

Labor and Employment

Spain | Newsletter 1st quarter 2021

January – April 2021



NEW DEVELOPMENTS

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3. Relevant court rulings
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1. EQUALITY – IMPLEMENTATION OF EQUALITY OBLIGATIONS AND PAY TRANSPARENCY

The obligations to conduct a pay audit and have a pay register established under [Royal Decree 902/2020](#) came into force in Spain on April 14, 2021.

We draw attention to the following aspects:

- > All companies, **without exception** are obliged to keep a pay register.

The **workers’ legal representatives** must be consulted before the register is drawn up.

If the pay register reflects a pay gap between men and women **exceeding 25%**, the company must provide an **objective and reasonable justification** for this difference not related to gender.

- > Companies under the obligation to have an equality plan (currently companies with over 100 employees) must also conduct a pay audit. Those **that already have a plan including a pay audit** have until **January 14, 2022**, to update it.
- > Companies with 100 or more employees should already have an equality plan to avoid being found **in violation of the law**. Those that do not have one should at least be preparing the diagnosis, negotiation and content of the equality plan to meet the following deadlines:
- > Companies with **50 or more employees** must comply with the obligation to have an equality plan from **March 7, 2022**.

| OBLIGATION | WORKERS | ENFORCEABILITY/ADAPTATION | |
|---|---------------|---------------------------------------|---------------|
| | | | |
| Diagnosis, negotiation and content of the equality plan | 151 or more | Already obliged | Jan. 14, 2022 |
| | 101 - 150 | From March 7, 2021 | ∅ |
| | | If equality plan before Jan. 14, 2021 | Jan. 14, 2022 |
| | 50 - 100 | March 7, 2022 | ∅ |
| Pay register | All companies | April 14, 2021 | ∅ |
| Salary audit | 250 or more | April 14, 2021 | Jan. 14, 2022 |
| | 151 - 249 | | |
| | 101 - 150 | | |
| | 50 - 100 | March 7, 2022 | ∅ |

Consequences of non-compliance

- > Companies that do **not fulfill** their obligations on equality planning will be considered to have committed a **serious** infraction and may be fined up to €6,250. They may also **violate** the right to trade union freedom if negotiations with the competent trade unions are obstructed. Discriminatory practices would be a very serious infringement, and companies would face fines of up to €187,515.
- > Also, [Act 9/2017, of November 8, on Public Sector Contracts](#) **forbids** entering into public contracts with companies that do not comply with the obligation of an equality plan .
- > Developing the approved equality plan also brings **benefits for companies**: positive reputation, potentially being awarded a Business Equality Label by the Ministry of Equality, among other awards and



acknowledgments, and greater stability and social peace while the equality plan is in force.

- The current trend is for these plans to include **diversity management** and to analyze differences not only with respect to gender, but also other factors, such as **age, ethnic origin and capacity**.

➤ For more details, see our Legal Flash on [“New challenges for companies operating in Spain: equal pay and reinforcement of equality plans”](#)

2. MEASURES TO TACKLE THE PANDEMIC

[Act 2/2021, of March 29, adopting urgent prevention, contention and coordination measures to tackle the health crisis caused by COVID-19](#) aims to **continue** the prevention, contention and coordination measures necessary to tackle the health crisis caused by COVID-19, and to prevent new outbreaks in view of the end of the state of emergency, set to remain in force until May 9, 2021.

Work centers are **subject to specific measures**, which must be implemented by company management, such as:

- **Ventilation, cleaning and disinfection measures** tailored to the characteristics and degree of use of work centers.
- Workers must be provided with **water and soap, hand sanitizers** and disinfectants.
- **Working conditions** must be adapted. When this is not possible, workers must be given personal protective equipment.
- Measures must be implemented to **avoid the agglomeration of people**, whether workers, clients or users, at work centers during peak times.
- Measures must be implemented for workers to **return to the workplace progressively** and to **encourage remote working**.

Specific rules must be imposed to prevent the spread of the virus. Companies must have an **operational protocol** in case workers are infected or have been in close contact with someone who is infected with the virus.

3. RELEVANT COURT RULINGS

Control of digital devices and videosurveillance

Constitutional Court ruling on [appeal 6838/2019, of March 15, 2021](#) focuses on a case involving the monitoring of the computer and digital devices of a worker suspected of irregularities.

It contains two strong warnings:

- Even if an irregularity is proven by accessing these devices, the evidence may not be admitted by the court for dismissal if it has been obtained by breaching the worker’s right to privacy, which in this case leads to the dismissal being declared unfair.
- The court must order the company to pay additional compensation for non-material damages caused by the illegal monitoring.

Contracts: main company liability

Companies must review their internal procedures for contract management due to Supreme Court judgment [no. 124/2021, of February 3, 2021](#), on subcontracting and the liability of main companies.

According to this ruling, certification of non-default with the social security system is not a sufficient guarantee because it does not provide any certainty as to the existence of debt, and in no way does it free companies of the joint and several liability legally provided while the contract is in force (unless the negative certification was unjustified, i.e., the General Treasury of Social Security based it on incorrect information).

Geolocation: Obligation to inform workers’ legal representatives (“WLR”)



To avoid work systems used in companies from being declared illegal, companies must make sure they fulfill their obligations to inform the WLR and respect the limits imposed by workers' rights.

As the Supreme Court has acknowledged and the lawmaker has generally reflected in [the Workers Statute](#) and, specifically, [Act on Data Protection and Guarantee of Digital Rights](#)—any company wishing to use a geolocation system to monitor the movements or activity of its workers must previously consult the WLR and respect the privacy and rights of its staff.

This point is underlined in Supreme Court judgment [no. 163/2021, of February 8, 2021](#).

Non-applicability of paid parental leave established under the collective bargaining agreement

Supreme Court judgment [no. 98/2021, of January 27, 2021](#), states that the removal under Royal Decree-Law 6/2019 of the two-day remunerated leave for the birth of a child, as acknowledged under article 37.3 b) of the Workers Statute, and the equal length of suspension of both parents' work contracts make improvements provided in collective bargaining agreements on parental leave inapplicable.

Classification of “prohibition against dismissal” on grounds related to COVID-19

What is colloquially known as the “prohibition against dismissal” due to COVID-19 will be in force until May 31, 2021, although it is likely to be extended together with the regulation on ERTes related to COVID-19.

The lack of regulatory clarity and cohesion in certain judicial decisions has sparked off a debate on the scope of this restriction first established in article 2 of [Act 3/2021](#).

4. FORTHCOMING DEVELOPMENTS

Extension of ERTes

The government has announced that ERTes will be extended beyond May 31, 2021.

Working through technology platforms

The Spanish government and social representatives have reached an agreement on the regulations of the legal labor relationship between delivery riders and digital platforms. The new regulation has not yet been published, but it has emerged that there is a rebuttable presumption of employment of the services provided.

WLR will be entitled to information on the parameters, rules and instructions on which algorithms and artificial intelligence systems are based and that affect decision making having an influence on working conditions, and access to and preservation of employment, including profiling.

Labor reform

News is still flooding in on the amendment of the labor regulations with regard to some of the labor amendments introduced in 2012 (such as priority being given to companywide collective agreements, the restriction on the extended validity of collective bargaining agreements and substantial amendments to employment conditions), although no changes are expected until later on in the year.

Also, there is ongoing support to reform [article 42 of the Workers Statute](#) with the aim of equating the working conditions of the employees at the contractor company with those of the employees at the main company.

Moreover, the Spanish government has presented the Recovery, Transformation and Resilience Plan, which includes reforms related to the labor market, such as types of contracts, flexibility and the regulation of remote working and working through digital platforms and subcontracting.



Pension reform

Finally, a reform on the public pension system is being envisaged which, if upheld, will affect the expectations of workers approaching retirement age, as it aims to increase the cost of early retirement.

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