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English version

NEWSLABOUR

RSM SPAIN LABOUR DEPARTMENT NEWSLETTER

Ignacio Hidalgo and Miguel Capel

There were various new events that took place last month in the field of labour law and, as always, **#NewsLabour** includes both the most important judgements and practical day-to-day aspects along with an analysis of the cases.

In this edition we deal with very interesting judgements, such as the one ruled by the Constitutional Court on video surveillance cameras but we also approach an issue in various articles that continues being developed on a daily basis: working from home.

On the one hand, we analyse the judgement ruled by the National Court on the possibility to recuperate working from home days that have not been worked by the employees and, on the other hand, in our Advice of the Month, we deal with the risks of prevention of occupational hazards for an employer when workers render their services by the working from home system.

We are always informing our readers and always updating them.

And, as always, we remain at your entire disposal!

CONTENTS

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?

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:

Roberto Villon

The judgement of the High Court of Justice of Valencia of 7 July 2022: Can a worker be dismissed due to watching a football match during working hours?

This is an interesting judgement at this time when the World Cup Championship is taking place. A case of dismissal was filed in the Division by a worker who took 15 minutes longer on his break so that he could watch a football match. The High Court of Justice, in the same way as the Labour Court, deemed that the dismissal must be considered unfair because such conduct by the worker, albeit not without criticism, did not harm the company since, on the one hand, it only implied a short fraction of the employee's working hours and, on the other hand, neither could it be observed that, as a result of this conduct, the worker did not complete all the work assigned to him. Therefore, the High Court of Justice deemed the worker's conduct must be punished by other less serious penalties.

The judgement of the High Court of Justice of Aragón of 9 September 2022: Are the external prevention services held severally liable for payment of the surcharge?

The High Court of Justice of Aragón recalled that, regarding the regulations applicable to liability for payment of benefits, companies that have not taken part in the production process causing them cannot be held liable for this payment. In this respect, such payment cannot be charged to companies that undertake the preventive action planning nor manufacturers or installers, among others, the infringing party being the one that took part in the production process. The High Court of Justice also recalled that the civil jurisdiction was competent to rule on issues of liabilities between the infringing company and the party responsible for prevention.

The judgement of the Supreme Court of 15 November 2022: Regarding the calculation of workers in a company when determining the number of representatives to be appointed.

The Supreme Court ruled on the way to determine the real staff working in a company when appointing the number of trade union delegates. In this respect, the Supreme Court deemed that the days worked by all the workers must be counted in the year before the summons was issued, both those whose employment contracts were in force on the date the electoral prior notice is sent and those with temporary contracts that had expired on the date of the summons, being counted as an additional worker for each two hundred days worked or fraction of such number. The judgement sustained that this reasoning is applicable both for determining the number of trade union delegates and for the unitary bodies representing the workers.

The judgement of the Supreme Court of 2 November 2022: Is the dismissal of workers fair when it took place due to an offence committed outside of their working hours?

The Supreme Court specified that it was not true that disciplinary dismissal can only be applicable to breaches of contract taking place during working hours and in the workplace. In this respect, it ruled the dismissal of a security guard was fair that, due to having committed an offence, had forfeited his professional permit. This is interesting if it is taken into account that, in spite of such forfeit of his professional permit being considered a serious offence in the collective bargaining agreement, this categorisation could imply relocation of the worker or, if need be, suspension of his contract. ■

Please contact us should you have any doubts about this article.

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>Practical Law

Is it legal to control workers by video surveillance systems for disciplinary purposes?

Marta Rico

The Constitutional Court recently ruled on this matter in its Plenary Judgement of 29 September 2022, admitting an appeal lodged by a company against a judgement ruled by the High Court of Justice of the Basque Country stating that the dismissal of a worker was unfair due to deeming that the means of evidence used, images recorded on the company's security cameras, was illegal since there was no record that the worker had been informed of the processing of these data for disciplinary purposes, which meant their use as evidence was invalidated. However, the Constitutional Court ruled that the company's fundamental right to effective judicial protection had been violated (Article 24.1 of the Spanish Constitution) related to the right to use the relevant means of evidence and a process with full guarantees (Article 24.2 of the Spanish Constitution). It was a case in which, due to conduct that was categorised as irregular by the management, the company began examining the recordings on the security cameras installed in places used to serve the public, verifying that illegal conduct had indeed been committed by one of its workers, which led to his disciplinary dismissal for this reason, the company using the recording on the security cameras as evidence of the infringing conduct.

The judgement ruled by the Constitutional Court analysed whether or not the installation of the system and its use for disciplinary purposes was in accordance with the data protection regulations and, if it was not, assessed its possible repercussion from the standpoint of the worker's right to privacy to hence decide on the legality or illegality of the evidence and therefore on whether or not the right to effective judicial protection had been violated.

Does installing video surveillance systems for labour control purposes violate the worker's right to personal data protection?

Regarding the installation of video surveillance systems and the use of the recorded images for labour control purposes, the Constitutional Court stated that, although the company had a duty to expressly, clearly and concisely inform its workers beforehand, *the Spanish Act 3 of 5 December 2018 on personal data protection and the guarantee of digital rights allows*, in the case of flagrant illegal conduct, the duty of information to be deemed as duly fulfilled if a sign is placed in a visible place with a warning that the system exists, which the Constitutional Court considered to have occurred in the case in question, hence resulting in the use of the recorded images being deemed valid by the Constitutional Court in order to verify that illegal conduct had been committed by a worker.

Does installing video surveillance systems for labour control purposes violate the workers' right to privacy?

The Constitutional Court stated that, in the case in question, installing the video surveillance system and the resulting use of the recorded images was a measure that was **justified** (prima facie signs of irregular conduct being committed by the worker), **suitable** (recording the possible illegality of the conduct), **necessary** (to prove the labour infringement) and **proportional** (since the cameras were installed in working areas open to serve the public) and therefore, after completing this procedure for examination, it ruled out that any harm had been caused to the worker's right to privacy regulated in Article 18.1 of the Spanish Constitution.

In conclusion, the Constitutional Court ruled that the evidence of the recordings on the security cameras was legal due to deeming that by obtaining it the worker's right to data protection and right to privacy had not been violated.

The dissenting votes of the judgement ruled by the Constitutional Court.

However, the dissenting votes of five senior judges of the Plenary should be mentioned regarding the judgement analysed here, who did indeed consider the worker's right to data protection had been violated by concluding that this control system had already been used by the employer five years earlier to dismiss another worker and the anomaly had not been remedied, consisting of the lack of information to employees about the use of the video surveillance

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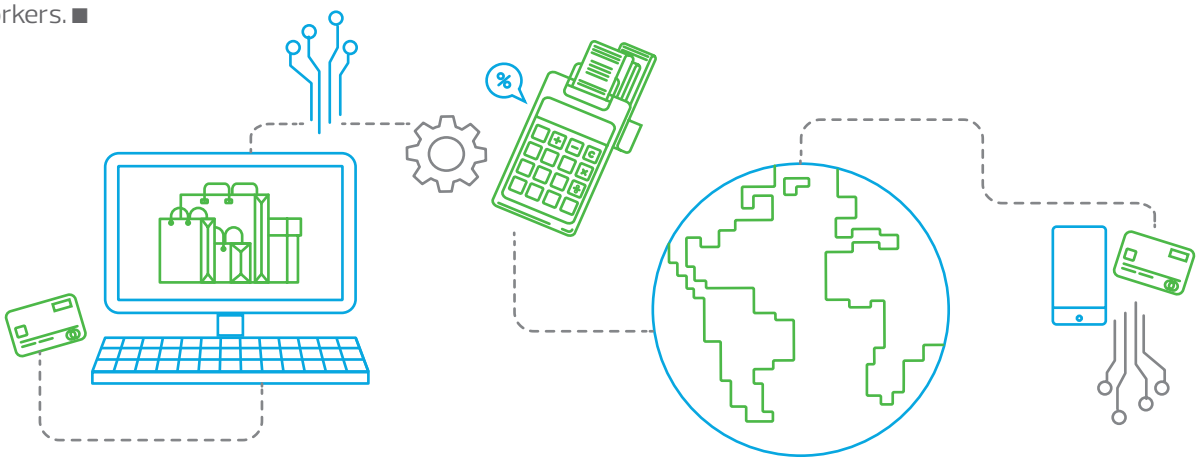
system to control their activities, as required by the *Spanish Act 3 of 5 December 2018 on personal data protection and the guarantee of digital rights* and hence the company used resources and rights that the legal system only grants in an exceptional manner and that under no circumstances may be used to avoid fulfilling the company's duties regarding fundamental rights.

Conclusions about the case law trend on this matter. The large number of dissenting votes by the senior judges of the Chamber against granting legitimacy as evidence to the graphic video recordings obtained by the company leads us to think that this will continue being a disputed issue in the courts and hence, if the company needs to use this kind of evidence for disciplinary purposes, it should fully comply with the data protection regulations in force, in particular, the duty to provide information to the workers. ■



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

Lara Conde
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>Advice of the month

The Spanish National Court was clear: the "lost" days worked from home for business reasons can be recuperated and it is mandatory for companies to compensate the expenses incurred in order to work from home. SAN 10-11-22.

Lara Conde

As we all already know, working remotely means the work is performed outside the company's normal centres and working from home is a sub-section of this system, which involves workers' rendering their services remotely by using new technologies.

In order to determine a regulatory framework for this system of working, in July 2021, the Spanish Remote Working Act 10/2021 (hereinafter referred to by its initials in Spanish "LTD") was published in which working remotely and working from home were regulated in depth and a series of obligations and rights were determined for employers and for workers.

The law was presumed necessary because working from home was beginning to be demanded more and more by workers after having become the normal way of rendering their services during the pandemic as a measure to control Covid-19. Moreover, this system enabled the needs for flexibility and safety of both workers and companies to be ensured; it has therefore been extended in many companies until it has now become a common and normal way of organising their work.

However, working from home is voluntary both for the worker and the company and must be duly agreed between both parties. Furthermore, which jobs/duties can be rendered remotely as well as the minimum working hours that the worker must be present in the company can be determined in the individual or collective bargaining agreements that are reached in this respect. Can the company decide on the specific days for working from home and change them for organisational/production reasons? Can the modified working from home days be recuperated?

Furthermore, one of the most important advantages of working from home is lower costs for offices and the cost-saving in the use of transport. However, costs are incurred for electricity, water and fitting out the area/work equipment etc., which have led to disputes arising between workers and employers. Who must pay these expenses?

The National Court provided an answer to these questions in the judgement analysed below.

What happened in this specific case?

The National Court ruled on a class action by virtue of which revocation was petitioned of various clauses in the collective bargaining agreement on working from home that was applied in the company.

Although various clauses in the aforementioned agreement were challenged, I will just focus on two of them, which refer to (i) the possibility for the company to decide on the percentage of time for working from home, the specific days when the worker can benefit from this system and the modification of such days in the event of organisational needs and (ii) the clause related to providing equipment and compensation of the expenses incurred for working from home.

Therefore, the dispute was related to a clause in which the company was granted authorisation to determine the specific days for working from home and was allowed to modify them, with sufficient prior notice, due to organisational needs and it was stipulated it was impossible to recuperate the "lost" working from home days. In addition, the regulation of a clause related to refusing compensation of the expenses incurred due to remotely rendering services.

What was the ruling of the National Court?

Regarding the clause related to the working from home system, the National Court ruled that the fact it is the relevant manager who specifically determines the exact days when the worker must be present in the company does not affect the agreement of intentions, bearing in mind that being present in the company must coincide with the company's organisational needs.

However, the fact that the days the worker must be present in the company when he/she would normally be working from home, without such working from home day being compensated or replaced by another does indeed imply an infringement of Article 8 of the LTD, since such provision requires that any changes in the

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conditions stipulated in the remote working agreement must take place by means of reaching an agreement and hence ruled revocation of the last section of the aforementioned clause.

Therefore, companies can choose which days its employees will work from home but if, once agreed, the working from home days are changed for business reasons, the worker cannot be denied the possibility of recuperating such working from home day.

Regarding the clause related to expenses, the National Court referred to the verbatim text of Article 12 of the LTD being clear, employees are entitled to be provided with the equipment required to perform their work along with its maintenance and to compensation and payment of the expenses incurred in order to render their services. The terms in which the worker will be provided with the required equipment, the mechanism for determining this and the compensation or payment of these expenses, but not the refusal thereof, can be regulated in a collective bargaining agreement. Therefore, revocation was ruled since the aforementioned clause clearly infringes the regulations in this respect.

In fact, it is compulsory for companies to pay the expenses incurred for working from home.

Conclusions

The grounds offered by the National Court to rule revocation of the aforementioned clauses have a clear legal basis, i.e. the LTD; hence both companies and workers must apply the provisions therein as far as working from home is concerned.

Moreover, in spite of the possibility to "freely" reach an agreement on numerous issues related to working from home, there are specifically regulated aspects that cannot be infringed by means of these agreements.

Do you have a working from home agreement in your company and would you like it to be reviewed to find out if it is in accordance with the law? Or would you like to apply a new working from home agreement and you need advice on this? Please do not hesitate to contact me because the Labour Department of RSM Spain knows exactly how to ensure that such agreement covers your needs and also complies with the regulations. ■

Please contact us should you have any doubts about this article.

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>Sentence of the month

The guarantee of indemnity and its application to internal complaints submitted by the company's employees

Carlos Díaz

One of the rights or guarantees par excellence granted to workers by law within the legal-labour scope is the guarantee of indemnity, normally defined as the right of all workers not to undergo reprisals by the company after having submitted a complaint against it related to any rights concerning their working conditions, its origin being included in Article 24 of the Spanish Constitution, which guarantees the right to Effective Judicial Protection.

The result, if any, of any corporate action as a way of taking revenge against a worker will be ruled null and void. In the event of dismissal due to these circumstances, this will be ruled null and void due to infringing the aforementioned Article 24 of the Spanish Constitution.

Although it is true that the guarantee of indemnity lacks a legally specified definition, the Spanish courts have undertaken the task of defining such an important concept. For example, this occurred when the Supreme Court ruled its judgement of 24-6-2020, by considering that *"the guarantee of indemnity implies that, if a legal action is filed or the preparatory or prior actions are carried out to file one, there must be no harmful consequences within the scope of private or public relations for the person acting as the plaintiff, since the right to effective judicial protection (Article 24.1 of the Spanish Constitution) is not only ensured by means of the actions of the judges and courts but it is also a guarantee of indemnity".*

However, are the internal complaints submitted by the company's workers considered sufficient for indemnity to protect the worker from possible dismissal?

The fact is that, up to quite recently, the guarantee of indemnity did not include the internal complaints submitted within the private scope of the company, at least as a general rule.

For example, the complaints or objections raised related to certain rights or working situations that a worker in your company could be involved in or situations when your workers could file any kind of claim for the sole purpose of precisely obtaining this protection from their employer have been situations in which the guarantee of indemnity has not been activated.

However, this situation could be completely turned around now, after the publication of Act 15 of 12 June 2022 on equal treatment and non-discrimination. Moreover, it is specified in Article 6.6 of this law that reprisal must be deemed to mean *"any adverse treatment or negative consequences that a person or group could undergo if the latter acts, participates or collaborates in administrative or judicial proceedings aimed at a discriminatory situation being prevented or ceased,* ***or due to having submitted a complaint****, claim, report, legal action or appeal* ***of any kind for the same purpose****".*

Including this new aspect leads to a significant impact on the consequences that could arise due to a possible dismissal, specifically in cases when a worker could have submitted an internal complaint to the company in the days, weeks and even perhaps months before the dismissal notice is received, because now there is a greater possibility that such dismissal will be ruled null and void due to the dismissal being expressly considered as a reprisal by the company in this case.

The recent judgement of the Supreme Court, which has not yet been published

A post has been recently published on the official website of the General Council of the Judiciary, the title of which is *"The Supreme Court rules the dismissal of a worker is null and void due to this taking place one day after submitting an internal complaint about not being paid his overtime".*

Although the full publication of the text of the judgement is not yet available, the brief information about the case in question that RSM has been able to obtain is related to the disciplinary dismissal of a worker that took place just one day after stating that he disagreed with not being paid his overtime. As a reason for his dismissal, the company alleged that his performance had decreased, which it could not manage to prove at the trial.

Please contact us should you have any doubts about this article.

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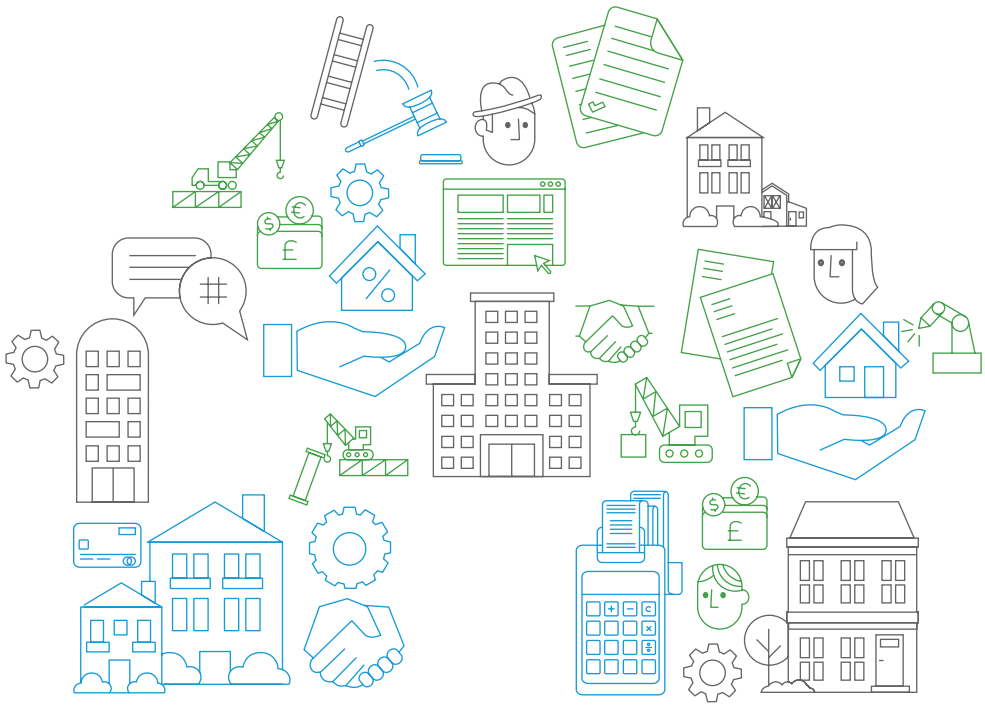
The judgement sustains that, as a general rule, internal complaints do not activate the guarantee of indemnity except in cases when a worker that submits a formal complaint against his/her company is immediately dismissed based on a reason that cannot subsequently be proven at the relevant procedural time.

Although it is true that, according to the brief summary published on the website of the General Council of the Judiciary, it seems the Supreme Court is continuing to sustain that, as a general rule, internal complaints submitted to a company do not activate the guarantee of indemnity, it is also true that we must pay great attention to the judgements ruled on similar cases in the future because, pursuant to the provisions in Article 6.6 of Act 15/2022, reprisal is considered to exist when a complaint of any kind has been submitted, making such fact applicable, as cannot be otherwise, to the labour field and activation of the guarantee of indemnity.

If, after reading this article, you have any doubts in this respect, in the Labour Department of RSM Spain we will be delighted to provide you with advice, so please do not hesitate to contact us. ■



Please do not hesitate to contact me if you have an employee working from home who has had an accident there and you need advice on how to structure your defence in the case of a possible claim.

Alejandro Duque
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› Tip of the month

There are various employees in my company who render their services by the working from home system. In this respect, what would happen if one of my employees has an accident while rendering his/her services at home? Would I run any risks as an employer?

Alejandro Duque

Over the last few years and, in particular, because of the declaration of state of alarm due to the socio-health crisis caused by Covid-19, many companies have opted to adopt some policies in favour of their employees in order to allow them certain flexibility within the scope of rendering their services, such as working remotely and/or a working from home system.

Although this system has certainly become one of the key factors within a corporate scope in order to attract and retain talent in organisations, the current regulatory working from home structure, provided in Act 10 of 9 July 2021 on working remotely, still contains numerous interpretive loopholes and doubts regarding its practical application and, more particularly, related to the implications that the development of rendering services by means of the working from home system and/or the remote working system could imply for companies.

In particular, what would happen if a worker has an accident while working from home? Would it be considered an occupational accident? What risks would I run as an employer?

As a preliminary approach, it should be pointed out that the regulations governing working from home state nothing about this issue and do not include any specific feature other than the provisions in the common regulations (Article 156 of the General Social Security Act – hereinafter referred to by its initials in Spanish "LGSS").

Pursuant to the provisions in Article 156.1 of the LGSS, an occupational accident is deemed to mean *"any bodily injuries caused to workers during or resulting from the work performed for their employer"*. Nevertheless, such article also refers to the presumption of occupational accident, regarding injuries caused to workers *"during working hours and in the workplace"* (Article 156.3 of the LGSS); however cases are excluded that are caused by force majeure not due to the work or those resulting from the worker's misconduct or negligence.

In this respect, the Labour Court Number 1 of Caceres ruled on this issue in its recent judgement of 26/10/2022, deciding that the injury caused to a worker in her home while she was rendering her services there was considered an occupational accident.

Background:

- In the case analysed here, the plaintiff was injured when she was coming out of her bathroom at her home while she was working according to the working from home system as a call centre operator with working hours from 8 am to 2 pm. She performed such duties from a seated position in front of her computer screen.

- The incident took place around 1.45 pm when the plaintiff was coming out of her bathroom to return to her desk, when she tripped over in the corridor and fell down, causing an injury to her elbow and right rib cage. As a result of the injury, the plaintiff was declared in a situation of temporary disability due to a non-occupational accident.

- Since she did not agree with such categorisation, the plaintiff filed a claim to determine a contingency so that the court would rule that the plaintiff's sick leave process was caused by an occupational accident.

Legal grounds and conclusions:

- After making a brief reference to the legal definition of occupational accident and the case law that interprets it, the judgement analysed here sustained that rendering services remotely and/or by the working from home system means that some aspects that have been consolidated by law and case law must be reconsidered or dealt with in greater depth, in particular considering that the incident occurred while the plaintiff was

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"continuing to fulfil her working hours, when she came out of her bathroom at her home to resume her work".

- Therefore, the judgement concluded that, even though the worker was not seated in front of her computer at home when the injury occurred, in the case in question a clear interruption in the nexus cannot be observed that would prevent the accident from being categorised as "occupational" because *"a necessary visit to the bathroom for a physiological need is deemed included in the employee's working hours"* cannot eliminate the presumption of "occupational" referred to in Article 156.3 of the LGSS related to injuries caused *"during working hours and in the workplace".*

- However, the judgement also sustained that the accident the plaintiff suffered would not be able to be considered of an occupational nature if there had been a clear interruption of such nexus, as could occur, as an example, in situations when the worker "was in the kitchen of her home during working hours and accidentally cut herself with a knife".

- Similarly, applying the solution adopted in another previous judgement ruled by the Labour Division of the High Court of Justice of Galicia on a similar case was ruled out, by virtue of which the common aetiology was acknowledged of the injury caused to a worker's shoulder when picking up a computer screen because, in that case, it had not been proven that such incident took place during working hours and in the workplace.

So is any accident that my employees could suffer within the scope of working from home considered an occupational accident?

No, only accidents suffered by employees while working from home and during their working hours can be considered as such, providing such workers are performing the duties of their jobs and there is no clear interruption in the nexus between the injury caused and rendering their services.

In any case, the circumstances arising in each specific case must be analysed.

Which risks could I run as an employer if an employee working from home has an occupational accident?

Occupational accidents can lead to serious consequences for employers from an administrative, civil and criminal standpoint.

For example, if it is proven that the accident was caused due to failing to fulfil safety measures, an infringement action could be filed against the infringing company by the Labour Inspection Unit.

Similarly, in such situation, the company could be held liable for paying a possible surcharge over the social security benefits that the worker could be paid due to the accident and possibly the relevant compensation for damages.

Therefore, when the employee working from home disagrees with the aetiology of the accident, it is always advisable for companies to seek advice in order to decide on its possible categorisation as "non-occupational" in this way contributing to avoiding liability being claimed against the company within this scope. In the same way, in order to avoid this, it is always advisable to ensure there is a suitable prevention of occupational hazards policy applicable to the scope of rendering services remotely and/or by the working from home system.

Please do not hesitate to contact us if you have employees working from home that have had an accident there and you need advice on how structure your defence if a possible claim is filed. 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. ■

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