

Guidance by jurisdiction

1. **Jurisdiction**

Spanish Jurisdiction

2. **Author**

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3. **Introduction**

In Spanish labour legislation, employment contracts are regulated by the provisions of Legislative Royal Decree 2/2015, of October 23, approving the Workers' Statute (WS). However, it is important to note, that employment issues can be, and usually are regulated by collective bargaining agreements.

4. **Employment Status**

In Spain, as well as employing individuals as employees, there is possible to hire self-employed consultants (under a consultancy agreement, not a labour contract), or agency workers (under a mercantile agency agreement) or even employees using Temporary Employment Agencies (ETT).

Depending on the relationship that is created, the rights and responsibilities will differ. Generally, the employees enjoy the greatest legal protection. Therefore, it is very common in Spain that, at the extinction of a consultancy agreement, the consultants prove that they were within the Company's organization sphere, using its personal and material resources and that the Company controlled their day-to-day activities, even though they bill to the Company and they are registered in the special scheme for self-employed workers, there is a high risk that a Court could consider them as formal employees of the Company, with all the corresponding legal implications.

5. **Immigration and Hiring Foreign Nationals**

The employees who are European Union citizen are entitled to work in Spain without being provided with a Work Permit. In order to maintain the contributions in their home countries it is possible to apply for a certificate of coverage which allows the employees to contribute in their countries of origin instead of in Spain while their assignment last.

The employees who are non European Union citizen are required to be provided with a Work Permit which currently is really difficult to obtain from the Spanish Authorities. There exist several types of Work Permit depending on the cases; it is to say, depending on the characteristics of the job which will be developed as well as depending on the period of time for such work

The easiest permit to obtain is regarding those employees who come to Spain through companies of the same group, in order to perform a transactional rendering of services.

6. **Terms of employment**

The working contract can be established either in writing, or by word of mouth. Work contracts should be drawn up in writing, when the statutory provisions require this and, in all cases, contracts for work practice and for training, part-

time contracts, fixed but interrupted or discontinuous for carrying out work, and for changes of personnel, contracts for housework, contracts for insertion, as well as workers contracted in Spain for providing their professional services for Spanish companies abroad.

Article 15 of the WS establishes that employment contracts can have an indefinite or a temporary duration.

Under Spanish labour law, there are many types of temporary employment contracts that can be executed:

- Contracts for training;
- Contracts for work practice;
- Contracts for a work task or particular service;
- Contracts of temporary nature due to circumstances of production;
- Interim contracts;
- Contracts to replace early retired workers.

The working contract will be understood as having been drawn up part-time, when the provision of work services has been agreed with respect to the number of hours per day, per week per month or per year, which are less in comparison than those of the working day of a full-time worker.

7. Wages

The applicable Collective Bargaining Agreements (hereinafter, CBA) determines the salary to be received by the employees, on the basis of their professional category or their job position in the company. The salary stated in the CBA fixes the minimum amount for each of the professional categories, so employers can remunerate the services provided by his/her employees in any amount, always exceeding those minimums.

One unusual aspect of wages in Spain is that workers are entitled to at least two extraordinary paychecks annually, normally one for Christmas and the other in summer. They can also be prorated monthly if this is agreed in a collective agreement.

The Spanish government sets the minimum wage (Spanish initials, SMI) annually. This is the minimum amount below which it is illegal to contract a worker. For 2019, it is €900 per month.

8. Collective Bargaining Agreements

Collective Bargaining Agreements are extremely essential in Spanish labour legislation since they regulate many aspects of the employment relationship such as wages or working time. A CBA is a written agreement adopted between the workers' and employers' representatives which regulates work and productivity conditions (art. 82 WS). That being said, all companies should comply with the collective agreement's rules that are applicable to them. They are divided into different scopes.

- According to its functional scope, there are company-level CBA (only applicable to one company and regulate labour conditions), sector-level CBA (applicable to one sector of the economy), inter-professional CBA (applicable to one geographical area, regardless of the industry or economic activity).
- According to its geographical scope (state, autonomous community, province and city)
- According to its function.
- According to its efficacy, statutory collective agreements or extra-statutory collective agreements.
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In order to know which CBA to apply, the following steps must be followed:

- General rule: In prior tempore rule. Meaning, we apply the collective agreement that was adopted first.
- Company-level CBA: these always have priority of application for the conditions established in article 84.2 WS (amount of base salary, compensation overtime and others, schedule, work shift...). Plus, according to case law, those subjects that are not in the list of that article but are most beneficial for the worker also have priority.
- Sector-level CBA and inter-professional agreements can both alter the general rule (in prior tempore rule) or extend the list of article 84.2, but never reduce it.

9. Pension and Benefits

In Spain, the State Social Security system covers retirement, death (widows, orphans and other dependents' benefits) and disability.

The standard retirement age has been recently increased gradually from 65 to 67 years, during a transition period of 15 years that will end in 2027.

After 2027 it will be still possible to retire at 65 with a full pension if the contribution period is of at least 38 years and 6 months. It will be possible to retire at 65 even if this contribution period is not reached, but a reduction coefficient will be applied.

For any of the contingencies mentioned above, beyond the fact that the basis of calculation of the corresponding benefit is the "contribution base" over a certain period and that a ceiling has already been applied to each of those bases, the resulting benefit is subject to the "maximum benefit" that for 2019 was fixed at 37.231,74 euros per year.

The Spanish Social Security guarantees to the employees allowances regarding pharmaceutical and medical services.

When the employees are temporarily disabled for work due to a common or occupational disease or an industrial or non-industrial accident, they receive health care and economic allowances from the Social Security.

Employees are entitled to a maximum of 18 months' sick leave in the case of illness or injury, which can be extended in some cases. During sick leave, the

employee will receive a sickness payment from the employer, which is approximately 75% of the employees' salary. If the sickness or injuries are due to an accident at work, Social Security will pay from the first day, but if it is due to a common illness or accident the employer can only recover the payments from the Spanish Social Security from the 16th day of absence.

Some collective agreements (and some Companies voluntarily) establish a supplement payment so the employee's receive 100% of their salary. If Social Security, at any time, declares the employee as permanently ill the employment contract will terminate and the employee will receive a social security pension.

The provision of other benefits (life assurance, share options, travel loans, etc) is at discretion of the employer and sometimes they are expressly foreseen in the applicable CBA.

10. Worker Representation

The right of participation of the workers in the company is articulated through the delegates of the staff and company's committees.

The staff delegates constitute the representation of the workers in the company or centre of work with less of 50 and more of 10 workers. Equally it exist a delegate of the staff in those companies or centers that have between six and ten workers, if the workers will decide so by majority.

The delegates of the staff can be: until 30 workers, one; from 31 to 49: three.

The Company Committees are the body representative of the workers of the company or centre of work as a whole that is constituted in each centre of work which census is of fifty or more workers.

The number of members of the work committee in function of the number of workers:

- From 50 to 100 workers: five.
- From 101 to 250 workers: nine
- From 251 to 500 workers: thirteen
- From 501 to 750 workers: seventeen
- From 751 to 1.000 workers: twenty one
- and forward, two for each 1.000 or fraction, with a maximum of seventy five.

The elections to delegates of the staff and members of work committees can be promoted by:

- The trade union more representatives
- The unions which have as minimum 10 per cent of representatives in the company.
- The workers of the centre of work for agreement of the majority.

The mandate will be of four years, being understood that they will be in functions in the exercise of their competences and of their guarantees while are not promoted and celebrated new elections. There are the same for both organs of representation of the staff. The work committee has the right of being informed and consulted by the employer about the questions that can affect the workers, about the situation of the company and the evolution of the employment

The members of the work committee and the delegates of the staff will have, as minimum, the following guarantees:

- Opening of contradictory dossier in the case of sanctions for serious and very serious infringements, in which will be heard the interested, the committee or the rest of the delegates of the staff.
- Priority of permanence in the company in the cases of suspension or expiration for technological or economical causes and in the cases of geographical mobility for technical, organizational or productive reasons.
- Not to be fired, not to be imposed sanctions during the exercise neither of their functions nor within the year following the expiration of their mandate, if the sanction tries to be based in the action of the worker in the exercise of its representation.
- To express freely their opinions in matters related with the range of their representation; they can publish and distribute, without disturbing the normal development of the work, the publications of labour or social interest, communicating it to the company.
- To dispose of a credit of several paid hours a month for each of the members of the committee or delegates in each centre of work, for the exercise of their functions of representation, according with the following scale:
 - Until 100 workers: 15 hours/month
 - From 101 to 250 workers: 20 hours/month
 - From 251 to 500 workers: 30 hours/month
 - From 501 to 750 workers: 35 hours/month
 - 751 and forward: 40 hours/month.

11. Working Time and Holidays

The duration of the working day will be agreed in the CBAs or work contracts. The maximum duration of the normal working day will be 40 hours per week of effective work, on an average in the annual computation.

The number of normal hours of performance of effective work per day, may not exceed 9 hours, except in the case of a collective agreement; or if not, in accordance with an agreement between the company and the representatives of the workers, which lays down a different distribution of times in the working day, respecting in every case the rest period between working days.

Workers under 18 years of age may not carry out more than eight hours per day of effective work.

Between the end of a working day and the beginning of the following, have to be as minimum twelve hours. When the duration of a continued working day exceeds

of six hours, have to be established a period of resting during the same time no inferior to fifteen minutes.

Workers will have right to a minimum weekly resting time, cumulated by periods of fourteen, of one day and half uninterrupted that, as general rule, will include Saturday afternoon, or when appropriate, Monday morning and the complete Sunday.

To the ordinary working day can be added extra hours. The maximum number of extraordinary hours is of 80 by year, but will not be taken into account in this limit the extra hours compensated for resting (with no remuneration) within the four months following its execution. Overtime shall be paid for or offset with rest periods as agreed under the individual work contracts or collective agreements.

All employees are entitled to, at least, 30 calendar days' paid holiday or if a more beneficial amount as governed by a CBA. Holiday entitlement can only be replaced by payment in lieu when the contract is terminated and there is accrued but untaken holiday. There are also additional 14 public holidays every year (that are not included in the minimum holiday entitlement).

On March 8th, 2019, Royal Decree-Law 8/2019 on urgent measures regarding social protection and against the precariousness of work in the working day was published. This new regulation impose employers to have a working time daily record, registering the specific time when each employee in fact starts and ends it working time. Employers will have to negotiate with their workers representatives the tool that will be used, being sure that the Company cannot manipulate it after having made the registration.

12. Protection against Dismissal

The employer is entitled to terminate an employment contract for a variety of "objective" causes, as:

- Ineptness of the employee which is discovered or arises after he/she has been granted employment with the company.
- Failure of the worker to adapt to technological changes in his employment position provided, however, that such changes are reasonable.
- Economic, technological, organizational or production grounds (job cutbacks).
- Repeated absences from work (even if justified but intermittent) if the employee has been absent for 20 percent or more of working hours in two consecutive months whenever the total of absences within 12 prior months reach the five percent of the working journeys, or for 25 percent or more of working hours in four non-consecutive months over a 12-month period (absences due to maternity, paternity, holidays, strikes, cancer or serious disease, temporary disability of more than 20 days, etc... will not be taken into account).
- Lack of budgetary provision for carrying out public plans and programs.

For this purpose the company must observe the following requirements:

1. Written notice including a precise description of the reasons behind the dismissal.

2. At the time of delivery of such written notice, payment to the employee of compensation of 20 days of indemnity per year of service, with a maximum of 12 months wages.
3. Granting a period of 15 days prior notice from the delivery of the notice communicating the termination of the contract to its actual date of termination. In the event that the company decides not to respect the prior notice period, the employee is entitled to receive the salaries for the period in default. During the prior notice period, the affected employee should be entitled to a weekly leave of six hours with pay in order to seek new employment.

The employer's decision to terminate the contract can be deemed by the Labour Court as fair, unfair or null and void.

The dismissal shall be deemed fair when the causes of the extinction of the contract alleged in the written communication are evidenced. In this case, the worker shall keep the 20-day's wage indemnity previously received and has no further rights.

The extinction of the contract shall be declared unfair when the causes are not evidenced or they are considered not to be serious enough. The employer may, in a period of five days from the notice of such declaration, choose between re-employing the worker or paying an indemnity of 45 days salary per year of service, up to a maximum of 42 months' salary if the employment contract was concluded before February 12th, 2012 or of 33 days salary per year of service, up to a maximum of 24 months' salary if the employment contract was concluded after February 12th, 2012.

If there exists a discrimination or a basic right is violated, the dismissal could be declared to be null and void and the Company should reinstate the employee to his/her former position in addition to the wages corresponding to the period from the date of dismissal to the date of the sentence by which the dismissal is declared null.

Disciplinary dismissal: This consists of the work contract being terminated by the employer on the grounds of serious and culpable breach of contract by the worker. Article 54 WS sets forth the infractions that can cause an employees' dismissal:

- Repeated or unjustified absences from work or bad time keeping.
- Lack of discipline or disobedience.
- Verbal or physical abuse to the employer, persons working at the company or members of their families who live with them.
- Breach of contractual bona fide agreements or breach of trust in carrying out the work.
- Continued and voluntary reduction of normal or agreed productivity.
- Habitual drunkenness or drug addiction if these have a negative influence on work performed.

- Harassment to the employer or to the rest of employees due to reasons racial or ethnic, religious or ideological, disabilities, age and sexual tendency.

The interval allowed for dismissing the worker is sixty days after the worker's breach comes to the employer's notice and no later than six months after it has been committed. The worker must be notified in writing of the dismissal, stating the grounds and the date from which it will take effect.

If the worker is the workers' legal representative or a union representative, there is a case for initiating proceedings to contest the dismissal during which, apart from the individual concerned, the other members of the group to which the person belongs, if any, may be heard. If the worker is a member of a trade union and the employer knows this, union representatives of the sector concerned, if any, must be heard previously.

If the employee challenges his dismissal as unfair, he may file a claim first for reconciliation before the Administrative Service (SMAC) which would summons the parties so that some kind of compromise may be reached. Failing this, the employee may then file a claim before the Labour Courts.

First, a disciplinary dismissal is deemed to be fair if it can be demonstrated to the court's satisfaction that the dismissal was justified under the circumstances, in which case the employment contract is terminated and no compensation need be paid to the employee. As a practical matter, however, it should be emphasized that Spanish labour courts tend to be very pro-labour, and thus it can be extremely difficult for an employer to demonstrate that a dismissal was in fact justified.

Second, a dismissal is declared to be unfair if, in the view of the court, there is insufficient proof of the grounds for the disciplinary dismissal. In most cases, the employer then has the option of either (i) reinstating the employee to his/her prior position; or (ii) paying a severance indemnity of 45 days salary per year of service, up to a maximum of 42 months' salary if the employment contract was concluded before February 12th, 2012 or of 33 days salary per year of service, up to a maximum of 24 months' salary if the employment contract was concluded after February 12th, 2012. This option belongs to the employee if he/she is an employee representative.

Third, a disciplinary dismissal is declared null and void if the dismissal (i) is based on discrimination or violates the employee's rights and liberties provided by law and the Constitution; or (ii) affects a suspended employee (e.g., one who is on maternity leave or leave for taking care of a child), (iii) in cases of reduction of working time for childcare, unless it can be established that the dismissal was in fact fair. When a dismissal is determined to be null and void, the labour court will order the employer to immediately reinstate the employee to his/her former position and compensate the employee for any lost wages. If neither option is taken within these five days it is assumed that the worker is to be reinstated. If the worker dismissed is a workers' legal or union representative it shall be the worker's decision to choose between being reinstated or accepting compensation for dismissal

For the purposes of calculating redundancy payments due all remuneration obtained by the employee (ordinary salaries and extra payments) must be computed.

13. Redundancy and Restructuring

According to the WS, employers are entitled to terminate a labour contract upon the existence of a proven objective need to reduce staff due to economic, organisational, technical or production reasons. A collective dismissal takes place where, within a ninety day period:

- 10 employees, in companies employing less than 100 employees, are dismissed.
- 10% of the employees, in companies employing between 100 and 300 employees, are dismissed.
- 30 employees, in companies employing 300 or more employees, are dismissed.

In addition, a collective dismissal is deemed to take place where all the employees of a company are dismissed –whenever the affected employees are more than 5- due to the fact that the company gives up business and is closed down, on the grounds mentioned below.

In order to carry out a collective dismissal, it is necessary to follow an established procedure, which starts with the opening of a negotiation period with the legal representatives (f there are no worker's representatives in the company, a commission of three employees could be elected) that will be communicated to the competent Labour Authority.

Where a company, with the sole purpose of circumventing the obligations arising from the collective dismissal procedure and in consecutive ninety day periods, individually dismisses employees without reaching the thresholds above and invoking the grounds above, such dismissals will be considered null and void.

14. Buying and Selling a Business

Pursuant to Article 44 of the WS, the transferor and the transferee must inform its respective workers' representatives affected by the transfer, about the transfer's foreseen date, transfer's reasons, legal, economic and social's consequences for the employees derived from the transfer and the measures that have been envisaged related to the employees.

The transferor must provide the above-mentioned information long enough, before the transfer. The transferee must communicate the information long enough and, in any case, before its employees are affected in their working and employment conditions. In case of mergers or excisions of companies both the transferor and the transferee must provide the above-mentioned information, in any case, at the time of publishing of the summons of the ordinary stockholders' meeting in which the agreements are going to be adopted.

Where it is anticipated that measures related to the employees will be taken by the transferor or/and the transferee, a consultation period with the employees' representatives must be opened in order to obtain their consent. Consultation with the employees' representatives must start well before the measures are due to be effective. The referred obligations regarding representatives' consultations are applicable in control operations of listed companies.

The transferee of an ongoing undertaking takes up any labour duties and rights which the employees had with the prior employer. The new employer must respect the terms and conditions of employment and Social Security governing the personal relationship with the previous employer including pensions' obligations. Pension entitlements go across the transfer in the same way of any other benefit and so the new employer must take on any agreements related to pensions before the transfer takes place.

The transferee must retain the working conditions agreed by means of the CBA to the same extent as had been agreed upon by the transferor, until the date of termination or expiration of the CBA or another CBA is applicable, unless after the transfer, the transferee and the workers' representatives had agreed the contrary.

Both the transferor and the transferee are jointly and severally liable for all labour obligations arising prior to the transfer and which remain unpaid (this liability lapses after 3 years); all labour obligations arising after the transfer, if the latter is deemed to have committed a criminal offence; and payment of all contributions to the Social Security accrued prior to the transfer date (this liability has a statutory limitation of 4 years from the date as from those contributions were due).

15. Resolution of Employment Disputes

Should the affected employees not agree with the company the decision to terminate their contracts, they can appeal such decision before the Labour Court within twenty working days of the termination of employment. A previous compulsory conciliation attempt should take place before the pertinent administrative service.

Disputes in respect of which no specific time limit is provided by legislation must be filed within one year following the date on which the cause for the claim becomes known by the employee.

16. Other Statutory Rights

On March 1st, was approved the Royal Decree-Law 6/2019 on urgent measures to guarantee equal treatment and opportunities for women and men in employment and occupation. The following new developments can be highlighted:

- Employees have the right to request an adjustment of the amount and allocation of their work hours and the forms of their provision, including working from home, in order to make conciliation of family life and work effective. These adjustments must be reasonable and proportional with regard to the employees needs and those of the company's organization

and production. Employees who have children may make such requests until the children are twelve years old.

- Breastfeeding leave is extended for the other parent so that both parents have the right to be absent from work for one hour (or two half-hours, at their choice) until the child reaches 9 months of age. This reduction may be accumulated into full days, not transferable between parents. If both parents exercise this right with the same duration and regime, it may be extended until the child reaches 12 months, but with a proportional reduction in salary from 9 months.
- Paternity leave of up to 16 weeks is implemented. Paternity leave will be 8 weeks from April 1, 2019 for births occurring in 2019, of which the 2 weeks following childbirth will be mandatory and uninterrupted and must be taken full time to ensure the protection of the mother's health. Such leave will increase to 12 weeks in 2020, of which 4 weeks will be mandatory and 16 weeks in 2021, of which 6 weeks will be mandatory, at which point full equivalence with maternity leave will be achieved.
 - From April 1, 2019: paternity leave will last 8 weeks, the first 2 of which will be compulsory and uninterrupted.
 - 2020: paternity leave will have a duration of 12 weeks, of which the first 4 will be compulsory and uninterrupted.
 - 2021: total equivalence with maternity leave, for which both types of leave will become jointly called "birth leave" (duration of 16 weeks, the first 6 of which will be obligatory and uninterrupted).

17. Discrimination

Under Spanish law, there is a general principle of equality, which forbids all forms of discrimination. According to Article 14 of the Spanish Constitution, Spaniards are equal before the Law and may not be subjected to any discrimination by reason of birth, race, sex, religion, opinion or any other personal or social circumstances.

And, more explicitly, article 17 of the WS prohibits such discrimination in employment relationships when it provides that collective agreements, pacts or decisions of the employer that directly or indirectly discriminate on the grounds of age are null and void, as are acts of positive or negative discrimination by the employer during employment.

An employee who has been discriminated against may file a claim before the judge to have the discriminatory act declared void and to receive compensation for the loss suffered. There is no cap on the amount of compensation, which can be awarded.

It should also be noticed, from a labour point of view that the Spanish Constitutional Court has confirmed the burden of proof will be reversed in cases of discrimination. Provided the applicant brings evidence indicating that discrimination has occurred, the burden rests on the employer to demonstrate the existence of objective and reasonable grounds, unrelated to any discriminatory intent. Prior to presenting evidence, the employer must prove that the grounds for the decision were reasonable and necessary from a business perspective.

The Royal Decree-Law 6/2019 introduced important measures to promote equality between women and men. One of them is that the Companies must pay the same amount for equal work, carried out directly or indirectly, whether such remuneration be part of the salary or not; no discrimination based on gender may occur with regard to any element or terms and conditions for said remuneration. Also the Companies must keep a register with the average values of the salaries, bonuses and extra salary compensations of their staff, disaggregated by gender and by equal, or equal value, professional groupings, categories and posts.

Another novelty is the need to implement equality plans in companies with 50 or more employees, establishing a deadline for implementation of such based on the number of employees in the workforce. In that sense, the implementation period will be 3 years for companies with between 50 and 100 workers, 2 years for companies with more than 100 and up to 150 workers and 3 years for companies with more than 150 and up to 250 workers. These transitional periods are calculated from March 7, 2019.

18. The Employment of Children and Young Persons

There are special rules to take into account regarding the employment of children or young people. Generally, the minimum age to start working is 18 years old, since it is when people acquire capacity to sign a contract. For youngsters in between 16 and 18 years old, if on the one hand they are emancipated and live independently, then they would only need consent of the parents. If on the other hand, they live with their parents, they would need an authorization of both of them, or of one of them and the consent of the other. In the case of minors under 16 years old, they generally cannot be employed, except in public shows, in which they need a Labour Authorization which will be given out exceptionally.

Minors that work, have more protection granted to them. Firstly, according to article 6 WS, they cannot carry out night work and the intervention of minors of 16 years old in public shows will only be authorized in exceptional cases by the Labor Authority, provided that it does not pose a danger to their health or to their professional and human training. The permit must be in writing and for certain acts. In general there is a higher protection of labour risks and these have longer breaks and a rest period of 30 minutes.

19. Outsourcing and Personnel Supply

Outsourcing is regulated in article 42 of the WS. In Spain, hiring another company to provide a service that you as a company should be providing it is a perfectly legal form of production organization. In terms of liability, when the company outsources its “own activity” the company still holds some kind of labour liability. When referring to “own activity” it is considering the main essential activities for the core business. Furthermore, the fact that “own activity” is outsourced, then there is joint liability both for unpaid wages and for Social Security contribution. Therefore on the one hand, when a company outsources its own activity to another company, the worker can sue one of the companies, the other or both at the same time, and during the year following the termination of your assignment, will be jointly and severally liable for obligations of a salary nature. On the other hand, the joint liability for Social Security contribution lasts the duration of contract plus 3 years.

20. Employee Rights Protections

There are a series of rights that are granted to employee in order to guarantee their protection, among others:

- The right to a safe working environment free from undue dangers.
- The right to not be discriminated against, based on the grounds of sex, age, race, nationality, ethnicity pregnant status, religion or disability.
- The right to a fair wage.
- The right to be in a free harassment working environment.
- The right to take time off work to care for yourself or a sick family member.
- The right to leave after the birth of a child.