employment requires a cause. The reasons for the termination can be classified as (i) conduct-related termination; and (ii) objective

dismissal,[2] which is mainly due to business-related reasons. In the second case, termination can take place through an individual or collective redundancy, depending on the number of workers affected.

A. Disciplinary termination

Disciplinary terminations are justified on the gross misconduct of a worker, based on the reasons listed in article 54 of the Workers Statute or in the applicable collective bargaining agreement.[3] They normally foresee forms of misconduct such as neglect of duty, disobedience of legitimate orders, intentional and continuous decrease of productivity, unjustified absence or lateness, disobedience or disorderly conduct, turning up for work in a state of intoxication, sexual or moral harassment, and breach of trust. The latter reason is construed broadly and an overwhelming number of litigated disputes concerning termination of employment for disciplinary reasons derive from the general ground of breach of confidence and trust.

Please note that this type of dismissal does not entail payment of severance compensation or observance of any notice period. The company only has to pay the pending salaries, extraordinary payments pro-rata and accrued holidays.

It is imperative to define the grounds for the dismissal in a written notification, stating the facts and details of the misconduct as well as how the company became aware of them. The failure to specify them will lead a court to declare the dismissal to be unfair. The dismissal would also be unfair when the misconduct is not considered sufficient or proportional to the sanction imposed.

Some collective bargaining agreements may foresee additional formal requirements when carrying out a disciplinary dismissal.

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[2] There are also three other reasons justifying an objective dismissal: (i) the worker's known or observed ineptitude after being placed in the company (however, any ineptitude existing before completing a probationary period cannot be raised after completing that period); (ii) the worker's lack of adaptation to technical modifications affecting his position (however, previous training is mandatory and the termination cannot take place before two months after the end of that training); and (iii) absences from work, even where these are justified but intermittent, when they amount to 20% of the working days of two consecutive months provided that the total absenteeism within a period of 12 months exceeds 5%, or 25% for four discontinuous months within a 12-month period (however, absences due to strike, the exercise of workers' legal representation activities, work accidents, maternity, paternity, pregnancy risk, leaves and holidays or illness longer than 20 consecutive days, among others, cannot be taken into account for such purpose).

[3] Collective agreements commonly establish a list of infringements that are qualified as minor, serious or very serious, and their corresponding sanctions. Companies decide which sanction is to be applied.

B. Individual redundancy

This type of termination of employment may be carried out if the existence of economic, technical, organizational or productive reasons to make the worker redundant can be proved.

- Economic reasons occur when a company is experiencing a negative economic situation, such as current or foreseen losses, or a persistent decrease in ordinary income or sales. The decrease will be considered as persistent if the relevant company undergoes a reduction in ordinary revenues or sales during a period of three consecutive quarters, compared to the same quarters in the previous year. It must be noted that economic grounds must be analyzed taking into consideration the whole context of the company or group of companies and are based on its economic balance sheets. Even though it is not required under the definition of economic grounds, a company is unlikely to obtain a declaration of fairness if it has not suffered any losses.
- Technical reasons occur when new technologies and production instruments are available, and result in a decrease of the required workforce.
- Organizational reasons occur when there are changes in the production, organization, or changes in the working systems, or cases where, pursuant to a corporate operation such as a merger, the company happens to duplicate positions, or more staff than necessary due to synergies.
- Productive reasons occur if there are changes in the demand of the products or services offered by the company (e.g., when a supplier contract is terminated by a third party).

Terminations of employment based on business-related reasons—individual and collective—must comply with the following formal requirements:

- The company must hand deliver a written dismissal letter to the worker clearly and precisely stating the reasons for the dismissal.
- The company must give the worker the dismissal letter with a notice period of 15 days before it becomes effective. Please note that if the notice period is not observed, the worker would be entitled to a payment *in lieu*.
- Moreover, at the time when the written notification is handed over, a severance of 20 days' salary per year of service, capped at 12 months' salary, must be paid to the worker. The salary for calculation purposes includes not only the fixed salary, but also the salary in kind (e.g., a company car), social benefits (e.g., pension plan) and variable salary received over the last 12 months (e.g., bonuses and commissions).

The termination is considered unfair if (i) the company has not complied with the dismissal formal requirements, or (ii) the reasons for dismissal are insufficient or disproportionate to justify the termination.

C. Collective redundancy

Under Spanish law, a special procedure must be followed in the event of a collective dismissal.

Qualifying threshold

A collective redundancy will be carried out when, in a period of 90 days, and based on business-related reasons (i.e., economic, technical, organizational or productive reasons, as defined above), the company dismisses a number of workers exceeding the thresholds defined in article 51 of the Workers Statute. The thresholds according to such article are as follows:

- 10 workers in companies employing fewer than 100 worker.
- 10% of the workforce in companies employing between 100 and 300 workers.
- 30 workers in companies employing more than 300 workers.

This procedure must also be followed when the whole workforce of a company is to be terminated, provided that the number of affected workers is higher than five and that the company undertakes a complete cessation of its business activity based on the same business-related grounds.

However, it is important to point out that recent court decisions in Spain, based on the European Court of Justice's decisions on the application of the EU Directive on collective dismissals, have widened the scenarios where a collective redundancy procedure will be followed. This has been done by using either the company or the work center as a reference to count the threshold, and by applying different thresholds in some cases, whichever is more favorable to apply consultation rights in collective redundancies. The table below summarizes the scenarios obliging a collective dismissal.

Company size (in workers)	Computation unit when considering the threshold	Number of workers affected that entails a collective dismissal
1 to 5	Company	Not collective
6 to 10	Company	Entire workforce
11 to 19	Company	+10 workers
20 to 99	Work center*/company	+10 workers
100 to 300	Work center*/company	10% of workers
More than 300	Work center*/company	+30 workers

(*) As long as the work center has at least 21 workers

In this regard, please note that to ensure that collective redundancies are subject to a proper consultation period, and that employers do not avoid this negotiating period by affecting a number of workers below the thresholds set

above, the Workers Statute establishes an anti-fraud clause that states that, when in successive periods of 90 days, and to avoid the provisions regulating the procedure of collective dismissal, the employer performs individual redundancies based on business-related reasons affecting a number of workers below the thresholds, and without a new cause that justifies these actions, the new terminations will be considered fraudulent and declared null and void.

Moreover, when calculating the threshold, any other employment contract that is terminated during the reference period of 90 days at the employer's initiative must be taken into account, provided it is based on reasons that are not inherent to the worker,[4] and there are at least five terminations.

- Procedure

The company must initiate the process through a formal communication informing of its intention to carry out the collective dismissal 7 or 15 days before beginning the negotiation process (depending on whether all affected work centers have workers' representatives). During that period, the workers or the workers' representatives should choose their representatives for the process.

The Workers Statute requires the employer to notify the competent labor authority and the workers' representatives, and to begin a negotiation period. This notification must contain the following information: (i) the grounds for the collective redundancy; (ii) the number and professional group of workers affected by the termination; (iii) the number and professional groups of workers in the company in the previous year; (iv) the criteria used to decide which workers will be affected; and (v) the period over which the redundancies will be carried out.

Please note that the company must also deliver certain documents substantiating the justification for the collective dismissal (such as legal reports, technical reports drafted by auditors, audited financial and patrimonial statements). These documents vary depending on the grounds on which the collective redundancy is based.

The consultation with the workers' representatives leads to a negotiation period of 30 days (or 15 for companies employing fewer than 50 workers). This consultation period is mandatory and is designed to facilitate an agreement between the employer and the workers' representatives, both in terms of the number of affected workers and the termination package made available

[4] Accordingly, it is important to bear in mind that the following terminations will also be taken into account, because they are considered as not inherent to the worker: (i) individual business-related dismissals; (ii) disciplinary dismissals considered unfair; (iii) objective dismissals based on non-business-related reason deemed unfair; (iv) temporary contracts terminated before the date on which they expire, or if these contracts are fraudulent.; (v) contract termination based on section 50 of the Workers Statute (at the worker's will, based on a previous breach by the employer).

to each worker to be made redundant following the conclusion of the collective redundancy process.

This consultation process may either end in a final agreement with regard to dismissals, or with no agreement at all. In both cases, the company must notify the labor authorities and the workers' representatives of the result of the negotiation period.

If the negotiation process end in an agreement with the workers' representatives, the collective redundancy would be applicable in the terms and conditions agreed.

If the negotiation process ends without an agreement, the company might decide to enforce the collective redundancy in an attempt to ease the process to reduce the workforce if the above referred economic, productive, organizational or technical grounds apply.

Exceptionally, the applicable collective bargaining agreement may foresee additional requirements when following a redundancy dismissal.

- Costs

The company must pay the workers' redundancy compensation. The legal minimum redundancy payments are equal to 20 days' salary per year of service up to a maximum of 12 monthly payments. However, this amount is usually increased as result of the negotiation period with the workers' representatives.

Moreover, the termination must be communicated in writing with a prior notice of at least 15 days (or payment *in lieu*) and the notification sent to the affected workers must comply with the requirements set forth under the Workers Statute for individual redundancies.

Additionally, if the collective redundancy affects more than 50 workers, the company must offer an outplacement plan of at least 6 months through an authorized relocating company.

Moreover, the collective redundancy may trigger the obligation to make a contribution to the public treasury, in the following circumstances:

1) The company has over 100 workers or belongs to a group of companies employing at least that many workers.
2) The dismissal procedure disproportionately affects workers aged 50 years or more in relation to the number of workers aged under 50 years in the workforce.5

[5] Including employees of that age affected by the collective dismissal and those whose contracts were terminated within the three years before the collective dismissal and up to one year after the collective dismissal, for reasons not inherent to the employee other than the expiration of a fixed-term contract.

3) One of the following situations takes place:
   (i) The company, or the group of companies to which it belongs, has filed tax profits in the two financial years previous to the year in which the company initiates the collective dismissal.
   (ii) The company, or the group of companies to which it belongs, files tax profits during at least two consecutive financial years within the period elapsing between the financial year before the collective dismissal and the four financial years after that date.

The calculation of the contribution takes into account the gross amount of unemployment benefits and subsidies owed to workers aged 50 years or more and are affected by the collective dismissal, including social security contributions made to the Spanish Public Employment Service. An average amount of this contribution per each worker ranges from €60,000 to €100,000.

Finally, the company must enter into special social security agreements and make the corresponding payments for workers aged 55 years and older (who did not pay social security contributions before January 1, 1967) up to 61 years of age. This measure aims to avoid the negative impact of the dismissal on the retirement pension. The cost of the agreements will depend on the workers' age, personal circumstances and their social security contribution base, but may reach €1,000 per month and per worker.

The decision to implement collective redundancies is subject to judicial review, and unions, workers as a group, or individuals affected are entitled to bring action against the company's decision.

However, it is noteworthy that in its resolution of July 2, 2018, the Supreme Court declared that, if the collective redundancy ends in an agreement between the company and the workers' representatives, individual workers are not entitled to question the existence of the objective reasons (whether economic, technical, organizational or productive) in the individual judicial process. Thus, the individual proceedings would be limited to private discussions (e.g., calculation of the severance compensation according to the worker's labor conditions, and the criteria used to select the affected worker).

D. Possible consequences of terminations

Termination through collective or individual procedures (based either on disciplinary grounds or on business-related reasons) can be declared by the labor courts as one of the following:

(i) Fair: workers are not entitled to additional severance pay.[6]

[6] Workers dismissed for disciplinary reason will not be entitled to any severance pay. On the contrary, workers affected by a business-related dismissal would receive at, least, the minimum mandatory

(ii) Unfair: a court will consider the dismissal is unfair if the reasons for termination are not proved or considered sufficient. Additionally, in case of individual terminations (either in disciplinary dismissals or individual redundancies), failure to comply with the formal requirements may imply the termination is unfair.

In this case, the company must choose between[7] (i) reinstating the worker and back-paying salaries accrued from the termination date, and (ii) paying severance compensation equal to 45 days' salary per year of service up to 42 months' salary for time worked until February 12, 2012; and 33 days' salary per year of service up to 24 months' salary after that date.[8]

In case of business-related terminations, the mandatory severance compensation already paid (of 20 days' salary per year of service, capped at 12 months' salary or the higher agreed in the collective redundancy procedure) will be subtracted from the severance pay for unfair dismissal.

(iii) Null and void: if the termination infringes the worker's rights and fundamental freedoms.

In the case of collective redundancies, the termination would also be declared null and void if the company has not fulfilled all procedural requirements established by law.

When this occurs, the worker must be reinstated immediately and back-paid any salaries accrued from the termination date until the reinstatement date. Moreover, if the worker's rights and fundamental freedoms have been infringed, the court can also award the worker compensation for damages.

Some terminations are automatically annulled, even when there are no discriminatory grounds, unless the employer can prove the grounds for disciplinary termination for gross misconduct, or that there were sufficient objective reasons for termination. Termination in these cases cannot be considered unfair (which would entail the payment of the severance pay for unfair dismissal); they are either fair (there is a cause for termination), or they are null and void ("**protected situations**").

This protection is applicable to workers whose employment contracts are suspended because of (i) maternity; (ii) health risk during pregnancy or during the breastfeeding period; (iii) sickness due to pregnancy, delivery or natural breastfeeding period; (iv) adoption or fostering; or (v) during paternity leave.

payment of 20 days' salary per year of service with a limit of 12 months' salary (or the higher amount agreed during the negotiation period in case of being affected by a collective redundancy).

[7] An employee who is a workers' representative is entitled to decide whether to be reinstated or terminated.

[8] The maximum severance pay is capped at 720 days' salary unless the severance pay accrued before February 12, 2012 is higher.

Courts will also annul the terminations of workers who have requested a reduction in their working hours because they are the primary the caregiver and legal guardian of a child aged twelve or younger, or they are the primary caregiver of a family member with a serious disability that prevents that person from taking care of him/herself Workers that are victims of domestic violence who have reduced their working time are also protected.

This protection also applies to (i) pregnant workers from the first month of pregnancy until their employment contract is suspended for maternity leave (even if the company is not aware of the pregnancy); (ii) workers who have requested a suspension of their contract to be the caregiver of a child for a maximum period of three years after the date of birth, adoption or fostering (iii) workers reinstated at work after the end of the suspension of their employment contract for maternity, paternity, adoption or fostering leave, for nine months after the date of birth, adoption or fostering; and (iv) workers that have reduced in their daily working hours to breast feed or after the birth of a premature child.

In particular, and regarding the protection of pregnant workers, we highlight the resolution of the European Court of Justice of February 22, 2018 (C-103/2016), which declares that Spanish law is contrary to article 10(1) of Council Directive 92/85/EEC[9] as it does not prohibit as a preventive measure the dismissal of a worker who is pregnant, has recently given birth or is breastfeeding, but only provides, by way of reparation, for that dismissal to be declared void when it is unlawful. However, the European Court does not state which kind of preventive measure would be adequate to the purpose of the mentioned Directive.

Additionally, on July 20, 2018, the Spanish Supreme Court annulled the termination of a pregnant worker affected by a collective redundancy, considering that the selection criteria had not been sufficiently detailed or proven. Thus, pregnant workers are particularly protected not only by wording of the law, but also by recent case law.

Apart from that, workers' representatives (members of works councils and health and safety councils) are also closely protected against termination under Spanish law.[10]

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[9] EU Directive of 19 October, 1992, on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

[10] E.g. they have priority of permanence in the company or work center with respect to other workers in cases of suspension or termination for technological or economic reasons. In cases of unfair dismissal, they will choose between the corresponding severance payment and reinstatement. In case of disciplinary termination, they are entitled to take legal action in which, as well as the interested parties, the works committee or other workers' delegates will be heard.

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