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# THE SPANISH LABOR REFORM OF 2021: A MODEL TO FOLLOW DUE TO ITS ORIGIN AND OBJECTIVES

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The most important Spanish labor reform in recent years has been enacted in Royal Decree-Law (RD) 32/2021, of December 28, 2021, on urgent measures for labor reform, the guarantee of employment stability and the transformation of the labor market. Its importance derives from its origin and objectives, which make it an example to follow in other countries of the world, regardless of its limited content, which could well be more ambitious and complete. In fact, that seems to have been the initial intention of the Government and the social partners, namely the trade unions and employers' representatives, but the need to reach an agreement reduced the final list of reformed topics.

The legislative text reflects the content of the previous agreement reached (on December 23, 2021) through the social dialogue between the CCOO and UGT unions, the CEOE-CEPYME employers and the Government (represented by the Ministry of Labor and Social Economy). Although the Government could have approved a labor reform unilaterally, or even bilaterally (either with the unions or with employers), it preferred to dedicate several intense months to negotiation and dialogue with all the social partners to achieve a balanced agreement with the greatest possible consensus. This approach should be viewed positively, as it reflects respect for the democratic values represented by the social pacts negotiated with trade unions and business organizations. Undoubtedly, having the opinion of the social partners is consistent, on the one hand, with the role that the Spanish Constitution (SC) attributes to them, which is "the defense and

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promotion of the economic and social interests" (article 7 SC) and, on the other hand, with the leading role that the EU and ILO wants to give to social dialogue in the introduction of labor and social reforms.

The agreement reached with the social partners was ratified with the validation (in its literal terms) of RD-law 32/2021 (provisional rule until then) on February 3, 2022, by the Plenary Session of the Congress of Deputies,[1] Spain's lower house of the legislative branch. The Congress of Deputies, thus, waived processing the agreement as a bill in parliament[2] and, therefore, the possibility of debating and altering its content by the different political parties.

The general objective of RD-law 32/2021 is *to radically change the direction of the Spanish labor reforms of recent years,* characterized by the creation of temporary and precarious employment. Indeed, since the labor reform of 1994 and, in particular, with that of 2012, the creation of temporary employment and the reduction of labor guarantees and rights for workers, both individually and collectively (in favor of increasing of business power when managing the employment relationship), were consolidated as a feature of the Spanish labor market. Thus, this reform seeks to change things, by creating more decent and higher quality employment, that is both of a permanent nature and covered by labor rights and protection. It is about improving the working conditions of workers, either with new rights, or with the recovery of other rights that were repealed or traditionally unfulfilled.

To achieve this general objective, some specific objectives are established.

The first specific objective of the labor reform is *to defend the principle of stability in employment,* with a firm commitment to permanent employment and the reduction of temporary employment. Stability in employment is achieved, to a large extent, with a permanent contract and this, traditionally, has not been easy in Spain. In 2020, Spain led the European ranking of the prevalence of temporary contracts, with a rate almost 12% higher than the European Union average. As stated in section II of the explanatory memorandum of RD-law 32/2021, temporary employment "exerts strong pressure on wages and the rest of the working conditions, becoming an instrument for wage devaluation." This devaluation, on the one hand, deteriorates people's standard of living and, on the other, weakens domestic demand and, with it, the capacity for economic growth. In addition, temporary employment is unbalanced according to the age or gender of the

1. Real Decreto-ley 32/2021, de 28 de diciembre, de medidas urgentes para la Reforma Laboral, la Garantía de la Estabilidad en el Empleo y la Transformación del Mercado de Trabajo (Royal Decree-Law 32/2021, of December 28, on urgent measures for the Labor Reform, the Guarantee of Stability in Employment and the Transformation of the Labor Market) (Spain); Constitución Española (Spanish Constitution) art. 86.2.

2. *Id.* Spanish Constitution art. 86.3.

working class, especially affecting young people and women, who suffer the highest levels of job insecurity, both in terms of job stability and working conditions.

For this reason, Spain's *Recovery, Transformation and Resilience Plan,* presented to the European institutions to receive EU funding for economic recovery,[3] provides for the introduction of certain measures to reduce temporary work, which now are included in the labor reform studied. Thus, it should be noted:

1) *The presumption* that the employment contract is concluded for *an indefinite period*. Before RD-law 32/2021, article 15.1 Workers' Statute (WS) began by establishing that the employment contract could "be entered into for an indefinite period of time or for a specific duration." The Law, therefore, did not expressly support one over the other form of work (although there were rules that pointed towards a legal preference for the indefinite contract). This apparent neutrality of the legislator between both types of contracts now ends with the new wording of the aforementioned article 15.1 WS, which clearly stipulates: "the employment contract *is presumed* to have been concluded for an indefinite period of time." This presumption favors the worker, so whoever claims the temporary nature of an employment bears the burden of proof for it.

Along with this express presumption, there is a set of rules that reinforce the commitment to the indefinite contract (some already existing before the reform). Thus, for example, a temporary worker is understood to be permanent – through automatic contractual conversion by operation of law – when the employer fails to comply with the causal or temporary requirements of temporary contracts or with the obligation to register the worker within the Social Security system or, finally, when temporary contracts due to production circumstances are chained during a certain legally established period (article 15.4 and 5 WS).

2) *The reinforcement of the fixed-discontinuous contract*. The fixed-discontinuous contract (*contrato fijo-discontinuo*) is a type of fixed or permanent contract that has traditionally been reserved for seasonal activities of a cyclical nature (for example, harvesting agricultural crops). The use of this contract has now been extended beyond that case, to include works or activities that were previously carried out through a temporary contract for a specific work or service (*contrato de obra o servicio determinado*), such as the provision of services in some outsourcing contracts (*contrata*). Likewise, the use of the fixed-discontinuous contract is now allowed for temporary employment agencies, to attend to the temporary needs of several user companies.

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3. Approved by the European institutions on July 13, 2021. *See* EUROPEAN COMMISSION, SPAIN'S RECOVERY AND RESILIENCE PLAN, https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility/spains-recovery-and-resilience-plan_en.

3) *Reducing the number of temporary contracts.* To foster employment stability, the reform does not only promote the indefinite contract but also adopts measures to reduce the use of temporary contracts. Thus, firstly, the types of temporary contracts allowed under the Spanish legal system are reduced. Moreover, the historical temporary contract for a specific work or service is repealed, as of March 30, 2022, although the agreements already in force are maintained temporarily until their original maximum duration, and in accordance with the regulations in force at the time of their celebration.[4] This type of contract has always been controversial. This is because it was possible to avoid fixing a final date for its duration (*dies ad quem*) and to link its termination to the conclusion of the work or the provision of the service. This implied that, in many cases, contracts of this type were fraudulently extended for several years, both in the private and public sectors. After several unsuccessful reforms establishing maximum time limits to put an end to this fraud (three years, extendable to four by collective agreement), this contract was now abrogated, since it was no longer trusted as an adequate model to temporary provision of services.

Allowable temporary training contracts are also reduced from two (training and apprenticeship contract and internship contract) to one, which is reflected in the title of the new article 11 WS, which now reads "Training Contract" in the singular. However, this formal reduction in the number of contracts is somewhat artificial, since the training contract itself maintains two different objectives, which correspond to the objects of the two previous training contracts, namely training alternating with paid work, on the one hand, and obtaining professional practice appropriate to the level of studies, on the other. Likewise, both the temporary contract due to production circumstances and the temporary substitution contract can be carried out in a greater number of cases than before (article 15.2 and 3 WS). This means that the situation continues to be as complex as before. As a positive aspect, the maximum duration of all these contracts (except the temporary substitution contract) has now been reduced, something which favors the worker's job stability.

4) The reinforcement of the *principle of causality* of temporary contracts. Another measure that contributes to controlling the proper use of these contracts is the reinforcement of the already existing principle of causality for temporary contracts. The objective is to guarantee effectively that these temporary contracts are linked to exclusive cause that justified the temporary nature of the contract, avoiding their abusive use and, with it, an excessive turnover and precariousness of the workers. The law now provides that to ascertain the existence of the cause that justifies this temporary nature

4. Third transitory provision of the RD-law 32/2021, *supra* note 1. In turn, those held between Dec. 31, 2021, and Mar. 30, 2022, will also be governed by the regulations in force at the time of their celebration, but will have a maximum duration of six months.

these data must be specified precisely in the contract: the qualifying cause of the temporary contract, the specific circumstances that justify it and "its connection with the planned duration" of the contract (article 15.1, third paragraph, WS). This should prompt employers to be precise when justifying the conclusion of a temporary contract, since this will allow its subsequent control by the worker, the labor inspectorate, and the courts. As can be seen, it is not enough to indicate a legal cause of temporality (one of those provided for in articles 11 or 15 WS), but it is also necessary to indicate the concurrent circumstances in the concrete case, since only the analysis of these will allow assessing whether the chosen cause is correct, and the expected duration is justified.

5) *The increase in economic costs* associated with temporary contracts. On the one hand, an additional social security contribution is established for short temporary contracts, namely employment contracts with a duration shorter than thirty days (compared to the five-day duration before the reform),[5] to discourage their use. This contribution is to be borne exclusively by the employer (and not shared with the worker) and must be paid at the end of the contract. On the other hand, the administrative sanctions against fraud in the use of temporary contracts are increased since the transgression of the regulation on this type of contract will be considered a serious administrative infraction[6] This offense will be punishable by a fine that can range between €1,000–€10,000,[7] for each of the workers affected.

The following table summarizes the main results of the amendments to the regulation of temporary contracts.

| TYPE OF CONTRACT | PREVIOUS LEGISLATION | NEW LEGISLATION | SIGNIFICANCE |
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| Temporary training contracts:<br><br>1) The contract for training and apprenticeship. | 1) Article 11.2 WS.<br><br>Maximum age (in general): 25 years.<br><br>Duration: 1 year (minimum)–3 years (maximum). | A training contract with two objects:<br><br>1) Training in alternation with paid work. Article 11.2 WS.<br><br>In general: there is no age limit (except in some cases: 30 years). | Reduction of the number of contracts.<br><br>Promotion of the stipulation of this contract by more people.<br><br>Improvement of working conditions (e.g., better salaries |

5. Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social, art. 151 (Spain), approving the consolidated text of the General Social Security Law.

6. Real Decreto Legislativo 5/2000, de 4 de agosto, por el que se aprueba el texto Refundido de la Ley Sobre Infracciones y Sanciones en el Orden Social, art. 7.2 (Spain), approving the consolidated text of the Law on Offenses and Sanctions in the Social Order.

7. *Id.* art. 40.1.c.bis.

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| | Salary: according to collective agreement.<br><br>Not less than the minimum interprofessional salary in proportion to effective working time.<br><br>Part-time not allowed. | Duration: reduction to 3 months (minimum)-1 year (maximum).<br><br>Salary: according to collective agreement. Not less than 60% or 75% the salary of the same professional group.<br><br>Part time allowed.<br><br>Stricter control about worker training. | and training plans).<br><br>Reduction of the duration of the contract. |
| 2) The internship contract. | 2) Article 11.1 WS.<br><br>Period for conclusion the contract: within 5 years of finishing studies, in general, and 7 for the person with a disability.<br><br>Duration: 6 months–2 years.<br><br>Salary: in the absence of express provision, the salary could not be less than 60% or 75% during the first or second year of the contract, respectively, of the salary established in the collective agreement for a worker who performed the equivalent job.<br><br>Training aspects less central. | 2) Obtaining professional practice appropriate to the level of studies.<br><br>Article 11.3 WS.<br><br>Period for conclusion the contract: within 3 years of finishing studies, in general, and 5 for the person with a disability.<br><br>Duration: 6 months-1 year.<br><br>Salary: according to the collective agreement applicable for these contracts. In the absence of that, the same salary of the professional group.<br><br>More attention to training aspects (duty to specify an individual training plan). | |
| Temporary contract: Specific work or service | Article 15.1.a) WS.<br><br>Object: the performance of a specific significant work or service within the activity of the company.<br><br>The execution of this work or service was limited in time, but, in principle, of uncertain duration.<br><br>Maximum duration: 3 years (the sectoral collective agreement could extend it up to 4 years). | This contract is repealed as of March 31, 2022. | The legislator wants to eliminate the temporary contract that led to the most serious abuses in the past.<br><br>Fostering the permanent contract. |

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| | After these periods, the worker acquired the status of permanent worker of the company. | | |
| Temporary contract due to production circumstances | Article 15.1.b) WS.<br><br>Only available for occasional and unforeseeable business circumstances.<br><br>Maximum duration: 6 months within a period of 12 months since these circumstances appear. | Article 15.2 WS. Occasional and unforeseeable circumstances.<br><br>Maximum duration: 6 months (by collective agreement up to 1 year).<br><br>Occasional and foreseeable circumstances.<br><br>Maximum duration: 90 days. | Allowable in more cases. Objective: increasing the use of this contract. |
| Temporary contract: temporary substitution contract | Article 15.1.c) WS.<br><br>Temporary replacement of workers entitled to keep their posts.<br><br>Covering a position during the selection or promotion process for its definitive coverage. | Article 15.3 WS<br><br>Three cases:<br>Substitution of a worker with the right to reserve their position.<br><br>Completing the reduced working hours of a worker.<br><br>Covering a position during the selection or promotion process for its definitive coverage. | Possible in more cases.<br><br>Objective: increasing the use of this contract. |

The second specific objective of the labor reform is *to recover rights in the field of collective bargaining,* reinforcing the central role of the social partners and of this institution as the ideal way to guarantee job improvements for workers and establish balanced agreements for both the parties of a collective agreement. Thus, two of the most harmful aspects introduced with the 2012 labor reform are reversed. Firstly, the prevalence of company agreements over sectoral agreements (at the state, regional or lower level) is abrogated in some aspects of salary matters and specifically regarding the setting of the amount of the base salary and salary supplements, including those linked to the situation and business results of the company [letter a) of the previous article 84.2 WS]. In this way, the application of the sector agreement unifies salary conditions throughout the functional and geographical area and avoids unjustified differences both in the purchasing power of workers and the use of (unfair) competitive advantages by those companies that would set low wages in the company agreement to save wage costs. However, company agreements continue to play a very important role as it their priority over sectoral agreements regarding some other salary

aspects (*e.g.*, payment or compensation for overtime and specific remuneration for shift work) and in working conditions unrelated to salaries, such as the schedule and distribution of working time, the shift work system and annual vacation planning, the adaptation of professional classification systems to the company, and measures to promote reconciliation between work, family and personal life. Reserving these matters to company agreements seeks to give employers the necessary flexibility to manage aspects that directly affect the organization of their production process.

Secondly, the temporary limitation (to one year) of the provisional extension (ultra-activity) of a collective agreement denounced by either party is eliminated. Such temporary limitation generated many problems, when, at the end of each year, either no higher-level collective agreement was applicable or more than one such agreements was applicable in theory and there were doubts about which one was to be practically applied in the relevant area. In addition, once the applicable collective agreement was chosen, problems of mismatch in content with the previous agreement could arise, leaving many specific questions unanswered. The reform now provides that, when the negotiation process of a new collective agreement has elapsed without a positive result, the previous agreement's validity will be maintained unless the parties stipulate otherwise (article 86.4, paragraph ending, WS). In this way, unless the negotiating parties establish a specific time limitation, the current legislation guarantees that the clauses of the previous collective agreement are in force until a new one is agreed, avoiding gaps in collective regulation or the interference of a higher-level collective agreement.

The third specific objective of the labor reform is to *reinforce the use of internal flexibility mechanisms in companies in times of crisis,* especially through temporary employment regulation measures of an ordinary or extraordinary nature. Indeed, when the situation of the company is difficult and there are economic, technical, organizational or production causes or causes derived from *force majeure*, the employer should, at least initially, adopt measures aimed at preserving employment and occupational level against "extinctive" measures (layoffs). Social security contributions are reduced for employers throughout the duration of these measurers (although they must commit to maintain employment for at least six months after the completion of these temporary employment regulation measures) and the workers receive unemployment benefits, while maintaining the right to carry out professional training and re-training actions, which are always important.

To this aim, two legislative changes were introduced. On the one hand, concerning the article 47 WS, the main innovations are: 1) the shortening of the deadlines for the constitution of the representative commission of the

workers,[8] with which the company has to negotiate during the mandatory consultation period; 2) the obligation for the company to indicate, at the time of its adoption, the initial duration of any measure to reduce the duration of the working days or suspend the employment contracts, which may be extended at any time during its validity; 3) a more detailed regulation of the reduction of working hours or suspension of the contract due to temporary *force majeure*, now defined by the legislator (article 47.6 WS), and which recalls the situation experienced during the COVID-19 pandemic. Finally, 4) common rules are established for all temporary employment regulation measures, regardless of their cause, something which commendably seeks both to give coherence to these measures and to grant the same protection to the worker against them.

The reform also creates a new "RED mechanism for flexibility and stabilization of employment," to be activated by the Council of Ministers in special crisis situations, allowing companies to individually request measures to reduce working hours and suspension of employment contracts (article 47 bis WS), to avoid collective redundancies. The good result given by such measures (ERTEs) during the years of the pandemic, which have made it possible to maintain the business environment and employment and avoid massive layoffs, has led the legislator to permanently establish this extraordinary mechanism for temporary regulation of employment. The RED Mechanism admits two modalities: the first one, cyclical, when a general macroeconomic situation (negative economic cycle) is deemed to make the adoption of additional stabilization instruments opportune, with a maximum duration of one year. The second one, sectoral, when in a certain sector or sectors of activity there are already permanent changes that generate needs for retraining and professional transition processes for workers, with an initial maximum duration of one year (to be possibly extended an additional six-month period twice). Importantly, in this second case, given the permanence of the negative changes, the legislator makes an extremely generous use of the temporary RED mechanism, to accompany the professional reconversion of workers who, possibly, will have to rejoin new professional sectors, given the definitive crisis of the previous one.

In short, albeit these amendments seem positive, to finally assess this special RED mechanism we must wait its future implementation by the Government, which depends on many aspects, such as its financing with a specific fund. The new labor reform should also be positively valued since it is headed in the right direction of promoting stable employment and promoting social dialogue and collective bargaining. Undoubtedly, these

8. From seven to five days, except in the case of absence of representatives in some centers, which the term of fifteen days is reduced to ten.

objectives are essential for achieving decent and quality employment, as well as the values of a social and democratic State of Law, such as Spain's.