



CUATRECASAS

# 10 key issues of the new remote working and teleworking regulation in Spain and extension of work-life balance rights

The [\*Official Gazette of the Spanish State of September 23, 2020\*](#) publishes Royal Decree-Law 28/2020, of September 22, on remote working, which comes into force on October 13. This regulation has been fast-tracked due to the COVID-19 health crisis and is the result of the agreement between the government, the employers' association and the main trade unions. The regulation develops the concept of remote working, establishing its limits and organizing its regime of obligations and rights. In general, this regime provides legal certainty, but both the legal solutions approved, and some questions of interpretation may make it less attractive. The regulation also extends the COVID-19 work-life balance rights recognized in the MECUIDA Plan until January 31, 2021.

September 23, 2020



## Key points

- I. At least 30% of remote working hours and use of IT resources when teleworking
- II. Remote working is not an excuse to establish different working conditions and cannot be an obstacle to workers' rights
- III. Remote working cannot be imposed; is not in itself grounds for dismissal and it is reversible
- IV. Remote working must be agreed in writing and agreement is required to modify its terms
- V. Remote working cannot cost the worker money
- VI. Remote workers are subject to the company's organization and control powers
- VII. Leading role of collective bargaining
- VIII. Application of the remote working regulations to prior agreements
- IX. Remote working due to COVID-19 is not subject to Royal Decree-Law 28/2020, but the company must cover the cost of resources and consumables
- X. New procedure for conflicts on access to, reversal and modification of remote working



## I. AT LEAST 30% OF REMOTE WORKING HOURS AND USE OF IT RESOURCES WHEN TELEWORKING

- › **Remote working** increases its scope of application as it goes from being the work **predominantly** carried out at the worker's home (article 13 of the Workers' Statute, WS) -which enables more combinations of on-site and remote working- **to become** the work **regularly** performed from home (article 1 of Royal-Decree-Law 28/2020), which is legally specified as **30% of the working day** in a three-month reference period.
- › The new regulation defines **teleworking** as a type of remote working performed with the **exclusive or prevalent use of IT**, telematic or telecommunication **systems and resources**.

## II. REMOTE WORKING IS NOT AN EXCUSE TO ESTABLISH DIFFERENT WORKING CONDITIONS AND CANNOT BE AN OBSTACLE TO WORKERS' RIGHTS

- › The regulation promotes **equal rights** for remote and on-site workers, so they receive **equal pay**, are entitled to the same **schedule, breaks** and **work-life balance** rights, and are specifically included in **equality plans, and -harassment prevention protocols**.
- › The company must **train** workers for **remote working** and ensure they get the necessary **attention** in case of technical difficulties, particularly in the case of teleworking.
- › The company is also required to provide the **resources** necessary for remote workers to have the same **career advancement** opportunities as on-site workers, to have their **hours recorded**, their **privacy** respected and their personal **data** protected. The company must also comply with

**occupational risk prevention** obligations (by assessing risk of home conditions) and guarantee workers' rights to **rest** and **disconnect** from the digital world, exercise their **collective rights**, communicate with their legal representatives and vote in **union elections**.

- › The workers' specific right to **flexible working hours** is recognized in the terms set out in the agreement, respecting the mandatory availability times and the regulations on work and rest time.

## III. REMOTE WORKING CANNOT BE IMPOSED; IS NOT IN ITSELF GROUNDS FOR DISMISSAL AND IT IS REVERSIBLE

- › Becoming a remote worker requires an **agreement** (in writing) between the company and the worker.
- › This voluntary nature is only overridden by **work-life balance factors, regular studies** and **gender-based violence**, as well as **preventive matters** in view of the risk of COVID-19 infection ([\*Royal Decree-Law 8/2020\*](#)).
- › **The company cannot unilaterally** make on-site workers remote by materially changing their terms of employment (article 41 WS).
- › **Workers cannot be dismissed or have their terms of employment forcefully modified** for refusing to agree to work remotely, their decision to return to on-site work, their unwillingness to work remote or their unforeseen unsuitability for it.
- › The decision to change from working on site to working remote is **reversible** for both the **company** and the **worker**. To exercise this right to return to on-site work, the terms of the collective bargaining agreement or the remote working agreement will apply.



- › Remote working is allowed for **underage** workers and for those with **training contracts**, but the company must guarantee at least 50% of working hours on site.

#### IV. REMOTE WORKING MUST BE AGREED IN WRITING AND AGREEMENT IS REQUIRED TO MODIFY ITS TERMS

- › The regulation requires a **written** agreement, with **minimum content**: the inventory of the remote working resources or the list of expenses, the term of the agreement, the schedule, the percentage and distribution of on-site work, the notice period for reversal and the remote working location; all under penalty of incurring in a **serious infringement** introduced in the Spanish Act on Infringements and Penalties in Labor Matters.
- › The company cannot unilaterally modify remote workers' terms of employment, **as any change requires agreement between the parties**.

#### V. REMOTE WORKING CANNOT COST THE WORKER MONEY

- › The regulation requires the company to provide remote workers, at its own cost, the **resources** and **tools** necessary to carry out their work, and it **prohibits** the company from requiring workers to use their own **resources**.
- › The **company** must pay the **costs** associated to the equipment, tools and work resources (maintenance, repairs, Wi-Fi). Part of the minimum content of the remote working agreement is the list of expenses and the definition of their quantification and compensation, which may be determined by collective bargaining agreements.

#### VI. REMOTE WORKERS ARE SUBJECT TO THE COMPANY'S ORGANIZATION AND CONTROL POWERS

- › Remote workers are **subject** to the company's **organization** and **management** powers (including the instructions on use and maintenance of the work equipment and tools provided) in the framework of protection of personal data and information security.
- › The **workers representatives** will participate in establishing the company's **instructions** for remote workers in relation to data protection and information security.
- › The company may **control** the remote worker's activity through the **telematic means** provided, albeit with **limits**, taking into account the workers' right to private use of the devices provided and, therefore, the risk that their rights of privacy, communication privacy and personal data protection established in article 18 of the Spanish Constitution could be affected. Those limits are those established in the Spanish Act on Data Protection and Guarantee of Digital Rights (*LOPDGDD*).

#### VII. LEADING ROLE OF COLLECTIVE BARGAINING

- › The regulation **leaves it up to collective bargaining agreements** to complete the remote working regulation in relevant aspects such as:
  - The terms for exercising the right to cease remote working and return to on-site work (reversal).
  - Provision and maintenance of the remote worker's resources by the company as required.
  - Flexible hours for remote workers.



- Terms under which the company may establish conditions for using the provided IT resources, including personal use.
- Resources and measures for exercising the right to disconnect.
- Conditions to guarantee collective rights.
- Other aspects such as maximum duration, additional content of the remote working agreement, minimum on-site hours for remote workers and other percentages lower than 30% to classify remote working as “regular.”

### VIII. APPLICATION OF THE REMOTE WORKING REGULATIONS TO PRIOR AGREEMENTS

- › Royal Decree-Law 28/2020 will apply in full to new remote working relationships entered into from October 13, 2020, as well as to remote working relationships in force, in two different situations:
- › If the remote working relationship is subject to a pre-existing collective bargaining agreement, Royal Decree-Law 28/2020 will apply:
  - When the applicable collective bargaining agreement is no longer valid.
  - When the remote working term established in a collective bargaining agreement elapses.
  - When the period expressly agreed between the parties, which cannot exceed **3 years** after Royal Decree-Law 28/2020 is published (September 23, 2020), elapses.
  - In the absence of an agreement, **1 year** after Royal Decree-Law 28/2020 is published (September 23, 2020).

- The parties will have **3 months** from those dates to enter into the written remote working agreement or adapt it to the new legal requirements.
- › If the remote working relationship is not subject to a collective agreement, the parties will have **3 months** to make the required adaptation or modifications to the individual agreement.
- › In no case may applying this regulation compensate, absorb or do away with more beneficial conditions or rights currently enjoyed by remote workers.

### IX. REMOTE WORKING DUE TO COVID-19 IS NOT SUBJECT TO ROYAL DECREE-LAW 28/2020, BUT THE COMPANY MUST COVER THE COST OF RESOURCES AND CONSUMABLES

- › Priority remote working under article 5 of [\*Royal Decree-Law 8/2020\*](#), as a preventive measure against COVID-19 infection, is not subject to this new regime of remote working rights and obligations, and ordinary labor regulations will remain applicable.
- › However, the company must provide the resources, equipment, tools and consumables necessary to work remotely, as well as the required maintenance. The method of compensating the costs is up to collective bargaining.

### X. NEW PROCEDURE FOR CONFLICTS ON ACCESS, REVERSAL AND MODIFICATION OF REMOTE WORKING

- › A new urgent, priority procedure is introduced in the Spanish Labor Act for claims (subject to 20 business days) for accessing, reversing and modifying remote working (except owing to work-life balance issues), in which the court may obtain a



written report from the Labor Inspectorate, and in which the ruling is final and may only be appealed if the sum of the claim gives access to the appeal for reversal.

## EXTENSION OF THE MECUIDA PLAN

- › The right of workers to adapt their working hours, including switching to remote working, or to reduce them (up to 100%), with a proportional salary reduction, to care for their spouse, domestic partner and blood relatives up to the second degree, due to exceptional circumstances related to the COVID-19, regulated in article 6 of [\*Royal Decree-Law 8/2020\*](#) and article 15 of [\*Royal Decree-Law 15/2020\*](#), is extended until **January 31, 2021.**

---

©2020 CUATRECASAS

All rights reserved.

This document is a compilation of legal information prepared by Cuatrecasas. The information and comments included do not constitute any form of legal advice.

Cuatrecasas owns the intellectual property rights over this document. Reproduction of this document by any medium, whether in whole, in part, or as excerpts, is prohibited, as is its distribution, transmission, or any other type of use, unless authorized in advance by Cuatrecasas.

