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English version

NEWSLABOUR

RSM SPAIN LABOUR DEPARTMENT NEWSLETTER

Ignacio Hidalgo and Miguel Capel

Let's kick off 2023, and as always, we are back with #NewsLabour!

In this first edition of 2023 you will find both the most important judgements and practical day-to-day aspects along with an analysis of recent cases.

In particular, we deal with very interesting judgements, such as, among others, the one ruled by the Court of Justice of the European Union on the mandatory obligation of companies to provide their workers with prescription glasses or contact lenses if their use is required for the work concerned.

Lastly, related to this new year, we also analyse the new legislative developments that have come into force this year and those that are expected over the next few months.

Constantly informing and updating our readers and, as always, we remain at your entire disposal.

Welcome back!

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Please contact us should you have any doubts about these judgements or their application in your company.

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>The courts in a nutshell

What's new on the block?

Roberto Villon

As always, every month we can find judgements and legal news that particularly draw our attention due to their special features or importance. We provide an overview of some of them below:

The judgement of the High Court of Justice of Madrid of 25 November 2022: Can a worker claim payment for the holidays he/she had not taken?

The High Court of Justice discussed whether or not a worker could retroactively claim the holidays that he had not taken during his labour relationship. In this respect, the Division recalls that taking holidays has a broad interpretation and it is a mistake to consider that the holidays not taken cannot be economically compensated. In this way the judgement admits the claim with no limit regarding the expiry of the right to claim the amounts. This remuneration would not be paid in cases when it is observed that failure to exercise the right was not caused by the employer.

The judgement of the High Court of Justice of Galicia of 23 November 2022: Sending messages after working hours violates the right to digital disconnection?

At present, there is an extensive discussion taking place about digital disconnection and the courts are responsible for stipulating the types of conduct representing a violation of such right. In this respect, the Labour Division of the High Court of Justice dismissed a claim that this right had been violated, which had been filed by a worker who alleged that she was repeatedly sent messages by Whatsapp after her working hours. The judgement deemed this fact had been proven but clarified that at no time was she ever asked to immediately reply to such messages nor was she required to connect her computer; in addition no reprisal whatsoever was observed in this respect.

The judgement of the High Court of Justice of the Canary Islands of 18 November 2022: Can workers be dismissed by email?

The High Court of Justice accepted the possibility to send a dismissal letter by email. In this case it had been proven that this means was normal procedure for all the messages to and from the worker. The judgement also recalled that the company can validly use any means of evidence allowed by law to prove the worker had been informed of her dismissal; however case law requires clarity and certainty about the facts implying termination, proof thereof and that there is no doubt about them, deeming that an email is sufficient to prove this.

The judgement of the High Court of Justice of Catalonia of 23 November 2022: Hindering the worker can imply harassment.

Mobbing or moral harassment is deemed as the harassment suffered by a worker that causes psychological harm. By repeating case law on this matter, the High Court of Justice of Catalonia also recalled that this conduct required the following: (i) there must be pressure that is perceived as an attack against the victim, (ii) it must be committed within a working scope, in other words, by members of the company, and (iii) it must be repeated over time. In this way the Division admitted the worker's allegations about the existence of harassment, due to omissions by the company related to the poor functioning of her remote work team, which prevented her from effectively rendering her services. ■

Please contact me if you would like further information about this issue.

Lara Conde
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>Practical Law

Dismissals in the digital era

Lara Conde

Online messages sent by email, Teams, WhatsApp etc. are the most usual way to interact within a working scope and have been accepted as valid means of evidence by the labour jurisdiction. However, can a worker be dismissed by means of these messages?

A worker's dismissal must take place by complying with the required legal formalities; otherwise the termination will be "automatically" ruled unfair dismissal by the courts.

The Spanish Labour Relations Act (hereinafter referred to by its initials in Spanish "ET") regulates, in the articles related to the form and effects of dismissals, i.e. Articles 53 and 55 of the ET, the formal requirements that must be met by the company when notifying termination of the employment contract, whether for objective or for disciplinary reasons, the dismissal must always be notified in writing in which the facts and reasons for the grounds of the dismissal are explained.

This formal obligation is justified because the worker must be duly informed of the alleged facts and reasons in the dismissal letter for his/her possible defence in legal proceedings. In addition, the contents of the notification must specify the judicial dispute, since the company cannot allege or justify the dismissal based on facts that are different from those stated in such termination notification. Lastly, the effective date included in the notification sets the time from which dies a quo begin to be counted for filing the relevant claim.

Therefore, bearing in mind the importance the notification will have for possible legal proceedings, it is apparently necessary that termination notifications must meet a series of formal requirements.

In this respect, as mentioned above, the regulations specify there must be "written notification to the worker specifying the reason for termination" and dismissal carried out or notified by an email, WhatsApp, etc. is also written notification. However, what could raise questions about these kinds of notifications is the authenticity of the sender or the effective reception of the company's decision by the worker.

We provide information about the rulings by Spanish courts about notifying dismissal online.

Dismissal by email

If dismissal takes place by an email message, in which the dismissal letter is included as an attached document, the judgement of the High Court of Justice of the Canary Islands of 18 November 2022 concluded that, since this was the usual means of communication between the employer and the worker, the notification of the dismissal carried out by email was valid.

It should be taken into account that the High Court of Justice has accepted other means of evidence or convincing elements to corroborate that the worker has due knowledge of his/her dismissal, such as the worker being absent from his/her workplace from such date, testimony of another worker who confirms it is the usual means of communication etc.

In this respect, the court clarified that *"proof that the worker had been informed can be provided by the company by any means of evidence allowed by law and no specific form whatsoever is legally determined as proof of receipt, such proof not being able to be limited, as alleged by the appellant, to receipts signed by the plaintiff or means of evidence that have similar reliability deemed as "full evidence", but other means of evidence can be used such as witnesses and even prima facie evidence".*

Therefore, the High Court of Justice accepted that the dismissal notification could be sent by email, being based on other means of evidence that supported the validity of such dismissal notification and the worker's effective knowledge thereof.

For such purpose, it is advisable to deliver the termination notification by any means that enable the receipt thereof by the worker to be reliably proven, such as delivery by hand in the presence of witnesses or being sent by registered fax (burofax) with acknowledgement of receipt, in this way the date of notification will be securely set and without

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needing to rely on other means of evidence or convincing elements.

Dismissal by WhatsApp

In this case, the employer dismissed the worker via WhatsApp without providing written dismissal notification until 3 days had elapsed.

The judgement of the High Court of Justice of Extremadura of 18 September 2018 deemed that the notification of dismissal via WhatsApp resulted in a direct ruling of the inadmissibility thereof. The court specified that the WhatsApp conversation clearly referred to the worker not needing to come to his work centre from that time because he had been dismissed, with no further explanations, and therefore the dismissal letter delivered afterwards was not admissible, the dismissal being unfair due to failing to meet the legally stipulated requirements.

Along the same lines, the judgement of the High Court of Justice of Galicia of 20 May 2021 ruled against the dismissal notification by WhatsApp, determining that it did not comply with the requirements stipulated in the regulations.

Specifically, the court pointed out that *"not everything sent by this channel can be considered valid notification and, much less so, can they be considered to have the same validity as traditional written notification, which includes the signature of the employer or the representative thereof and the receipt by the worker thereof is proven, either by him/her signing a copy; one or several witnesses signing the dismissal letter that was delivered (if the recipient does not or cannot do so); acknowledgement of receipt and certificate of the contents of the notification sent by registered fax (burofax), etc."*.

Therefore, up to now the Spanish courts have not accepted notification of dismissal via WhatsApp, opting for the traditional form of notification, delivery by hand or sent by registered fax (burofax) that, with no need to resort to other means, reliably prove receipt of the notification by the worker.

Pursuant to the judicial rulings, the system with the most guarantees is certainly the use of traditional means of communication for the dismissal. We will see the progress made by case law in this respect in an increasingly more digitalised world. ■

Please contact me should you require any further information about the practical effects of this judgement.

Marta Rico
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>Advice of the month

The judgement of the Court of Justice of the European Union of 22 December 2022 on the mandatory obligation of companies to provide their workers with prescription glasses or lenses if their use is required for the work concerned..

Marta RIco

Background

The Court of Justice of the European Union adopted a decision on a reference for a preliminary ruling submitted by a High Court of Justice of Romania. The object of this was the interpretation of Article 9 of *Directive 90/270/EEC of the Council of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment*, related to the dismissal of the petition for reimbursement of the expenses incurred to acquire glasses filed by a worker.

Legal grounds

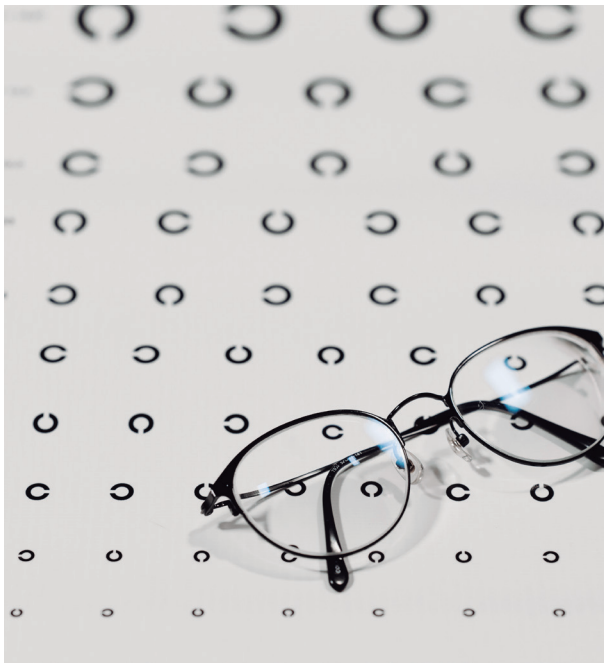
Chamber Two of the Court of Justice of the European Union analysed that, by virtue of the provisions in the aforementioned Article 9, *"special corrective appliances appropriate for the work concerned"* must be provided to workers if the results of the appropriate eye and eyesight test, or the ophthalmological examination referred to in the regulation show that they are necessary and normal corrective appliances cannot be used.

The Court of Justice of the European Union pointed out that fulfilment of the minimum provisions that can ensure an enhanced safety level for the jobs that require the use of a display screen is mandatory in order to ensure workers' health and safety and "special corrective appliances " must be construed in a broad sense; therefore they do not only refer to prescription glasses but also to other types of appliances that can correct or prevent eyesight problems and that are appropriate for work using display screen equipment, such as contact lenses and, it is not necessary that the work with a display screen is the cause of these problems and it can mean an examination or diagnosis being conducted before beginning to work with the equipment, neither do the regulatory provisions impose any restriction for use outside the working environment.

The Court of Justice of the European Union also stated that, although the provisions do not explain the way that the employer must fulfil this obligation, by interpreting the provisions analysed it must be deemed that this can take place either by directly providing the appliance or else by reimbursing the expenses that the worker needed to incur, specifying this cannot take place by paying the workers a general supplement in their wages.

Conclusions

The judgement of the Court of Justice of the European Union could certainly imply somewhat of an economic impact on the business sectors where display screens or computers are the main working tool used in the company and it will need to be assessed how the aforementioned judgement will be applied to the real Spanish business situation; therefore, please do not hesitate to contact us should you have any doubts about implementing these kinds of measures. ■



Please contact me if you would like further information about the practical effects of this judgement.

María Torres
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>Judgement of the month

What happens with the holidays that workers have not taken in the calendar year?

María Torres Ramos

A question that is very often asked by workers is what happens when their holidays have not been taken by 31 December, are they forfeited? Are they accumulated with those in the following year? The Court of Justice of the European Union has answered these questions in its judgement of 22 September 2022.

The first thing we should take into account is that workers are entitled to annual holidays, which is stipulated in Article 38 of the Spanish Labour Relations Act and in Article 31, Section 2, of the Charter of Fundamental Rights of the European Union, in this way guaranteeing the right of all workers to an annual period of paid holidays.

However, under certain circumstances a worker may not have been able to take his/her holidays in the calendar year and this is where the doubts arise, both for workers and employers. Within the scope of this situation, the Court of Justice of the European Union has recently clarified this matter by means of a reference for a preliminary ruling submitted by the Labour Supreme Court of Germany.

In order to understand this matter better, we will analyse the case in depth:

What happened in this specific case?

In the case in question, the plaintiff worker, whose contract had been terminated, claimed economic compensation for the holidays he was unable to take in the last four years, because the company had not provided any incentive for him to do so. On the other hand, the company alleged that the right and the amounts claimed had expired, in the case of German regulations these expire after three years.

The debate that the European High Court focused on was related to the application of the term of expiry for claiming holidays, specifically German regulations determine that a claim for the right to holidays expires in 3 years, in Spain the term for economic compensation for holidays not taken is limited to one year, according to the provisions in Article 59 of the Spanish Labour Relations Act, although this must not be strictly applied if the company had not actively encouraged the worker to exercise this right.

On the one hand, the expiry of the right to claim annual paid holidays must be applicable when the employer has adopted an active position, incentivising the worker to exercise his/her right to take the holidays that had not been taken; therefore, this had occurred for a reason caused by the employee. In such case, the company can indeed claim that the right had expired.

However...If the worker cannot take his/her holidays for reasons caused by the company?

The Court of Justice of the European Union concluded that the expiry of the right is against the regulations when the employer had effectively failed to encourage the worker to exercise his/her right to annual holidays. Therefore, although the court did not clarify the way such incentive must take place, it should be sufficiently understood, because the company cannot benefit from its own infringement by alleging the right had expired if the holidays could not be taken for a reason caused by the company.

Therefore, the conclusions we can draw from the ruling of the Court of Justice of the European Union is that the expiry of the right to take holidays or receive economic compensation in lieu thereof is strictly limited if the labour relationship has been terminated and the right may only be opposed if it is reliably shown that company had encouraged the worker to take the rest period by means of sufficient information and incentive to exercise such right because if no such information and incentive was provided by the company, the claimed right cannot be deemed to have expired.

Did any of your workers not take all their holidays in 2022? Have they claimed the holidays even though they had been informed and incentivised to take them? Please do not hesitate to contact me in order to study the special features of your particular case to find the most appropriate solution. ■

Do you need to know which monitoring and surveillance systems are legally valid for the correct use of a company car by your employees? If so, please do not hesitate to contact us.

Miguel Capel
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› Advice of the month

Company car. Which monitoring and surveillance systems are legally valid for your employees' correct use of a company car?

Miguel Capel

Providing workers with a company car so that they can perform the duties involved in their jobs is a very widely used system in various business sectors. The employees are also allowed to use this car for personal purposes; however the expenses incurred for such personal use must be borne by the employee, unlike the expenses incurred for using the vehicle for business purposes.

The problem that arises for us when applying this formula is the difficulties we encounter when deciding which expenses are solely incurred for the business use of the car and, on the other hand, which expenses are incurred for the aforementioned private or personal use thereof.

In particular, which methods can I use to monitor the distances driven during working hours and to therefore know the total kilometres corresponding to the business use of the car? Would installing a GPS system in the car violate the workers' right to privacy and data protection? What risks could I face as an employer?

As a preliminary approach, we would like to point out that the legislation based on which the subject matter of this article has been determined is, precisely the Charter of Fundamental Rights of the European Union, in particular the provisions in its Article 8, i.e. the right to *"personal data protection"*.

This article states the following::

1. *Everyone has the right to the protection of personal data concerning him or her.*

2. *Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*

3. *Compliance with these rules shall be subject to control by an independent authority.*

In this respect, the recent judgement ruled by the European Court of Human Rights on 13 December 2022 dealt with this issue and determined that **installing a GPS system in a company car** in order to check the kilometres and routes driven by the employees during their working hours and in their personal time **does not imply a violation** of Article 8 of the Charter of Fundamental Rights of the European Union.

Background:

- In the case analysed here, the plaintiff was dismissed by his employer after the latter discovered he had included the kilometres he had driven for his personal use of the company car as though these distances had been for business purposes.

- The plaintiff had been warned by the company that GPS devices were installed in the company cars, as well as the purpose for such installation and the data that was intended to be obtained from them.

- The dismissal was challenged by the plaintiff in the Court of Vila Real, which considered that the dismissal was fair. Due to this the plaintiff appealed such ruling in the Court of Appeal of Guimarães that, albeit with different legal grounds, upheld the judgement of the lower court and also considered the dismissal was fair.

- The plaintiff resorted to the European Court of Human Rights to file a claim against Portugal, because he considered that processing the GPS data obtained from such system and his dismissal on the basis of such data had violated his right to respect of his private life, pursuant to Article 8 of the aforementioned Charter, and hence the State had infringed its affirmative duty to protect the plaintiff's right due to the courts deeming that the dismissal was fair.

Do you need to know which monitoring and surveillance systems are legally valid for the correct use of a company car by your employees? If so, please do not hesitate to contact us.

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Legal grounds and conclusions:

- The judgement analysed the rulings of the aforementioned courts explaining that, although the first court considered the dismissal was fair because the plaintiff had been duly informed both of the installation of the GPS device and the use of the data that would be collected by the use thereof, the second court considered that the use of this information to verify the performance of the employees was not in accordance with the law, since this use would exceed the scope of remote surveillance that is prohibited by the Portuguese legal system, but it was in accordance with the law to check that the information related to the kilometres that the employee counted for his professional work was in accordance with the real situation.

- Therefore, the European Court of Human Rights considered that the Court of Appeal of Guimarães restricted the scope of interference in the plaintiff's private life to what was strictly necessary for the legitimate purpose sought, i.e. to monitor the company's expenses.

- Along the same lines, the European Court of Human Rights considered that the Court of Appeal of Guimarães had carefully taken into account the plaintiff's right to respect of his private life and the right of his employer to ensure the company operated efficiently, bearing in mind the legitimate objective sought by the company, i.e. the right to monitor its expenses. Therefore, in this case, it did not raise the margin of consideration that was applied by the State. The Court of Justice concluded that the national authorities had not breached its affirmative duty to protect the plaintiff's right to respect of his private life.

- Therefore, the Court concluded that, in this case, the State had not violated the right included in Article 8 of the Charter of Fundamental Rights of the European Union.

So, is the use of devices, such as GPS, always a means of monitoring and surveillance by the employer that fulfils the provisions in Article 8 of the Charter of Fundamental Rights of the European Union?

No. The specific features of each case must be analysed, in particular the predominance must always be assessed between the interests that the company intends to safeguard with the aforementioned measure and the greater or lesser alteration affecting the worker's right.

In any case, the circumstances arising in each case and the specific legislation for such purpose that could have been determined by each country must be analysed.

What risks could I face as an employer if a monitoring and surveillance system is installed that is later considered to violate the rights related to my employees' privacy and data protection?

We should clarify that if, by using surveillance systems that are not in accordance with the law, this results in a worker being dismissed and later this means of evidence is ruled null and void, we could be faced with various consequences:

1. The penalty could be ruled inadmissible, if there are not sufficient grounds for the dismissal by considering the reasons alleged for this have not been proven. In the event of such ruling, within a term of five days, counted from the date notice of the judgement is served, the employer may choose to reinstate the worker or pay compensation equivalent to thirty-three days salary per year worked.

2. The dismissal could be ruled null and void, which would take place when the decision for dismissal adopted by the employer was due to any of the reasons for discrimination prohibited by virtue of the Spanish Constitution or the law or the worker's fundamental public rights and freedoms have been violated, as well as if any of the reasons for objective nullity arise. The ruling that the dismissal is null and void would imply the worker must be reinstated in his/her job and the relevant salary while the case was being processed must be paid. This could also imply acknowledgement of the right to compensation for the damages caused to the worker.

However, it is important to stress that the ruling of specific means of evidence being null and void does not imply automatic nullity, nor simply inadmissibility, since the dismissal can be based on other means of evidence that, nevertheless, must be in accordance with the law.

Do you need to know which monitoring and surveillance systems are legally valid for the correct use of a company car by your employees? If so, please do not hesitate to contact us.

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Please do not hesitate to contact us should you have any employees who use company cars and you have doubts about adopting monitoring and surveillance measures in this respect. You will probably be surprised to know that not all the solutions adopted by Spanish courts are applicable in the same way to all cases; hence the special features of each case must be studied in order to find the most appropriate solution. ■

Please contact me if you would like further information about any of these legislative developments.

Irene Ferriols
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› Legislative developments

What will 2023 hold for us?

Irene Ferriols

By taking advantage of the start of the new year 2023, the labour department of RSM Spain would like to summarise a series of new legislative developments that have either already been approved or are expected this year.

Firstly, the **changes already approved**, we would like to draw your attention to the following:

1. Intergenerational Equity Mechanism

EThe Intergenerational Equity Mechanism (with its initials in Spanish "MEI") came into force on 1 January 2023, which is a new kind of contribution that, for the purpose of maintaining an inter-generational balance and strengthening the sustainability of the social security system in the long-term, sets an increase of 0.6% in contribution, which will be applicable both for companies and their workers.

This increase in contribution of 0.6 per cent applied to the common contingencies base in all situations of registration or similar to registration in the social security system in which there is an obligation to pay contributions to cover the retirement pension, will be divided between the company and the worker as follows:

- The companies must pay 0.5%.
- The employees must complete the remaining 0.1%.

Through the RED Newsletter of 28 December 2022, the social security system provides further information about this additional contribution, clarifying that it is not applicable to the groups of workers excluded from contributing to the retirement contingency; therefore it is not applicable in the following cases, among other possible situations:

- Workers obliged to only contribute to temporary disability due to common contingencies, professional contingencies and contribution to solidarity, for example active pensioners...
- Groups obliged to only contribute to professional contingencies.
- Newly enrolled students of the Ministry of Defence, Legislative Royal Decree 13/2010 (TRL 938)
- It is neither applicable to workers who are taking training courses and non-labour academic internships (TRL 986).

2. Revaluation of pensions

Moreover, a revaluation of pensions has been determined for 2023 of 8.5%, in accordance with the average inflation last year.

However, there is a limit in this increase by means of which, in 2023, the maximum amount that can be received will be the whole monthly sum resulting from applying the percentage increase equivalent to the average value of the year-on-year variation rates, expressed as a percentage, of the CPI in the 12 months prior to December 2022 to the amount of €2,819.18, apart from the extraordinary payments that the holder could receive, the amount of which will also be subject to the aforementioned limit.

3. Contribution bases

It is important to know that for 2023 there will be an **increase in the maximum contribution bases**, which is included in Article 122 of the General State Budget Act.

As of 1 January 2023, the maximum cap of the contribution base, in each of the social security systems that have been determined, is the amount of €4,495.50 a month.

Regarding the minimum contribution bases, these are increased depending on the increase in the inter-professional minimum wage (which must still be determined).

However, the contribution rates remain the same as last year.

4. Amount of unemployment benefits

Another new labour development to be pointed out for 2023 is the **increase in the amount of the contribution to unemployment benefits**, a new measure that is included in the General State Budgets of 2023 regarding unemployment.

These benefits are increased by 10%, from 50% to 60%

Please contact me if you would like further information about any of these legislative developments.

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of the regulating base as of day 181 that the benefits have been received.

In fact, for 2023, the unemployment benefits will be received as follows:

- The first six months: 70% of the worker's regulatory base.

- From thereafter: 60% of such base.

5. A new development related to equality plans

The Final Provision Twenty-Seven, Section Three of the General State Budget Act amends Act 9/2017 on public sector agreements and this amendment gives rise to another of this year's new labour developments.

By means of this amendment, from 1 January 2023, companies that must have an equality plan (companies with 50 or more workers) cannot enter into contracts with the authorities and other public sector institutions if they do not have an equality plan, pursuant to the provisions in Article 45 of Act 3 of 22 March 2007 on equality between men and women.

6. Notification of sick leave

Royal Decree 1060 of 27 December 2022 will come into force on 1 April 2023, which amends Royal Decree 625 of 18 July 2014 regulating certain management and supervision aspects of the temporary disability processes in the first three hundred and sixty-five days it lasts.

We point out the following new aspects included in this new Royal Decree:

- The doctor issuing the sick leave, confirmation or discharge certificate must provide the worker with a single copy thereof; therefore **the second copy is eliminated**.

- The worker **no longer needs to provide a copy of the sick leave certificate to his/her company**, since it will be the public health service or, if any, the mutual society or collaborating enterprise that must send the data of the sick leave, confirmation and discharge certificate online to the Spanish social security institute (INSS).

We would also like to briefly mention some of the **changes that are expected** this year and to which we should pay attention:

1. Possible increase in the inter-professional minimum wage (SMI)

It is speculated there will be a possible increase in the inter-professional minimum wage that, in principle, should be set between €1,046 and €1,082 a month, currently frozen at €1,000, hence implying an increase of between 4.6% and 8.2%.

2. New leaves planned in the Preliminary Bill of the Families Act

The preliminary bill of law plans three new types of leave aimed at achieving a balance between employees' work and family lives:

- **Paid leave of five days per year** to care for relatives up to the 2nd degree or cohabitants in the case of hospitalisation, accident or serious illness or a surgical operation.

- **Unpaid leave of six weeks**, which can be taken continuously or discontinuously until a minor child is eight years old.

- **Paid leave of four days per year** to care for relatives in the case of force majeure.

3. Pre-childbirth leave and paid leave for painful menstruation

The bill of law that amends the Act on sexual and reproductive health and voluntary interruption of pregnancy includes the following two new aspects that should be highlighted:

- **"Pre-childbirth leave"** as of week 39 of pregnancy, such leave being automatic and will not be deducted from the worker's maternity leave.

- Possible **paid leave for particularly painful menstruation**

Please do not hesitate to contact us should you have any doubts about these legislative developments this year. ■

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