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Spain's New Decree on Remote Working

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A new decree (Royal Decree-law 28/2020) was passed on 22 September to regulate remote working in Spain.

As for many countries worldwide, Spain has recently seen a marked increase in the number of employees working from home as part of its bid to decrease physical contact between individuals and curb the COVID-19 pandemic. Prior to March 2020 when the pandemic hit, remote and home-working was relatively unusual in Spain and therefore largely unregulated. As a result, it was widely acknowledged that there needed to be a legal framework to protect and designate the rights and obligations of employers and employees alike in that new world of home working. This new decree is it, the result of months of negotiations, with the initial draft published on 26 June. However, despite those extensive negotiations, unfortunately there are some areas where the decree does not provide the level of detail and clarity that employers might reasonably expect to help them to oversee these arrangements in practice. We would expect many of these points to receive early consideration in the case-law which will no doubt swiftly grow up around this new decree.

The main thrust of the decree is to require remote working arrangements to be formalised through written agreements. Importantly, the decree also makes clear that remote working must be voluntary for the employee and that any refusal to work remotely will not justify the termination of that individual's employment. From a literal reading of the law, this appears to be the case even where that refusal might force the employer to maintain an office and incur costs that it might otherwise have been able to save- although presumably if the majority had agreed to work from home it might at least be able to downsize its office space, and so on. It seems unlikely that it was the legislators' intention to allow the whim of a single employee to deny employers the ability to save potentially very material real estate costs. In this situation, we suggest that an employer may need to take specific legal advice to weigh up the various risks and options.

Similarly, an individual's employment cannot be terminated nor their working conditions substantially modified solely because they terminate their agreement to work from home after having agreed, or they encounter difficulties carrying out their role which arise solely from the fact that they are working from home. In this instance, or if any agreed homeworking trial period proves unsuccessful for either party, we suggest the employer would need to allow the employee to work from the office (as above) rather than moving straight to any dismissal (although of course, if the employee also refused to return to the office there might then be grounds to dismiss).

In addition, the employee must not suffer any detriment or negative consequences from working at home. For example, an employer must not choose to promote or retain an office-based employee in preference to a homeworker doing the same job, for that reason. Further, employers must bear any reasonable costs which arise for the employee as a result of working from home (although they can to some degree offset any savings the employee makes as a result of not needing to travel and/or buy lunch out, for example); remote employees will have the same rights as if they had provided face-to-face services, including to pay (other than for those rights which are inherent in providing face-to-face work); and employers must ensure that the employee's right to privacy is preserved and that the employee retains the right to digital switch-off outside of working hours.

One key point to be aware of is that although this new decree was largely borne out of the COVID-19 pandemic, impromptu remote working arrangements which have already arisen as a result of these exceptional circumstances are in fact exempt in some respects from the provisions of the decree – including the requirement to enter into a formal agreement in circumstances where it would now be clearly retrospective. However, the employer is still obliged to provide the employee with the means, equipment and tools he or she requires to work from home. Somewhat unhelpfully, the decree does not include any limits on what must be provided – so while we would presume that this obligation is intended to cover general office equipment such as computers, office chair, maybe a telephone and so on rather than industrial equipment, this is not made express and so employers will need to consider the specific circumstances carefully.

FAQs

Does the new law apply to all remote working arrangements?

No. The law will only apply to remote working that is carried out on a "regular" basis. Remote working will only be "regular" if over any three months at least 30% of the employee's total hours are carried out remotely.

When will the new law come into force?

The new law will come into force 20 days after its publication in the Official Gazette – likely to be 13 October 2020.

For existing remote working arrangements (covered by collective bargaining agreements or other internal regulations), the new decree will apply only on their expiry. If those arrangements do not provide for an end date, the new decree will apply to those arrangements automatically one year after it comes into force (unless the parties agree to extend the pre-existing arrangements for a longer term, which may be for not more than three further years).

What do employers need to know about remote working agreements?

For remote working arrangements covered by the decree, a written remote working agreement must be entered into **before** the remote working starts.

The employer must provide the workers' legal representatives (if any) with a copy of all remote working agreements within ten days of their being entered into. A copy must also be sent to the employment office.

Information which must be included within the remote working agreement:

- Details of the means, equipment and tools required for remote working, as well as their useful life or renewal period
- A list of the expenses that the employee may incur due to his or her working from home, as well as how these will be met by the company and how often
- Working hours and availability rules
- Percentage and distribution (i.e. which days) of face-to-face versus remote working (if applicable)
- The office address to which the employee is assigned and where, if applicable, he or she will carry out any face-to-face part of the working day
- The location where the employee will work remotely (his or her address)
- How each of the company and the employee may terminate/reverse the home working agreement (usually some length of prior written notice)
- Details of how the business will control/monitor the employee's remote work
- The procedure to follow if technological difficulties prevent the employee from being able to work remotely
- Any instructions issued by the company, with the participation of the workers' legal representatives, regarding data protection and security information as they may be specifically applicable to remote working
- Intended duration of the remote working agreement, or that it is permanent.

Will it be possible to amend a remote working agreement entered into under the decree?

Any modification of the remote working agreement must be agreed upon by the employer and the employee, and must be formalised in writing beforehand and brought to the attention of the workers' legal representatives.

Do any specific rules apply to contracts with minors?

In relation to minors or training/apprenticeship contracts, any remote working agreement must guarantee that a minimum of 50% of the individual's time will be spent face-to-face, rather than remote working.

Are employers required to carry out a risk assessment?

Yes. However, any risk assessment should only cover the area authorised for the provision of services and should not extend to other areas of the dwelling.

The employer must obtain all the information it can about the risks by means of a "robust methodology" (it is somewhat hard to imagine what this might involve other than a physical visit, unless it can sensibly be done by way of a video call perhaps), and provide for the protective measures that are most appropriate in each case.

If it is necessary for the employer to visit the employee's home (or wherever the home working is carried out), a written report justifying this must be issued and given to the employee and the prevention delegates. Prior to any visit, the employer shall be obliged to obtain the employee's permission (if it is his or her home) or of any third party owner (where applicable). In circumstances where all advice is to minimise contact with others, we suspect that employees will be no happier to have company visitors in their home than are the company inspectors to go there, so practically-speaking a greater than usual burden is likely to be placed upon the employee to communicate any health and safety risks he or she identifies.

Do specific rules apply to protect the employee's privacy while remote working?

Yes. The employer must ensure that the control or monitoring of the employee's work activities through automated or electronic means will adequately guarantee the right to privacy and data protection.

The employer may not require the installation of its software or applications on devices owned by the employee, or the use of such devices in the performance of remote work.

Will remote workers retain their collective rights?

Yes. Remote employees shall have the right to exercise their collective rights to the same degree as the rest of the employees in the work location to which they are assigned. In particular, the employer shall ensure that those employees are not prevented from communicating with their legal representatives or with other employees broadly as they could if they attended that workplace.

Contacts

Ignacio Regojo
Partner, Madrid
T +34 91 426 4804
E ignacio.regojo@squirepb.com

Juan Nasarre
Director, Madrid
T +34 91 426 4866
E juan.nasarre@squirepb.com

Caroline Noblet
Partner, London
T +44 20 7655 1473
E caroline.noblet@squirepb.com