

RocaJunyent Informs

Labour Law Department
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In the Official State Bulletin of 1 March 2023, three laws of interest were published, with direct impact on labour relations and the field of Social Security.

1. Organic Law 1/2023, of 28 February, amending Organic Law 2/2010, of 3 March, on sexual and reproductive health and the voluntary termination of pregnancy

This law, effective as of 2 March 2023, has the purpose of, amongst other aspects, i) guaranteeing fundamental rights in the area of sexual and reproductive health, ii) regulating the conditions of the voluntary termination of pregnancy and iii) preventing and responding to all manifestations of violence against women in the reproductive field. Focusing on its workplace-related content, we highlight the following:

It recognises **three new specific situations of temporary incapacity, due to common contingencies**, which will be **effective as of 1 June 2023**.

- A woman may find herself on work leave due to **secondary incapacitating menstruation**.¹
- The **termination of pregnancy**, be it voluntary or not, whilst she receives healthcare from the Public Health Service and is unfit for work.
- The period spanning between the **first day of the 39th week of pregnancy of the female employee until labour**.

In the particular situation of leave for secondary incapacitating menstruation, benefits shall be paid by the Social Security from the day of leave from work. In the particular situation of leave due to the termination of pregnancy, as well as in the particular situation of leave from the first day of the 39th week of pregnancy, the benefit shall be paid by the Social Security from the day after leave is taken from work, and the employer shall be responsible for the full salary corresponding to this day of leave.

In the new cases of leave for secondary incapacitating menstruation or termination of pregnancy, a minimum period of contribution shall not be required.

In the case of medical leave for secondary incapacitating menstruation, each process shall be considered as new, without being counted for the purposes of the maximum period of duration of temporary incapacity (365 days) and its possible extension (180 days).

The benefit shall be paid whilst the situation of leave is maintained. Nevertheless, in the particular situation of leave at the beginning of the 39th week of pregnancy, it shall be paid from the moment when work leave is initiated until the date of labour, unless the employee had previously initiated a situation of risk during the pregnancy, in which case the employee shall continue receiving the benefit corresponding to the aforementioned situation whilst it is maintained.

Foster care. The requirement that its duration cannot be less than a year in order to generate benefit entitlements is abolished. To this effect, the Royal Decree 295/2009, of 6 March, regulating childbirth and childcare benefits, and the article 45.1.d) of the Workers' Statute, regulating the causes of termination of employment contracts, are modified.

¹ Situation of temporary incapacity derived from dysmenorrhoea generated by a previously diagnosed condition.

2. Law 3/2023, of 28 February, on employment

It is effective as of 2 March 2023. The following changes are highlighted:

The amount corresponding to the minimum interprofessional wage (SMI) is immune to garnishments. Part 2 of article 27 of the Workers' Statute is modified, in order to establish that the SMI, in both its annual and monthly amount, cannot be garnished. For the purposes of determining the above, both the period of accrual and the method of calculation shall be kept in mind, whether or not the proration of additional payments is included, guaranteeing that the quantity that results in each case cannot be garnished.

In particular, if together with the monthly salary a bonus or additional pay is received, the maximum amount that cannot be garnished shall consist of double the amount of the monthly minimum interprofessional wage and, in the case that the monthly salary received is included in the proportional part of extra payments or bonuses, this limit shall consist of the value of the minimum interprofessional wage on an annual pro rata basis over twelve months.

Mandatory report of the Labour Inspectorate (ITSS) on the causes for collective dismissals and sufficiency of documentation (article 51.2 of the Workers' Statute). The mandatory report of the ITSS, which the Labour Authority requests after the notice of the opening of the consultation period, in addition to verifying the points of communication and the progress of the consultation period, shall make a statement about the existence of the causes specified by the company in the initial communication, and shall verify that the documentation submitted by the company complies with the documentation required in accordance with the specific reason put forward for dismissal.

Amendments to the General Law on the rights of people with a disability and their social inclusion. Social Security pensioners with a recognised permanent disability pension in the degree of total, absolute or severe disability shall be considered to have a degree of disability greater or equal to 33%.

Repeal of the ex-officio procedure before the labour courts, derived from communications from the Labour Authority. Previously, when the General Social Security Treasury (TGSS) or the Labour Authority questioned the labour nature of the relationship in an administrative sanctioning or liquidation procedure, they had to file an ex-officio claim before the labour jurisdiction. Except for flagrant cases, they could not directly make ex-officio registrations.²

² The Royal Decree-law 1/2023, on urgent measures in relation to incentives for labour recruitment and the improvement of social protection for artists, provides the Social Security Administration with ex-officio review powers in acts regarding the inclusion of workers in the Social Security system.

The Employment Law repeals this 'ex-officio procedure', regulated in article 19 of the General Regulation on procedures for the imposition of penalties for labour offences and in the article 148 d) of the Regulatory Law of the Labour Jurisdiction.

The companies and workers shall be able to resort to the Contentious-Administrative Jurisdiction, competent to resolve contestations of administrative acts regarding Social Security registration and affiliation.

Procedure for the recognition of economic compensation for those affected by asbestos. The Law 21/2022, on the creation of a compensation fund for the victims of asbestos, is modified. The procedure shall be initiated at the request of the affected party or their successor, and shall be addressed to the National Institute of Social Security (INSS). The request must be accompanied by the documents proving the illness and injuries suffered, and by reports issued in the terms determined by regulation.

In the case of employees affected by exposure to asbestos, the request must also be accompanied by the health report of PIVISTEA (Comprehensive Health Surveillance Plan of workers who are or have been exposed to asbestos), and by the documents that are established by regulation to prove the exposure. Nevertheless, if the occupational nature of the disease has already been determined, the request shall only be accompanied by the verdict concerning the recognition of illness. The information regarding judicial and extra-judicial actions that are ongoing at the time of the request must also be attached, as well as the benefits or compensations recognised due to the exposure.

The INSS shall reach and announce a decision within a maximum period of 6 months, indicating, where appropriate, in accordance with the documentation provided, the illness suffered, injuries, cause of injuries or death, and possible recognised disability, as well as the corresponding compensation. After this period has elapsed without the notification of an express resolution, the request shall be considered dismissed. In any case, an express resolution must be issued.

Transformation of the State Public Employment Service into the Spanish Employment Agency. The creation of the Spanish Employment Agency is expected, which shall replace the State Public Employment Service (awaiting development).

3. Law 4/2023, of 28 February, for the real and effective equality of trans people and for the guarantee of LGBTI people's rights

This law, effective as of 2 March 2023, aims to guarantee and promote the right of equality of those who are lesbian, gay, bisexual, transgender and intersex (LGBTI), as well as that of their families. Focusing on its workplace-related content, we highlight the following aspects:

Extension of the causes of discrimination in labour relations. Articles 4.2.c) and 17 of the Workers' Statute is modified, including sexual identity,³ gender expression⁴ and sexual characteristics among the causes of discrimination.

Offences and penalties in the labour order. The law introduces amendments to the Law on Offences and Penalties in the Labour Order (LISOS), which is adapted to this new law, establishing in articles 8.12, 8.13 bis, 10 bis.2.d) and 16.1.c), as very serious offences,⁵ discriminatory conducts and harassment for reasons of sexual orientation and identity, gender expression and sexual characteristics, as well as the request of personal data in this respect, in the context of recruitment processes.

Equality and anti-discrimination plans. They must specifically include transgender people, with special attention to trans women.

Inclusion of pregnant transgender people in the term 'biological mother'. Article 48.4 of the Workers' Statute is modified to this effect, which regulates the suspension of a contract by reason of the birth and care of a child under 12 months old.

Measures and protocols in companies with more than 50 employees. Within 12 months from the entrance into force of the law (therefore, by 2 March 2024), companies with more than 50 employees shall have in place 'a planned set of measures and resources in order to achieve the real and effective equality of LGBTI people, which includes an action plan for dealing with harassment and violence against LGBTI people'.

³ Internal and individual experience of gender as felt or self-defined by each person, which may or may not correspond to the gender assigned at birth.

⁴ Manifestation of sexual identity made by each person.

⁵ In relation to individual and collective labour relations (article 8.12 and 8.13 bis of the LISOS); in relation to information and consultation rights, and the participation of employees in European public limited companies and cooperative companies (article 10 bis.2.d) of the LISOS); and in the context of employment (article 16.1.c) of the LISOS). Note that article 16.1.c) of the LISOS was modified by the Law 3/2023, on Employment, of 28 February, and has been newly modified by this Law (Law 4/2023, of 28 February).

The measures “shall be agreed upon through collective negotiation and agreed to with the employees’ legal representatives”.⁶ The content and scope of these measures is awaiting regulatory development.

Linked to the foregoing, **the employers must adopt methods or tools sufficient for the prevention and detection of situations of discrimination for reasons previously set out in this law, as well as implement measures to stop them immediately.** Failure to comply shall result in the assumption of liability by the employers.

Procedural legitimisation of LGBTI associations. Article 17 of the Regulatory Law of the Labour Jurisdiction is modified, in order to extend the procedural legitimisation in proceedings for the defence of LGBTI rights to associations and organisations that have amongst their objectives the defence and promotion of the rights of LGBTI people, duly established, in addition to the affected people themselves, provided that they have the express authorisation of the latter.

In any case, “the harassed person” (sic) shall be the only one entitled to litigation in disputes on discriminatory harassment for reasons of sexual orientation and identity, gender expression or sexual characteristics.

Rules concerning the burden of proof. When discrimination due to sexual orientation and identity, gender expression or sexual characteristics is alleged, and there are well justified indications of its existence, the defendant shall be responsible for providing an objective and reasonable justification, sufficiently supported, of the measures adopted and their proportionality.

⁶ It may generate interpretation doubts with respect to those companies whose applicable collective bargaining agreement does not regulate these measures and/or that do not have in place a Workers’ Committee/Personnel Delegate with whom to agree them.