Freshfields Bruckhaus Deringer

Briefing

Spanish labour market reform

February 2012

Summary

The eagerly anticipated Spanish labour market law reform came into force on 12 February 2012. It is a significant reform that makes substantial changes to Spanish employment legislation, shifting to a degree the balance of power between employer and employee representatives.

This briefing will be of particular interest to HR and legal teams with subsidiaries in Spain, as it opens several new possibilities for the management of employment costs in Spain.

For further information please contact

Raquel Flórez
Partner
T +34 91 700 3722
E raquel.florez@freshfields.com

Introduction

The new labour market law reform entered into force on 12 February 2012, and it has introduced substantial changes in the employment legislation. Royal Decree Law 3/2012, of 10 February, on urgent measures for the reform of the employment market involves a substantial change in the balance of power between employer and unions.

The legislation allows wider changes to employment terms and conditions, including those set out in collective bargaining agreements. The aim is to improve internal flexibility and make it easier to show fair grounds for redundancy. In addition, it changes the procedure on collective redundancies, which will no longer require prior approval from the employment authorities.

Measures to improve internal flexibility

One of the main goals of the Royal Decree Law (RDL) is to improve companies' internal flexibility as an alternative to termination of employment agreements.

The measures set out below are now in force.

Professional classification

The RDL has removed the reference to professional categories, so that now the classification will be in 'professional groups' only. This provides wider flexibility to employers in terms of changes to functions without giving rise to substantial changes to terms and conditions.

Working time

The employer may unevenly distribute 5 per cent of the working day throughout the year. Until now, this required provision in the collective agreement or an agreement with employee representatives.

Changes to terms and conditions of employment

The employer may implement more easily both substantial modifications of employment conditions or geographical mobility since the necessary justifying economical, technical, organisational or production reasons (ETO reasons) for those modifications are now lighter.

Justifying reasons to implement substantial modifications include those related to competitiveness, productivity, etc, but there is no need to show evidence on the future effects of these changes.

In addition, the RDL has added the option of reducing salaries by way of substantial modification of employment conditions.

The provision stating that employees may refuse the substantial modification and/or the transfer and ask for the termination of the employment agreement being entitled to receive a compensation of 20 days of salary per year of service up to nine or 12 monthly instalments remains (extending the grounds that may justify it).

The RDL also clarifies the characterisation of a substantial change as collective or non-collective, which now depends exclusively on the number of employees affected by the measure.

Temporary suspension or working time reduction

Prior administrative approval has been removed for the suspension of employment agreements and/or working time reduction due to ETO reasons (regardless of the number of employees affected).

However, the consultation period with employee representatives in the event of suspension of employment agreements and/or working time reduction remains in force.

In addition, if the employer agrees to maintain, for at least one year, the employment of affected employees, the company might benefit from a social security discount (*bonificación*) up to 50 per cent of employer's social security contributions accrued by employees affected by the suspension and/or working time reduction.

If the company implements unfair dismissals and/or collective redundancies affecting employment agreements to which social security discounts have been applied, it will lose 12 months' worth of the discounts.

Employees who have been affected by suspension and/or working time reduction measures, and that are later made redundant, will have the right to recover the

time consumed from their unemployment benefit up to 180 days (provided that some temporal and particular conditions are met).

Collective negotiation

Non-application of the content of the applicable collective bargaining agreement

The general rule that all employers and employees included in the scope of collective bargaining agreements are bound by their content while they are in force remains the same under the RDL.

That said, an exception to this general rule is introduced so that whenever there are ETO reasons, it will be possible to avoid the application of the terms and conditions set out in the relevant sector or company collective bargaining agreement, affecting the following:

- working time;
- working timetable and distribution of the working time;
- shifts;
- remuneration system and salary amount;
- work system and performance;
- functions exceeding the limits for functional mobility; and
- voluntary complementary payments over the social security statutory payments.

Such non-application of the above-mentioned conditions must be agreed between the company and its employee representatives through a consultation period of a maximum of 15 days.

The RDL defines ETO reasons as a persisting decrease in revenue or sales (see below), where a 'persisting decrease' means two consecutive quarters of decline (rather than three, as in the case of redundancies).

If an agreement is reached, it is understood that the ETO reasons are justified and the agreement may only be challenged before the employment courts if there has been fraud or abuse.

The agreement must clearly set out the new working conditions as well as their length, which in any case may not go beyond the date when a new collective bargaining agreement starts to be applicable to the company.

If no agreement is reached during the consultation period, the parties may submit the disagreement to the collective bargaining agreement commission (*Comisión paritaria*), which has seven days to issue a resolution. If the commission does not reach an agreement, then each party may use the mediation and arbitration mechanisms set out in the relevant collective bargaining agreement.

If no agreement is reached after the consultation period and if the parties did not submit the disagreement to the arbitration mechanisms (or these were not able to solve the discrepancy), then each party may submit it to the Collective Bargaining Agreements National Consultation Commission (*Comisión Consultiva Nacional de Convenios Colectivos*) or to its relevant regional entities.

These entities will issue their decision within 25 days, with the same effects as an agreement reached during the consultation period.

Collective bargaining agreements must include procedures for solving the discrepancies that may arise from the non-application of the terms and conditions of employment mentioned above.

Preferential application of the company collective bargaining agreement

In a change to the previous regulation, company collective bargaining agreements will have priority in their application over the relevant national or regional sector collective bargaining agreements as regards the following conditions:

- salary base amount and salary complements, including those related to the situation and results of the company;
- remuneration or compensation with time-off for overtime and remuneration of working shifts;
- working timetable and distribution of the working time, shifts and annual holidays planning;

- adaptation to the relevant company of the employees' professional classification;
- adaptation of the aspects of the different types of employment agreements attributed by the RDL to the company collective bargaining agreements;
- measures to favour conciliation between professional, family and personal life; and
- those subjects set out by statutory agreements and collective bargaining agreements.

Collective bargaining agreements that apply to a group of companies or companies linked by organisational or productive reasons will also enjoy such preferential application in the above-mentioned conditions.

In practice, company collective bargaining agreements are not very common in small and medium-sized companies. Therefore, in case these companies can't apply the terms and conditions set out in the relevant national or regional sector collective bargaining agreements, they will now have a chance to implement the procedure for the non-application of their content as explained in the previous section.

Term of collective bargaining agreements

Until the RDL entered into force, collective bargaining agreements that had reached their expiration date remained in force indefinitely if no new agreement was negotiatiated.

The application of an expired collective bargaining agreement is now limited. If two years have elapsed from the date the parties gave notice of the expiration of the previous collective bargaining agreement and no agreement was reached or no arbitration resolution was passed, then, unless agreed otherwise, the previous collective bargaining agreement will lose its effects. If this happens, either the relevant superior national or regional collective bargaining agreement or the Workers' Statute will apply.

For collective bargaining agreements whose expiration was communicated before the entry into force of the RDL on 12 February 2012, the two-year term will start from the date of entry into force of the RDL.

Termination of the employment relationship

The RDL substantially modifies the rules for the termination of the employment agreements, including new grounds for implementing objective terminations and reducing the statutory severance compensation in the event of unfair termination.

The main changes affecting termination of employment agreements are set out below.

Non-collective terminations

Objective dismissals

The RDL modifies some of the grounds for objective non-collective terminations, but not the statutory severance compensation, which amounts to 20 days of salary per year of service up to 12 months of salary.

The main changes are set out below.

Termination due to lack of adaptation to new technical development

The RDL sets out that before implementing an objective termination due to lack of adaptation to new technical development, the employer must provide the relevant employee with training aimed at helping him acquire the required skills. During the training, the employment relationship will be suspended and the employer must pay the employee his salary.

Termination may not be implemented for at least two months from the introduction of the development or the end of the training.

Termination due to justified but intermittent absence from work

The RDL sets out that the employer will be entitled to implement an objective dismissal when the non-attendance of an employee (although justified) amounts to 20 per cent of the working days within two consecutive months or 25 per cent within any four months in a 12-month period. There are certain justified absences that should not be taken into account (this remains unchanged).

The RDL eliminates the prior additional requirement that the total absenteeism within the company amounts to at least 5 per cent.

Termination due to economic, technical, organisational grounds or reasons linked to production

The RDL also clarifies the grounds for an ETO-based termination.

The RDL sets out that:

- economic grounds are accepted when from the analysis of the results of the company a negative economic situation arises (ie, if there are current or forecasted losses or a persisting decrease of revenue or sales volume). The RDL defines 'persisting' as three consecutive quarters;
- technical grounds are accepted if there are changes, among others, in the scope of the production means;
- organisational grounds are accepted if there are changes, among others, to the methods and systems of work of the staff; and
- reasons linked to production are accepted if there are changes in the demand for the company's products or services.

The existing reference to the need to justify that the economic measure had to be reasonable to achieve or improve the company's competitive position or that the organisational or technical reasons should contribute to preventing a downturn for the company, or to improving its position, is removed.

This means, in theory, that if the redundancy is challenged the court's assessment should be only about the actual existence of the grounds, without making forecasts on what the effects might have for the future.

Severance for unfair dismissal

The statutory severance compensation to be paid if the termination of the employment relationship is declared unfair is limited to 33 days of salary per year of service up to 24 months of salary.

Notwithstanding the above, for those employees whose employment agreements were in force at the time of the entry into force of the RDL, the severance compensation for unfair dismissal will (up to a maximum of 720 days of salary) be calculated as:

- 45 days of salary per year for the period of time between the employment start date and the date of entry into force of the RDL (ie 12 February 2012); and
- 33 days of salary per year from 12 February 2012 and the date of termination.

This limit will not be applicable when the calculation of the severance for the period before the entry into force of this RDL is higher than 720 days of salary, in which case the maximum severance will be the one applicable at the time of the entry into force of the RDL, without in any case exceeding 42 months of salary.

In addition, if the employee challenges the termination, the RDL also eliminates the obligation for the company to pay salaries accrued from date of termination until the date of notification of the resolution (*salarios de tramitación*) in the event of unfair terminations, except when:

- the employer chooses to reinstate the employee, instead of paying the statutory severance compensation; or
- when the employee is an employee representative.

The obligation for the employer to pay such salaries when the termination is declared null and void remains unchanged.

Finally, it is not clear to what extent a unilateral acknowledgement of unfairness without going to court will still be possible and, furthermore, the tax treatment of the severance payable in such a case.

Collective redundancies

The main (and more substantial) change is that the employment authorities will no longer need to authorise the collective redundancy.

In addition, the RDL also clarifies the grounds for a collective redundancy. In this regard, it is still necessary to show that there are ETO reasons that justify the terminations, but the RDL defines the scope of such ETO reasons (see above).

Procedure

The rest of the procedure for implementing collective redundancies is similar to the existing one. It is still necessary to:

- file an application form with the relevant employment authority;
- simultaneously notify the employee representatives; and
- open a consultation period with the employee representatives. If no employee representatives have been appointed, then consultation should be opened with the employees concerned by the collective redundancy. The law allows the unions (and the employers' associations) to be asked to carry out the consultation. This period should last a maximum of 30 days (or 15 days for companies with less than 50 employees).

This implies that, although the consultation period with employee representatives remains and the participation of the employment authorities at the first stage of the collective redundancy is still compulsory (and even the Labour Inspection must issue a report regarding the termination procedure), the employer, when the consultation procedure is over, will be entitled to implement the collective redundancy whether or not there is an agreement with the employee representatives. In addition, the reference to the consultation having to include a discussion on the grounds has also been removed.

As well as preparing a memorandum explaining the grounds for the redundancies, the list of employees and the envisaged date for the redundancies, it will now be necessary to set out the criteria used to choose the employees affected by the redundancies.

In addition to the existing priority for employee representatives, the collective bargaining agreement or agreement reached during the consultation period may now offer a right of priority to stay for specific employees, such as those with family burdens, those above a certain age or those with a disability.

When the collective redundancy affects more than 50 employees (and as long as it is not the result of an insolvency procedure), the company should provide each individual with external outplacement services from an authorised outplacement company for a minimum of six months. Failure to comply with this requirement will entitle the employees to ask for compliance, and may be considered as a very serious breach and subject to a fine (but will not affect the redundancy decision).

Until the entry into force of the RDL, it was key to reach an agreement with the employees' representatives on the terms and conditions of the terminations, since the employment authorities were reluctant to authorise collective redundancies that did not have an agreement between the employer and the employee representatives.

This implied that enhanced payments were not unusual. Unions were often able to reach agreements on amounts in excess of 45 days' pay per year of service. The final amount agreed (as well as whether there could be any other amounts) depended on the bargaining strength of the parties.

The RDL drastically modifies this. In this regard, although the statutory severance for objective terminations remains unchanged (ie, 20 days of salary per year of service up to 12 months of salary), in principle the fact that there is no need to obtain employment authority authorisation will likely reduce the cost of the severance terminations.

If the consultation procedures ends without agreement between the parties and the employer decides to implement the collective redundancy, the affected employees (as well as the employee representatives or the employment authorities) will be entitled to file a claim against the terminations within 20 working days of the notification from the employer of the end of the consultation procedure.

The works council or unions, as well as the affected employees and the employment authorities, may challenge the employer's decision if:

- there are no grounds for the redundancy;
- the procedure has not been duly followed; or
- there has been fraud or abuse of law.

A challenge by the works council or unions will freeze any individual claims from the affected employee. If any employee challenges the decision when there has been an agreement with the works council or unions, then these should be brought to court as defendants as well.

This procedure will be dealt with extreme urgency by the employment courts, which will be declared:

- adjusted to law: if, provided that the procedure (consultation period) has been duly followed, the company can show sufficient grounds;
- null and void: if the due procedure has not been followed; or
- not adjusted to law: if the procedure has been followed but the company cannot show sufficient grounds for the termination.

The RDL sets out that if a company employing more than 500 employees (or that forms part of a group of companies employing over 500 employees) that has made a profit during the two fiscal years before the collective redundancy implements a collective redundancy that includes employees aged 50 or older, it must make an economic contribution towards the cost of the unemployment benefits of the employees affected.

In addition, the RDL also sets out that those companies that had made a profit and had implemented collective redundancies authorised by the public authorities will also have to make the economic contribution if the collective redundancies have affected 100 or more employees.

Other changes regarding termination

Guarantee Salary Fund (FOGASA)
The Guarantee Salary Fund will only cover a part of the statutory severance (in particular, for an amount of eight days of salary per year of service) in the event of fair objective dismissals implemented by companies of less than 25 employees.

Application of the objective terminations within the public sector
Public sector entities will be bound by the regulation on objective terminations as set out above.

The RDL sets out that economic grounds will be accepted when from the analysis of the results there is a persisting budgetary inadequacy.

Termination of directors and executives within the public sector
The RDL sets out that public sector directors and executives may be terminated by paying a severance that in no case may exceed an amount equivalent to seven days of cash salary per year of service up to a maximum of six months of salary.

Terminated directors or executives who are government employees (*funcionarios*), will receive no severance since they will have the chance to be reinstated to their former public position.

New employment agreement for entrepreneurs

A new type of employment agreement is set out to support 'entrepreneurs', ie entities with less than 50 employees. The agreement will be indefinite and subject to the standard form to be provided.

This agreement will be the same as the ordinary indefinite agreement, with one (key) difference: it will be possible to stipulate a trial period of up to a year. In practice, this means that the employer will have one year to terminate the agreement without the need to justify the grounds for the termination (other than showing that it is not discriminatory).

Additional rules for financial entities

The RDL also sets out certain rules for individuals rendering services to credit entities that have received financial support or are controlled by the Fund for Orderly Bank Restructuring (FROB). In particular, the RDL sets out:

- a cap for severance for termination, which shall not exceed: (i) twice the maximum fixed remuneration for executive chairpersons, managing directors and executives (under the Financial Reform RDL (as explained below)); or (ii) an amount equal to two years of the agreed fixed remuneration. As an exception, the Bank of Spain may leave (i) above without application in relation to directors or managers who have been engaged after the FROB invests or gives support to the relevant entity;
- the employment or service agreements of the individuals in board or executive positions of these entities may be validly terminated (without any right to compensation) if they are sanctioned for serious breaches committed by the relevant entity; and
- if the individuals in board or executive positions of these entities are suspended under the banking rules or substituted provisionally under the FROB rules, their employment agreement may also be suspended (with no right to receive remuneration) for the same period of time.

The rules of the RDL add up to the new legislation on the reorganisation of the financial sector (*Real Decreto Ley 2/2012* or Financial Reform RDL), which came into force on 4 February 2012. The Financial Reform RDL introduced strict limitations to remuneration of directors and executives of entities in which the FROB has a majority stake or that have received FROB support.

Under the Financial Reform RDL, these entities must sign service agreements with their executives that include the minimum content required by the Ministry of Economy, and that also comply with the rules set out below.

- Limits to remuneration to be set out by reference to the average of comparable entities, and subject to the following caps:
  - directors (other than as set out below) of entities in which the FROB has a majority stake: €50,000 (in total, including variable);
  - directors (other than as set out below) of entities in which the FROB does not have a majority stake: €100,000 (in total, including variable);
  - fixed remuneration of executive chairpersons, managing directors and executives of entities in which the FROB has a majority stake: €300,000; and
  - fixed remuneration of executive chairpersons, managing directors and executives of entities in which the FROB does not have a majority stake: €600,000.

All remuneration received from any entity belonging to the relevant group should be taken into account in the calculation. In addition, the fixed remuneration of executive chairpersons and managing directors includes amounts received for belonging to the board of directors and any committees or bodies depending from them.

- Limits to variable remuneration, set out as a percentage of fixed remuneration, by reference to that applied to comparable groups of individuals of similar entities, and subject to the deferral and performance rules set out above.

In addition, directors and executives engaged by entities in which the FROB has a majority stake will not be entitled to any variable compensation or contributions to pension funds in 2012. If the relevant entity has received support from the FROB, the variable remuneration of directors and executives will be subject to three-year deferral and will only be paid if results justify it, as confirmed by the Bank of Spain.

Other changes

The RDL also includes additional measures, which are briefly mentioned below:

- temporary employment agencies will be entitled to operate as well as job agencies;
- a specific right to training is set out for employees; and
- to promote employment, there are various changes to existing types of employment agreements and provisions for social security benefits.

Comment

We have always said that employment law is biased towards the employee, but this seems to be changing with the new labour market reform. Power has now somewhat shifted to employers, who now have the ability to make significant changes to terms and conditions, relocate employees or even make redundancies. It remains to be seen how all this will be interpreted by the employment courts, where the principle 'in case of doubt, favour the employee' still applies (and seems to be construed very widely).

In any case, this is a good chance for employers to review their employment cost structure, and see to what extent this may be adjusted to the current (adverse) circumstances.

freshfields.com