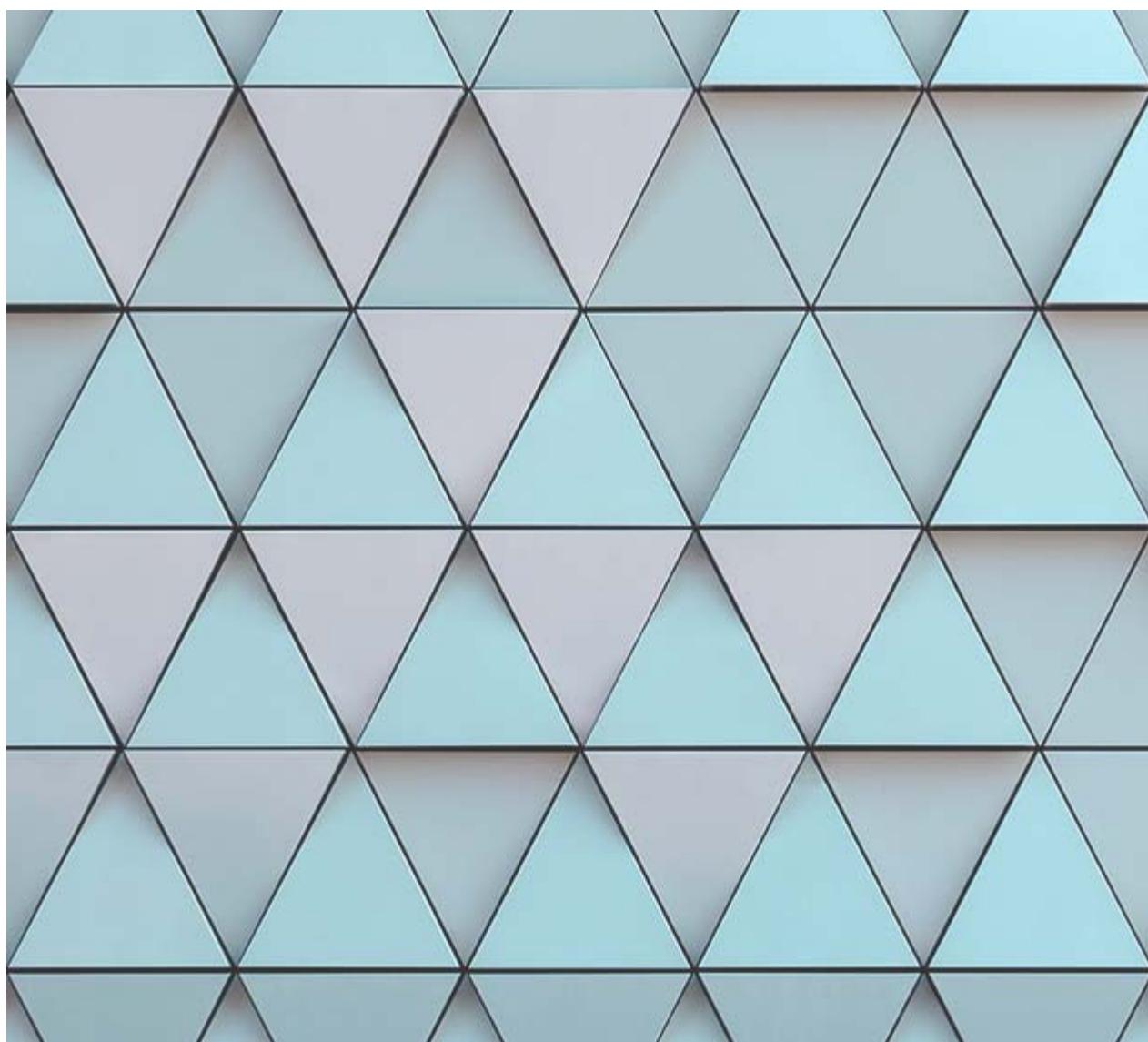


Labor and Employment Newsletter





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Whistleblower protection

- > On March 13, Act 2/2023, regulating the protection of persons who report regulatory breaches and the fight against corruption, came into force, transposing Directive 2019/1937 (the Whistleblowing Directive), under which companies with 50 or more workers, and those belonging to certain sectors (e.g., financial services, products and markets) regardless of the number of staff, must implement an information system incorporating all of the company's reporting channels:
 - Companies with over 249 employees must implement the system by June 13, 2023. The deadline is extended to December 1, 2023, for other companies.
 - Besides detailing how the new information system must be structured, the act conditions employment-related decisions about whistleblowers that use internal or external channels, presuming any measure taken against them or against third parties related to them to be an act of retaliation.
 - This Legal Flash further explains this regulation.

LGTBI

- > Act 4/2023, of February 28, for the full and effective equality of transgender people and for the guarantee of LGBTI rights, entered into force on March 2, having a decisive effect on labor relations as a result of the following new developments:
 - Companies with over 50 employees have 12 months to negotiate through collective bargaining a planned set of measures and resources enabling them to ensure full and effective equality, which must comprise a plan of action to prevent harassment and violence against LGBTI persons.
 - Moreover, equality and non-discrimination plans must specifically include transgender people, with special attention given to transgender women.
 - Finally, the act sets out special rules for the procedural defense of effective equality as regards legitimacy as well as sharing the burden of proof.



Sexual health

- > Organic Act 1/2023, of February 28, amending Act 2/2010, of March 3, on sexual and reproductive health and the voluntary termination of pregnancy, which entered into force on April 1, introduces three new situations of temporary incapacity for common contingencies relating to women, which are governed by specific rules (e.g., the subsidy will be paid out of social security funds, instead of the company's funds, from the first day or the day following the first day off work).

These are the new situations:

- Secondary incapacitating menstruation
- Voluntary termination of pregnancy or miscarriage that does not result from an accident at work or occupational disease
- Pregnancy of the worker from the first day of the 39th week

Employment

- > Act 3/2023, on Employment, entered into force on March 2. The key features are listed below:
 - Control of the grounds for collective dismissals: the report issued by the Labor Inspectorate, as well as examining the contents of the notice and the outcome of the consultation period, must now explain its findings on the grounds for dismissal and confirm whether the documents filed are in line with those required for the grounds concerned.
 - It will no longer be possible to suspend clearance of accounts and infringement procedures carried out by the Labor Inspectorate in cases of false self-employed workers.
 - On carrying out selection processes, it will be a very serious offense to request data that could be discriminatory towards gender, gender orientation, trade-union membership, social status, or language, besides data already established as discriminatory.
 - It forbids the attachment of the minimum wage, regardless of whether the employee's extra payments are prorated.
 - Intermediation—which can only be provided by public employment services and placement agencies—is extended to workers being relocated as a result of company restructuring processes and to recruitment.



Minimum wage

- > *Royal Decree 99/2023, of February 14*, sets the minimum wage in 2023 at €1,080 per month in 14 payments (€15,120 per year), effective from January 1, 2023. Companies must analyze on a case-specific basis the possibility of balancing out the increase through other benefits regulated under the applicable collective bargaining agreement.

Significant judgments

Standard working day register

Supreme Court, Labor Division, February 22, 2023 (judgment no. 161/2022)

The Spanish Supreme Court declares that coffee and cigarette breaks can be excluded from the working day register, and that return journeys on the same day will no longer be considered an extension of the working day unless it is proved that these employment conditions already existed.

Disciplinary dismissal

Supreme Court, Labor Division, February 21, 2023 (judgment no. 149/2023)

The Supreme Court considers fair the dismissal of a bus driver who tested positive for banned substances (cocaine) during a routine test, even though the drugs had no effect on the driver's skills, given that, under the applicable disciplinary regime, the infringement qualifies as driving under the influence of drugs, which is not subject to any other requirement.

Preliminary hearings in cases of disciplinary dismissal

High Court of Justice of the Balearic Islands, February 13, 2023 (judgment no. 68/2022)

The court declares that a disciplinary dismissal is unfair given that the worker was not granted a preliminary hearing, directly applying article 7 of ILO Convention 158, under which “*The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.*”



This criterion has never been adopted to date, and there are several Supreme Court decisions to the contrary. For years, the Supreme Court has rejected directly applying article 7 of ILO Convention 158, which means that the criterion adopted in the appeal against the Balearic Islands court will be decisive.

Dismissals in situations of temporary incapacity

Dismissals in situations of temporary incapacity are now becoming significant following the entry into force of *Comprehensive Law 15/2022, of July 12, for equal treatment and nondiscrimination*, which introduces as factors of discrimination illness, health condition, serological status and genetic predisposition to suffer from pathologies and disorders.

In general, most judgments have not automatically declared dismissals in situations of temporary incapacity as null; rather, they are considered a sign of discrimination that the defendant company must eliminate. Therefore, companies must analyze the worker's personal circumstances and strengthen their arguments regarding the grounds for dismissal when planning and managing an individual termination.

The following courts have ruled in this sense: Labor Court of Granada, February 15, 2023 (*appeal no. 753/2022*); Labor Court of Vigo, February 15, 2023 (*judgment no. 64/2023*); Mieres, February 14, 2023 (*judgments nos. 46, 47, and 48/2023*), and the High Court of Justice of Catalonia (*judgment no. 5758/2022*), which declares that the dismissal brought to trial is fair. The ruling of the Labor Court of Toledo dated February 6, 2023 (*judgment no. 23/2023*) also declares the dismissal to be fair.

Upcoming new developments

Owing to their significance in the context of labor relations, we highlight the following regulations, which are currently undergoing processing and are expected to be approved soon:

- > The European Parliament has approved the *Proposal for a Directive on pay transparency*, currently pending approval by the European Council to be published in the OJEU. Among other issues, employers must indicate the pay level for a specific position or job; it prohibits employers to ask prospective workers about their pay history; and it requires them to justify any pay difference when it reaches 5% between female and male workers in the same employee category.
- > The *Draft bill on families*—approved by the Council of Ministers—extends certain rights to work-life balance and leave, and cases where dismissal would constitute objective nullity if the worker is on parental leave or adjusting working hours.
- > The Council of Ministers has also approved the *Draft bill on the equal representation of women and men in decision-making bodies*, under which there must be an equal presence of each gender in companies' governing bodies. It has been submitted for parliamentary processing.
- > Under the *Draft bill on sustainable mobility*, companies must adopt a sustainable transport plan in work centers with over 500 workers or 250 workers per shift.



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



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