

ALLEN & OVERY

Working from home: its scope, costs and requirements...all the keys to the new regulation

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The Official Gazette of the Spanish State (**BOE**) of 23 September published Royal Decree Law 28/2020, of 22 September, on remote working regime (**RW**), which will need to be ratified by the Congress of Deputies over the next 30 days.

The RW Regulation will enter into force on 13 October. This is a complex piece of legislation that is redundant in some parts, with continuous calls to collective bargaining. It is based on three principles:

- RW is voluntary for employees and companies, unless the right to work remotely is recognised by law or under a collective bargaining agreement.
- companies must assume the cost of furnishing the services and must provide their employees everything they need and compensate them for their expenses; and
- employees have at least the same labour rights as if they were working on site.

There are some unclear issues that will likely result in conflicting interpretations. Hopefully some of them may be cleared up if the Royal Decree Law is passed into a law.

The main points are addressed below.

Delimitation of the remote working subject to regulation

The rights and duties envisaged in this law **do not apply to all services provided from home**, but rather to those that meet the following requirements:

- Employees must perform them **at their home or at the location of their choosing**. If the company determines the work location (regardless of whether it is on site at the company), then it will not be classified as RW.

If the RW is performed exclusively or mainly with computer, telematic and telecommunication media and systems, then the employee will be considered as an employee working remotely.

- It must be “**regular**” work. This means the work must be performed for at least 30% of the work period over a three-month reference period. This percentage will need to be adapted in proportion to the duration of the contract and, as in the case of the reference period, it may be lowered in collective bargaining.

This mention of a variable percentage based on the duration of the contract and its application to an unspecified work period (daily, weekly, monthly, yearly, ordinary, extraordinary, reduced, etc.) will generate doubts when work is not performed remotely steadily and predominantly for the entire year.

- It may be performed by workers in any field, except for government employees, who will have

a specific regulation. Until that, they will be subject to section 13 of the Spanish Workers Statute [*Estatuto de los Trabajadores*] as amended by this Royal Decree Law.

Voluntary nature of RW

RW must be agreed to by the company and the employees. **Companies may not impose RW on employees, nor may employees demand it**, unless the right to work remotely is recognised by law or in the collective bargaining agreement. It will be important to consider section 34.8 of the Workers Statute--which provides for the right to request RW as a way to reconcile work and family life--and the Plan MECUIDA in Royal Decree Law 8/2020.

Similarly, employees that regularly study to obtain an academic or professional degree have priority to RW if that is the system in place in the company and if their duties are compatible. Victims of gender violence and terrorism also have the right to work fully or partially from home, or to stop working from home if that is the established system, provided that this would be compatible with their position and duties.

An absolute right to remote working is not recognised in any of these cases, but any refusals to allow it must be justified.

Collective bargaining agreements may establish mechanisms, criteria and preferences for switching from work on site to work from home and vice versa. In this regard, the decision to move from working on site to work from home may be reversed at the company's or employee's choice. This return to the original situation must be exercised in the terms established in the collective bargaining agreement or, in the absence of that, in the specific agreement with the employee. Those who have only worked from home since they were hired will have priority to hold positions that are fully or partially on site. The company will be required to inform them of any vacancies, which they must also communicate to the workers' representatives.

Any employee claims about access, switching back and modifying RW regimen must be channelled through a new legal proceeding that will be urgent and preferential. In all cases, a refusal to work from home, deciding to switch back and factors exclusively related to changing from work on site to some type of telecommuting cannot be grounds for a substantial modification

of employees' work conditions or for terminating their contracts.

Individual agreement: training and content

The RW agreement must be signed in writing before remote working begins. A copy must be submitted to the workers' representatives (who must acknowledge receipt) and to the employment office, respecting the limits derived from personal privacy and data protection that apply to non-certified copies of contracts.

Any changes to the original agreement's provisions will require a new agreement and its communication to the workers' representatives.

The new regulation establishes the "minimum mandatory content" for this agreement, although some of the envisaged points are optional. All of these provisions must be integrated with the regulation established in the collective bargaining agreement.

The agreement must reflect:

- **the inventory** of the media, equipment and tools required for RW, indicating their useful life or the maximum period for replacing them.

Employees working from home must follow the instructions on the use and maintenance of the computer equipment and tools specified by the company.

- a specification of the **expenses** "that the employee may have due to remote working" with the way to quantify the compensation the company must pay for them, and the payment time and form.

The law does not exclude any direct or indirect expenses, but it does allow for collective bargaining to establish the mechanism for determining and compensating or paying these expenses.

- the **percentage and distribution of work** on site and remote working, where applicable.

Contracts with minors under age 18 and trainees must guarantee that at least 50% of the work is performed on site (although it is not clear if this calculation includes remote theoretical training specific to the contract for training and learning).

- the work **schedule**, including any rules on availability.

- the location of the RW and the assigned work **site**.
- the minimum period to notify in advance the exercise of the right to switch back to work on site, where applicable.
- the corporate tools for **overseeing** the work.

The law gives companies the right to select these oversight tools, which may be remote tools if they consider appropriate. In any case, the criteria and limits provided under section 20.3 of the Workers Statute and under sections 87 et seq. of the Spanish Personal Data Protection and Guarantee of Digital Rights Act [*Ley Orgánica de Protección de Datos Personales y Garantía de Derechos Digitales*] apply.

- the **procedure** to follow in the event of technical difficulties that prevent the normal performance of the RW.
- the instructions issued by the company, along with the **workers'** representatives, to protect data and information security specifically applicable to RW.
- the **duration** of the RW agreement.

If the agreement is signed with employees who have already been working from home, then it must include the most favourable rights and terms that they have been already granted. "Under no circumstances" may the application of this law entail their absorption, compensation or elimination.

Failure to sign the agreement in the terms and with the requirements specified by law or under the collective bargaining agreement constitutes a serious infraction with fines of EUR 626 to 62,150.

Obligations of the company

To enter into RW agreements, companies must first establish the applicable criteria a, in some cases with participation from the workers' representatives.

The law also recognises or specifies a series of labour rights for employees working remotely that the company has the obligation to guarantee and implement. In this regard, the company must:

- Provide the employees the **media, equipment and tools**, and their

maintenance, in compliance with the agreed inventory.

- Compensate their **expenses** in the agreed terms and as specified, the case being, in the collective bargaining agreement.
- Grant the employees the **same rights** as if they were working on site, except for those inherent to working on site. This equality of rights includes the right to remuneration, which must be at least the same as the total owed to the RW employees' professional group, level, position and responsibilities. It is important to note that any supplements established for those only working on site must be included, which may increase the cost.
- **Prevent** all types of direct and indirect **discrimination**, particularly gender discrimination. Companies must also take RW employees into account when diagnosing, implementing, applying and assessing measures and plans on equality, prevention of harassment and protection of victims of gender violence.
- Adopt measures to ensure the employees' **effective participation in training** in equal conditions with employees on site, attending insofar as possible to the characteristics of their remote work. Companies must also ensure that employees have the necessary prior training to properly work from home, and that they have technical assistance.
- Inform employees in writing of the possibilities for **promotions** to positions on site and RW.
- Faithfully record their **worked hours**, including their clock in and clock out times.
- Allow RW employees to **flexibilise** their work hours within the limits agreed in the RW agreement and the collective bargaining agreement. Note that the law does not grant employees a subjective right to flexibilise their work hours, but rather to activate what was agreed individually or collectively. However, the company must justify any refusals, especially if the employee claims a need to balance family and work life.

- Guarantee employees the right to **digital disconnection**, preparing a policy in which the workers' representatives must have a say.

The rule repeats an obligation that has been in force since 2018, but it adds a qualification that is extremely important because of its explicit nature: collective bargaining may determine the possible extraordinary circumstances in which the right to disconnection may be adjusted.

To establish, with participation from the workers' representatives, rules for using digital devices. Even though these rules may already be in place in the company, now employees cannot be forced to use their personal devices to work, but they may be allowed to a personal use of the devices provided by the company for RW.

- Issue **data protection and information security instructions** that apply specifically to RW. There must be participation by the workers' representatives.
- Adapt the **risk assessment** and planning of the preventive activity. The assessment only needs to cover the specified work area. When a visit is required, a written report justifying it must be sent to the employee and the worker representatives. For visits to the homes of employees or other private individuals, permission from the employee must be granted. If permission is not granted, then the company may conduct the preventive activity based on the information provided by the employee, in accordance with the instructions from the prevention department.

The law says nothing about **workplace accidents**, so the general rule of assumption applies regarding working hours and work area. Since disputes will probably arise when it comes to delimiting the specific work area within the location selected by the employee, this should be specified as much as possible in the RW agreement.

- Provide the **workers' representatives** the tools they need to represent the employees, including access to communications and the electronic addresses used in the company and the

implementation of the virtual bulletin board, where compatible with the RW format.

Lastly, it is important to bear in mind that implementing RW in a company may result in a change in how the company's work is organised. Therefore, a preliminary report must be provided by the Workers' Committee.

Collective bargaining options

The law grants plenty of space to collective bargaining, although the degree to which the agreements pick up the gauntlet remains to be seen. Company agreements may no doubt be an interesting instrument for fine tuning the conditions for RW, adapting it to the specific needs of the productive organisation in which it is implemented.

For the time being, collective bargaining is invited to intervene in any questions it feels need to be regulated, especially in the following aspects:

- Identifying activities, positions and duties that may be performed by RW.
- Establishing the conditions for accessing and performing RW, including the maximum duration.
- Adding content to the RW agreement.
- Establishing the terms in which a personal use of any company provided devices may be allowed.
- Establishing minimum on-site workdays.
- Regulating the possibility of switching back.
- Setting a percentage or reference period shorter than the legal limits to determine when an employee is a regular RW employee.
- Establishing a percentage for on-site work in training contracts that is different than the percentage specified in the law, except for contracts with minors.
- Determining the extraordinary circumstances where the right to digital disconnection may be adjusted.

Pre-existing RW situation

For cases where employees are already working from home when the Royal Decree Law comes into force, various scenarios are distinguished:

- 1) **If there is no collective bargaining agreement or convention on RW conditions:** the law will apply as of 13

October. From that date, companies and employees will have three months to sign a RW agreement.

- 2) **If there is a collective bargaining agreement or convention on RW conditions that specifies a duration:** the law applies from the moment when the agreement or convention is terminated. From that date, companies and employees will have three months to sign a RW agreement.
- 3) **If there is a collective bargaining agreement or convention on RW conditions that does not specify a duration:** the law will apply after one year since it was published in the BOE, although the parties to the collective bargaining agreement or convention may extend this period up to a maximum of three years. From that date, companies and employees will have three months to sign a RW agreement.

Particularities in the case of exceptional RW due to COVID

This regulation does not apply to RW exceptional measures provided for by section 5 of Royal Decree Law 8/2020 (which sets RW as a priority) and to health contention measures due to COVID-19, for as long as they are kept in place.

For these situations, the Royal Decree Law indicates that ordinary labour regulations will continue to apply, although companies will be required to provide employees the media, equipment, tools and consumables they need to work remotely, along with any necessary maintenance.

With regard to compensation for expenses incurred by employees, the law entrusts collective bargaining to establish, if applicable, “the form of compensation” for any expenses that have not yet been compensated.

It is good news that, at least in part, this Royal Decree Law does not apply to the circumstances arising from the health crisis, because it was designed with an eye to situations of stability and structural commitment to a remote working system. It leaves little margin for quick and flexible reaction to urgent situations.

Nevertheless, it is important to bear in mind that it does not provide exoneration from compliance with basic labour obligations, as the ordinary legislation the Royal Decree Law 8/2020 referred to for these cases envisages a fair amount of the rights in it for all employees in essential matters.

Other provisions

In addition to regulating RW, the Royal Decree Law 28/2020 also contains provisions on other social/labour, tax and administrative matters. This includes the extension of the Plan MECUIDA (which we discussed in our “Beyond the headlines” labour newsletter of this month) up to 31 January. It also keeps in place the classification of COVID infections by healthcare and social healthcare personnel as occupational accidents, together with temporary leave for employees who need to be confined and who are not allowed in and out of their cities to go to work. It also modifies the procedure for the basic minimum income to be granted.

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