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News Alert

Labour Law Department

PUBLICATION OF ROYAL DECREE 28/2020 OF 22 SEPTEMBER ON REMOTE WORK.

Royal Decree 28/2020, published in the Official State Gazette on 23 September (hereinafter, “RD-Ley 28/2020”) regulates working remotely, including telecommuting, which is particularly relevant in today’s world compared to traditional business organisation, and allows new ways of working based on flexibility and balancing professional and family life.

The main developments of the above-mentioned standard are summarised below:

1. SCOPE OF APPLICATION AND LIMITATIONS ON REMOTE WORK

Applies to the employment relationships described in Article 1.1 of the Workers’ Statute that are developed remotely on a regular basis, i.e., a minimum of **thirty percent of the work day**, or the equivalent proportional percentage depending on the duration of the employment agreement, is provided within a **reference period of three months**.

In employment contracts entered into with minors, and in training and apprenticeship contracts, only remote working agreements that guarantee a percentage of at least fifty percent on-site services, notwithstanding the telematic development, where appropriate, of theoretical training related to the latter, shall be admissible.

2. DEFINITIONS

- **Remote working:** form of organising or performing work-related activity whereby this is done in the home of the worker or in the place of his/her choosing during all or part of their workday, on a regular basis.
- **Tele:** remote work performed through the exclusive or prevalent use of computer, telematic and telecommunication means and systems.
- **On-site work:** work that is performed at the workplace or at the place determined by the company.

3. EQUAL TREATMENT AND OPPORTUNITY AND NON-DISCRIMINATION

Remote workers:

- They will have the same rights as if they provided services at the company's work site (except rights that are inherent to the work performed on-site, whereby none of their working conditions can be affected, including remuneration, job stability, work hours, training and professional promotion).
- The right to receive, as a minimum, **the total remuneration established in accordance with their professional group, level, position and duties**, as well as any **supplements established for workers who only provide on-site services**, particularly those related to personal conditions, the results of the company or the job characteristics.
- The agreed upon conditions may not be affected or altered, particularly with regard to work hours or remuneration, due to technical or other difficulties not attributable to the worker.

Companies undertake to avoid any direct or indirect discrimination, particularly on the basis of sex, against workers who provide services remotely.

Similarly, companies shall take into account telecommuters or remote workers and their employment characteristics in the diagnosis, implementation, application, monitoring and assessment of equality measures and plans.

- Companies should take into account the particularities of remote working, especially telecommuting, in the design and implementation of measures against sexual harassment, harassment based on sex, harassment based on discrimination and harassment in the workplace.
- Individuals who work remotely have the same rights as on-site workers with regard to work-life balance and co-responsibility, including the right to adapt work day so that work does not interfere with personal and family life.

4. THE REMOTE WORK AGREEMENT

a) Volunteer nature of remote work

Working remotely shall be voluntary for the parties and shall require the signing of the remote work agreement, which may not be imposed, all notwithstanding the right to working remotely that may be recognised under law or by collective bargaining.

The refusal of a worker, the exercise of reversibility of on-site work, and difficulties in terms of the proper development of remote work activities that are exclusively related to the change from on-site work to another system that includes remote work shall not be causes that justify the termination of the employment relationship or substantial modification of working conditions.

The decision to work remotely rather than on-site will be reversible for the company and the worker. Such reversibility may be exercised under the terms set out in the collective bargaining agreement or, failing that, under the terms set out in the remote work agreement.

b) Formal obligations of remote work agreements

These must be done in writing before the remote work begins and may be incorporated in the initial employment agreement or done at a later stage.

The company must provide the workers' legal representatives, within 10 days, with a copy of all the remote working agreements established and their updates, excluding any data that could affect personal privacy.

This copy will then be sent to the employment office. Where there is no legal representation of the workers, a basic copy should also be made and sent to the employment office.

c) Content of the remote work agreement

The following shall be the minimum mandatory content of the remote work agreement, notwithstanding related in collective agreements or arrangements:

- a) Inventory of the means, equipment and tools required for the development of concerted remote work, including consumables and movable elements, as well as their useful life or maximum period for renewal.
- b) List of expenses that the worker may have because he or she is working remotely, as well as the form of quantification of the compensation that the company is required to pay and the time and form in which it must be delivered, which shall correspond, where applicable, to the provision included in the applicable collective agreement or arrangement.
- c) Work hours of the worker and within them, if applicable, the rules on availability.
- d) Percentage and breakdown of on-site and remote work, where applicable.
- e) Work site of the company to which the remote worker is assigned and where, if applicable, he or she will spend part of their work day on-site.
- f) Remote workplace chosen by the worker.
- g) Duration of notice periods for the exercise of reversibility situations, where applicable.
- h) Means of corporate control of the activity.
- i) Procedure to be followed in the event of technical difficulties preventing the normal development of remote work.
- j) Instructions issued by the company, with the participation of the legal representation of the workers, regarding data protection, specifically applicable to remote work.
- k) Instructions issued by the company, after informing the workers' legal representatives, on information security, specifically applicable to remote work.
- l) Duration of the remote work agreement.

d) Modification of remote work agreements

The modification of conditions established in the remote work agreement, including the percentage of on-site work, must be the object of an agreement between the company and the worker and must be formalised in writing prior to its application. Such modification will be brought to the attention of the legal representation of the workers.

Individuals who work remotely from the beginning of the employment relationship during their entire workday will have priority to occupy positions performed totally or partially on-site.

Collective bargaining agreements or arrangements may establish the mechanisms and criteria by which an individual carrying out on-site work may switch to remote work or vice versa, as well as preferences related to certain circumstances, such as training, promotion and stability in the employment of persons with functional diversity or with specific risks, the existence of multiple employment or multiple activities or the concurrence of certain personal or family circumstances, as well as the order of priorities established in this Royal Decree-Law.

In the design of these mechanisms, the perpetuation of gender roles and stereotypes should be avoided and the promotion of co-responsibility between women and men should be taken into account. The equality plan must be identified and managed by the company.

5. RIGHTS OF REMOTE WORKERS

Professional training	Right to training	The right to effective participation in training actions, on terms equivalent to those of persons providing services at the company offices. The company will have to guarantee individuals who work remotely the necessary training for the adequate development of their activity both at the moment of formalising the remote work agreement and when changes occur in the means or technologies used.
	Right to professional promotion.	The right, under the same terms as those who provide on-site services, to professional promotion, where the company must inform the them, expressly and in writing, of any possibilities of promotion that may arise, whether for on-site or remote positions to develop their career.
Rights related to the provision and maintenance of work media and to the payment and compensation of expenses	Right to adequate provision and maintenance of work media, equipment and tools	The right to the provision and adequate maintenance by the company of all means, equipment and tools necessary for the development of the activity, in accordance with the inventory incorporated in the individual agreement.
	Right to payment and compensation of	The development of remote work must be paid or

	expenses:	compensated by the company and may not involve the assumption by the worker of expenses related to equipment, tools and media related to the development of their work activities. Collective bargaining agreements or arrangements may establish the mechanism for the determination and compensation or payment of these costs.
Rights with impact on work hours	Right to flexible hours	The hours established for the provision of services may be made more flexible, in accordance with the terms set out in the remote work agreement and collective bargaining, while respecting mandatory availability times and regulations on working and rest time.
	Right to accurate recording of work hours	The work hours recording system should accurately reflect the time spent by the remote worker on the job, without prejudice to flexible working hours, and should include, <i>inter alia</i> , the start and end of the work day.
Right to work risk prevention	Right to appropriate safety and health protection in the workplace	Risk assessment and planning of preventive activities. Risk assessment and planning of preventive activities in remote work should take into account the characteristic risks of this type of work, paying particular attention to psychosocial, ergonomic and organisational factors. In particular, the breakdown of the work day, hours of availability and guarantee of breaks and disconnections throughout the day must be taken into account. Risk assessment should only be carried out in the area where the services are to be provided and should not extend to other areas of the home or place chosen for the development of remote work. When obtaining this information requires that the individual responsible for prevention visit the site where, in accordance with the agreement referred to in Article 7, the remote work is performed, a written report justifying this must be issued and given to the worker and the prevention delegates. This visit will require, in any case, the permission of the worker, if it is at their home or that of an individual third party. If such permission is not granted, the preventive activities

		may be performed by the company on the basis of determining the risks arising from the information collected from the worker according to the instructions of the prevention service.
Rights related to the use of digital media	Right to privacy and data protection	The use of telematic means and the control of work performance using automatic devices will adequately guarantee the right to privacy and data protection, in accordance with the principles of suitability, necessity and proportionality of the means used. The company may not require the installation of programs or applications on devices owned by the worker, or the use of these devices in the development of remote work. Companies must establish criteria for the use of digital devices while respecting minimum standards for the protection of their privacy in accordance with social customs and legally and constitutionally recognised rights. The legal representation of workers must be involved in its preparation. Collective agreements or arrangements may specify the terms under which workers may use, for personal reasons, the computer equipment provided by the company for the development of remote work, taking into account the social uses of such means and the particularities of remote work.
	Right to disconnect digitally	Individuals who work remotely, particularly those who telecommute, have the right to disconnect digitally outside their normal work hours. The corporate duty to guarantee disconnection entails a limitation on the use of technological means of business communication and work during rest periods, as well as respect for the maximum duration of the work day and any limits and precautions regarding the work day established under applicable legal or conventional regulations. The company, after hearing the legal representation of the workers, will draw up an internal policy aimed at workers, including those in management positions, in which they will define the modalities for exercising the right to disconnect and training and awareness-raising actions for staff on the reasonable use of technological tools to avoid the risk of computer fatigue.

		Collective labour arrangements or agreements may establish appropriate means and measures to ensure effective exercise of the right to disconnection during remote work and appropriate organisation of the workday that is consistent with the rest-time guarantee.
Collective rights		Remote workers shall have the right to exercise their rights of a collective nature with the same content and scope as the rest of the workers at the site they are assigned. Collective bargaining may establish the conditions for guaranteeing the exercise of the collective rights of remote workers, taking into account the specific features of their provision, with full respect for the principle of equal treatment and opportunities between the remote worker and the individual performing tasks at the company's establishment. <u>The company must provide the legal representatives of workers with the necessary elements for the development of their representative activity, including access to communications and electronic addresses for use in the company and the implementation of the virtual bulletin board, when this is compatible with the form of remote work.</u> It shall be ensured that remote workers may participate effectively in activities organised or arranged by their legal representation or by other individuals working in defence of their employment interests, in particular their effective on-site participation in the exercise of voting rights in the selection of legal representatives.

6. ORGANISATION, GOVERNANCE AND BUSINESS CONTROL POWERS

- Data protection and information security:

In the development of remote work, workers must follow the instructions established by the company within the framework of legislation on data protection, with the participation of the workers' legal representation.

Workers must follow the instructions on information security specifically provided by the company, after informing their legal representative, in the area of remote work.

- Conditions and instructions for use and maintenance of computer equipment or tools: Workers must comply with the conditions and instructions for use and conservation established in the company in relation to computer equipment or tools, within the terms that, where appropriate, are established in the collective bargaining.
- Business control powers: The company may adopt certain measures it deems most appropriate for monitoring and control to verify the worker's compliance with his or her work obligations and duties, including the use of telematic means, taking into account, in their adoption and application, any due consideration of his or her dignity and taking into account, where appropriate, the real capacity of workers with disabilities.

7. ADDITIONAL PROVISIONS

a) Remote work in collective bargaining:

Collective arrangements or agreements may:

- Establish, in view of the specific nature of the activity in the corresponding field, the identification of jobs and functions that can be carried out through remote work, the conditions of access and development of work activity under this modality, the maximum duration of remote work, as well as additional content in the remote work agreement and any other issues considered necessary to regulate.
- Regulate a minimum work day for remote working, the exercise of reversibility to work at the company's premises, a percentage or reference period lower than those set out in this Royal Decree-Law for the purposes of qualifying this modality of execution of work activity as "regular", a percentage of on-site work in training contracts different from that set out therein, provided that they are not entered into with minors, as well as the possible extraordinary circumstances of modulation of the right to disconnection.

b) Remote working situations existing at the time of entry into force of the royal decree.

- Remote work as a measure of health containment resulting from COVID-19. Article 5 of Royal Decree Law 8/2020, or as a consequence of COVID-19 sanitary control measures, will continue to apply to remote work, and as long as these measures are maintained, ordinary labour regulations will continue to apply.

In any case, companies will be required to provide the means, equipment, tools and consumables necessary for the development of remote work, as well as the necessary maintenance.

Where appropriate, collective bargaining shall establish the form of compensation for expenses incurred by the worker in this form of remote work, if they exist and have not already been compensated.

- RD-Law 28/2020 will be fully applicable to current labour relations that were regulated, prior to its publication, by collective arrangements or arrangements on conditions for the provision of remote services, from the moment these cease to be in force.
- If the arrangements or agreements referred to in the previous section do not provide for a period of duration, the rule will be fully applicable after one year from its publication in the "Official State Gazette", unless the parties to these agreements expressly agree to a longer period, which may be up to three years.

- Under no circumstances may the application of RD-Law 28/2020 law result in the compensation, absorption or disappearance of any more beneficial rights or conditions enjoyed by individuals who previously provided their services remotely, which will be reflected in the remote work agreement, in accordance with the provisions of Article 7.
- The remote work agreement regulated in the second section of chapter II of RD-Law 28/2020 must be formalised **within three months of this Royal Decree-Law becoming applicable to the specific employment relationship**. Within the same period, adaptations or modifications must be made to the remote work agreements of an individual nature in force on the date of publication of RD-Law 28/2020, which do not derive from collective arrangements or agreements.

8. OTHER ISSUES

- Extension of PLAN MECUIDA (Article 6 of Royal Decree-ley 8/2020) until 31 January 2021.
- Amendment of the revised text of the Law on Offences and Penalties in Social Order, approved by Royal Legislative Decree 5/2000, of 4 August.

Article 7.1 of the revised text of the Law on Offences and Penalties in Social Order, approved by Royal Legislative Decree 5/2000, of 4 August, is amended to read as follows: *“1. Not formalising an employment agreement in writing when this requirement is enforceable or has been requested by the worker, or not formalising the remote work agreement in the terms and with the legal and conventional requirements.”*