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News Alert

Employment Law Department.

DEVELOPMENTS ON REMOTE WORKING AND EMPLOYMENT PENALTIES.

Below is a summary of the main new developments of Law 10/2021, of 9 July, on remote working (hereinafter, "Law 10/2021"), which essentially maintains the same content of Royal Decree-Law 28/2020, of 22 September, except for certain specifications regarding risk assessments and the address of reference for the purpose of considering the competent Employment Authority.

It also summarises the amendments made by the aforementioned Law – in terms of the amount of penalties to be imposed within the employment sphere – to the Law on Infringements and Penalties in the Social Order.

REMOTE WORKING.

1. SCOPE OF APPLICATION.

The standard on employment relationships regulated by Article 1.1 of the Workers' Statute will also be applied to employment relations conducted remotely on a regular basis.

Under this law, work conducted remotely on a regular basis is understood as work performed within a reference period of three months, at a minimum of 30% of the work day, or the equivalent proportional percentage depending on the duration of the employment contract.

2. DEFINITIONS.

The following definitions are maintained:

- "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.
- "Teleworking": remote work performed through the exclusive or prevalent use of computer, telematic and telecommunications means and systems.
- "On-site work": work that is performed at the workplace or at the place determined by the company.

3. LIMITATIONS IN REMOTE WORKING.

Only remote working agreements that guarantee a percentage of at least 50% on-site services, notwithstanding the use of telematic means, where appropriate, of theoretical training related to the following work contracts, shall be admissible:

- Contracts entered into with minors.

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- Internship contracts.
 - Contracts for training and learning.

4. EQUAL TREATMENT, EQUAL OPPORTUNITIES AND NON-DISCRIMINATION.

Workers who perform their work under remote working arrangements will have the same rights as if they had provided services at the company's workplace, except for those rights inherent in carrying out work in person. Workers in remote working arrangements cannot suffer prejudice in any of their working conditions, including remuneration, job stability, working time, training and professional promotion.

Notwithstanding the foregoing, people who carry out all or part of their work remotely, shall be entitled 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.

Likewise, they must not suffer prejudice or changes to the agreed working conditions, particularly in terms of working time or remuneration, caused by any difficulties, technical or otherwise, that may arise in the teleworking situation through no fault of the worker.

Companies must avoid any direct or indirect discrimination against any worker who provides remote services, ensuring equal treatment and the provision of support, and shall implement all reasonable measures deemed appropriate.

Companies must take into account the aforementioned teleworkers or workers providing remote services and their work characteristics in the diagnosis, implementation, application, monitoring and evaluation of measures and equality plans, as well as in the configuration and application of measures against sexual harassment, harassment on the basis of sex, harassment for discriminatory reasons and harassment at work.

Workers in remote working arrangements will also have the same rights as on-site workers with regard to work-life balance and co-responsibility, including the right to adapt the working day, as established in article 34.8 of the Workers' Statute, so that work does not interfere with personal and family life.

5. VOLUNTARY REMOTE WORKING AND AGREEMENT TO WORK REMOTELY.

Remote work must be voluntary for both the worker and the Company and requires the execution of a written remote work agreement, which may form part of the initial contract or be incorporated at a later date, and cannot be imposed through a substantial modification of the working conditions.

The following shall not be justified grounds for the termination of the employment relationship or the substantial modification of the working conditions:

- The refusal of the worker to work remotely.
- The decision to go back to onsite work.
- Work performance difficulties that are exclusively related to the change from providing onsite work to that involving remote work.

The decision to move to remote working from onsite working will be reversible for the company, and the reversibility may be exercised by the worker under the terms established in the collective bargaining agreement or, failing that, under the terms established in the remote working agreement provided for in the aforementioned law.

6. FORMAL OBLIGATIONS OF REMOTE WORKING AGREEMENTS.

The remote working agreement must be in writing and implemented prior to the start of the remote work.

If the workers have legal representatives:

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

A copy must also be sent to the employment office.

If the workers do not have legal representatives:

A basic copy must also be formalised and sent to the employment office.

7. CONTENT OF THE REMOTE WORKING AGREEMENT.

The following shall be the minimum mandatory content of the agreement, notwithstanding the provisions of the collective agreements or arrangements:

- Inventory of the means, equipment and tools required for the remote work, including consumables and movable elements, as well as their useful life or maximum period for renewal.
- List of expenses workers may incur while working remotely, as well as the form of quantification of the remuneration 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.
- Working hours of the worker and within them, if applicable, the rules on availability.
- Percentage and breakdown of on-site and remote work, where applicable.
- Workplace of the company to which the remote worker is assigned and where, if applicable, he or she will carry out part of their on-site working day.
- Remote work location chosen by the worker to carry out the remote work.
- Duration of notice periods for the exercise of reversibility situations, where applicable.
- Means used by the company to control remote work.
- Procedure to be followed in the event of technical difficulties preventing the normal completion of remote work.
- Instructions issued by the company, with the participation of the legal representation of the workers, regarding data protection, specifically applicable to remote working.
- Instructions issued by the company, after informing the workers' legal representatives, on information security, specifically applicable to remote working.
- Duration of the remote working agreement.

8. MODIFICATION OF THE REMOTE WORKING AGREEMENT AND PRIORITISATION.

8.1. Modification of the agreement:

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

8.2. Prioritisation:

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

company must inform such remote workers and the legal representatives of the workers of vacant jobs that are available 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 the aforementioned 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.

9. RIGHT TO TRAINING.

Companies must implement the necessary measures to ensure the effective participation of workers who work remotely in the training activities in an equivalent manner to people working onsite, adapting the training, insofar as possible, to the characteristics of their remote services.

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.

10. RIGHT TO PROFESSIONAL PROMOTION.

People who work remotely must have the same right to professional promotion as those who provide on-site services, and the company must inform remote workers, expressly and in writing, of any promotion opportunities that may arise, whether for on-site or remote-based positions.

11. RIGHT TO ADEQUATE PROVISION AND MAINTENANCE OF WORK MEDIA, EQUIPMENT AND TOOLS.

People who work remotely will have the right to adequate provision and maintenance by the company of all the means, equipment and tools required for their work activity, ensuring the required assistance in the event of technical difficulties, particularly in the case of teleworking.

In the case of workers with disabilities, the company will ensure that these means, equipment and tools, including digital ones, are universally accessible, to avoid any exclusion in this regard.

12. RIGHT TO PAYMENT AND REIMBURSEMENT OF EXPENSES.

Remote working expenses must be covered or reimbursed by the company and not by the worker. The rule has missed an opportunity to clarify many of the doubts that arose in this regard after the RD 28/2020 came into force.

Collective bargaining agreements or arrangements may establish the mechanism for the determination and reimbursement or payment of these costs.

13. RIGHT TO FLEXIBLE WORKING HOURS UNDER THE TERMS OF THE AGREEMENT.

In accordance with the terms set out in the remote working agreement and collective bargaining, while respecting mandatory availability times and regulations on working time and rest time, the remote worker may make the established working hours more flexible.

14. RIGHT TO ACCURATE RECORDING OF WORK HOURS.

The time recording system regulated in article 34.9 of the Workers' Statute, in accordance with the provisions of collective bargaining, should accurately reflect the time spent by the remote worker on the job, without prejudice to flexible working hours, and should include, inter alia, the start and end of the work day.

15. RISK ASSESSMENT AND PLANNING OF PREVENTIVE ACTIVITIES.

Risk assessment and planning of preventive actions in remote working should take into account the characteristic risks of this type of work, paying particular attention to psychosocial, ergonomic and organisational factors and effective accessibility to the work environment. 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.

The company must obtain all the information about the risks to which the remote worker is exposed by using a methodology that offers confidence with respect to its results, and provide the most appropriate protection measures in each case.

When the act of obtaining this information requires that an individual responsible for risk-prevention matters visit the site where the remote work is performed, a written report explaining this circumstance must be issued and given to the worker and the risk-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.

16. RIGHT TO PRIVACY AND DATA PROTECTION.

The right to privacy and data protection will be adequately guaranteed, in the terms established by law in accordance with the principles of suitability, necessity and proportionality of the means used.

The company shall not demand the installation of programs or applications on devices owned by the worker, or the use of these devices in carrying out their remote work. Likewise, 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.

17. RIGHT TO DIGITAL DISCONNECTION.

People who work remotely, particularly in telework, have the right to disconnect outside of working hours, both in terms of the limitation on the use of technological means of work and business communications 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 from the workers' Legal Representatives, shall draw up an internal policy aimed at the workers, including those who hold management positions. This should define the methods for exercising the right to disconnection and the training and awareness-raising actions of the personnel on the reasonable use of technological tools that avoids the risk of computer fatigue.

Collective Employment 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.

18. COLLECTIVE RIGHTS OF PEOPLE WORKING REMOTELY.

18.1. Rights of workers

Remote workers shall have the right to exercise their collective rights with the same content and scope as the rest of the workers in the work centre to which they are assigned.

Companies shall ensure 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.

18.2. Rights of the workers' legal representatives

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.

Companies must ensure that there are no obstacles to communication between remote workers and their legal representatives, as well as with the rest of the workers.

19. DATA PROTECTION AND INFORMATION SECURITY.

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

20. 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.

21. 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, their personal circumstances, such as being workers with disabilities.

22. REMOTE WORK IN COLLECTIVE BARGAINING.

Collective bargaining arrangements and 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.

They may also regulate a minimum work day for remote working, the exercise of the choice to return to work at the company's premises, a percentage or reference period lower than those set out in this 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.

23. ADDRESS FOR THE PURPOSE OF CONSIDERING THE COMPETENT EMPLOYMENT AUTHORITY AND THE APPLICABLE PUBLIC SERVICES AND PROGRAMMES FOR PROMOTING EMPLOYMENT.

A new aspect of this law establishes that, in remote work, the address of reference considered for the purposes of considering the competent Employment Authority and the applicable public services and programmes for the promotion of employment, shall be that which appears as such in the employment contract and, failing that, the address of the company or the physical workplace or centre.

24. ENTRY INTO FORCE:

In terms of the regulations regarding remote work, this Law will enter into force the day after its publication in the Official State Gazette (Boletín Oficial del Estado, BOE).

AMENDMENT OF THE REVISED TEXT OF THE LAW ON INFRINGEMENTS AND PENALTIES IN THE SOCIAL ORDER, APPROVED BY THE LEGISLATIVE ROYAL DECREE 5/2000, OF 4 AUGUST (LISOS).

The Law on Infringements and Penalties in the Social Order (Ley sobre Infracciones y Sanciones en el Orden Social, LISOS) is amended in terms of the amount of certain penalties. In this regard:

Infringements regarding Employment and employment relationships and in Social Security matters:

- For minor infringements, the lowest penalty amount is **from 70 to 150 euros (previously 60 to 125 euros)**; the medium penalty amount is **from 151 to 370 euros (previously 126 to 310 euros)**; and the highest penalty amount is **from 371 to 750 euros (previously 311 to 625 euros)**.
- For serious infringements, the lowest penalty amount is **from 751 to 1,500 euros (previously 626 to 1,250 euros)**, the medium penalty amount is **from 1,501 to 3,750 euros (previously**

1,251 to 3,125 euros); and the highest penalty amount is **from 3,751 to 7,500 euros (previously 3,126 to 6,250 euros)**.

- For very serious infringements, the lowest penalty amount is **from 7,501 to 30,000 euros (previously 6,251 to 25,000 euros)**; the medium penalty amount is **from 30,001 to 120,005 euros (previously 25,001 to 100,005 euros)**; and the highest penalty amount is **from 120,006 to 225,018 euros (previously 100,006 to 187,515 euros)**.

The penalties applied for the infringements indicated in Articles 22.2, 22.7 a), 22.16 and 23.1.a) shall be as follows:

- For the serious infringements described in Articles 22.2, 22.7 a) and 22.16, the lowest penalty amount is **from 3,750 to 7,500 euros (previously 3,126 to 6,250 euros)**; the medium penalty amount is **from 7,501 to 9,600 euros (previously 6,251 to 8,000 euros)**; and the highest penalty amount is **from 9,601 to 12,000 euros (previously 8,001 to 10,000 euros)**.
- For the very serious infringement described in Article 23.1.a), the lowest penalty amount is **from 12,001 to 30,000 euros (previously 10,001 to 25,000 euros)**; the medium penalty amount is **from 30,001 to 120,005 euros (previously 25,001 to 100,005 euros)**; and the highest penalty amount is **from 120,006 to 225,018 euros (previously 100,006 to 187,515 euros)**.

When an obstructed inspection is aimed at verifying the employment status of the workers providing services in a company and the breach of any obligations of the employer, the penalty amounts for infringements due to the obstruction of supervision by a Employment inspector, shall be as follows:

- For serious infringements, the lowest penalty amount is **from 3,750 to 7,500 euros (previously 3,126 to 6,250 euros)**; the medium penalty amount is **from 7,501 to 9,600 euros (previously 6,251 to 8,000 euros)**; and the highest penalty amount is **from 9,601 to 12,000 euros (previously 8,001 to 10,000 euros)**.
- For very serious infringements, the lowest penalty amount is **from 12,001 to 30,000 euros (previously 10,001 to 25,000 euros)**; the medium penalty amount is **from 30,001 to 120,005 euros (previously 25,001 to 100,005 euros)**; and the highest penalty amount is **from 120,006 to 225,018 euros (previously 100,006 to 187,515 euros)**.

Infringements in the area of occupational risk prevention:

- For minor infringements, the lowest penalty amount is **from 45 to 485 euros (previously 40 to 405 euros)**; the medium penalty amount is **from 486 to 975 euros (previously 406 to 815 euros)**; and the highest penalty amount is **from 976 to 2,450 euros (previously 816 to 2,045 euros)**.
- For serious infringements, the lowest penalty amount is **from 2,451 to 9,830 euros (previously 2,046 to 8,195 euros)**; the medium penalty amount is **from 9,831 to 24,585 euros (previously 8,196 to 20,490 euros)**; and the highest penalty amount is **from 24,586 to 49,180 euros (previously 20,491 to 40,985 euros)**.
- For very serious infringements, the lowest penalty amount is **from 49,181 to 196,745 euros (previously 40,986 to 163,955 euros)**; the medium penalty amount is **from 196,746 to 491,865**

euros (**previously 163,956 to 409,890 euros**); and the highest penalty amount is **from 491,866 to 983,736 euros (previously 409,891 to 819,780 euros)**.

Infringements in the area of cooperatives:

- **For minor infringements, the penalty amount is from 450 to 905 euros (previously: 375 to 755 euros).**
- **For serious infringements, the penalty amount is from 906 to 4,545 euros (previously: 756 to 3,790 euros).**
- **For very serious infringements, the penalty amount is from 4,546 to 45,504 euros (previously: 3,791 to 37,920 euros).**

Entry into force:

The amendment of the penalty amounts set out in the LISOS will enter into force on 1 October 2021.