MADRID
Castellana, 216
28046 Madrid
Tel.: (34) 91 582 91 00

BARCELONA
Diagonal, 640 bis
08017 Barcelona
Tel.: (34) 93 415 74 00

BILBAO
Alameda Recalde, 36
48009 Bilbao
Tel.: (34) 94 415 70 15

MALAGA
Marqués de Larios, 3
29015 Málaga
Tel.: (34) 952 12 00 51

VALENCIA
Gran Vía Marqués
del Turia, 49
46005 Valencia
Tel.: (34) 96 351 38 35

VIGO
Colón, 36
36201 Vigo
Tel.: (34) 986 44 33 80

BRUSSELS
Avenue Louise, 267
1050 Bruselas
Tel.: (322) 231 12 20

LONDON
Five Kings House
1 Queen Street Place
EC 4R 1QS Londres
Tel.: +44 (0) 20 7329 5407

LISBON
Avenida da Liberdade, 131
1250-140 Lisboa
Tel.: (351) 213 408 600

GUIDE TO LEGISLATIVE ROYAL DECREE 3/2012, OF 10TH FEBRUARY, ON URGENT MEASURES TO REFORM THE EMPLOYMENT MARKET

Gómez-Acebo & Pombo Employment Area

Legislative Royal Decree 3/2012, of 10th February, on urgent measures to reform the employment market, was enacted on 12th February 2012; leaving aside the hyperbole used by its supporters or detractors to highlight its virtues or deficiencies, it represents a highly relevant, brave, complex and polemic rule. Here, we will make a preliminary and urgent approximation to the 64 pages of the BOE [Spanish Official Gazette] (35,525 words 189.440 characters), in which we will try to highlight those aspects that appear most relevant for companies, without breaking down the entire content of the rule.

1. Support for Small and Medium Companies

LRD 3/2012 considers that these companies find the greatest difficulty in meeting employment obligations and bears in mind their size to make some of them less onerous:

- < 250 employees: significant reductions in contributions in training contracts.
- < 50 employees: open-ended employment contract to support entrepreneurs, with the possibility of fiscal incentives and bonuses in contributions, which will also apply to the conversion of temporary contracts into open-ended ones.
- < 25 employees: rationalisation of FOGASA's responsibility, which is limited to restitution of a part of compensations for the termination of open-ended contracts that have not been declared unfair.

2. Modernisation

- Up-to-date guidelines are given for remote work (formerly working from home), accepting compatibility between physical presence and on-line work, with no loss of rights.
- Employee's training is incentivised, by means of a personal "account" (which will record the training received by the employee throughout his active life), adaptation periods, or the acknowledgement of a paid leave of 20 hours per year (for employees with a seniority of more than one year; training must be related to the job; can be accrued every three years). The Law is intended to prevent technological or any other changes from leading to the employee's dismissal, and to reinforce employees' professional training.
- The right to training is reinforced: when implementing a technical modification to which the employee must adapt, the employer is required to offer a training course. That training period interrupts

the contract and the employee is paid his salary and can only be dismissed for failure to adapt if this training has been provided beforehand, unsuccessfully.

– Accredited training centres and enterprises are also permitted to directly execute training schemes at State and Regional Government level.

3. Stable job creation and training

– The open-ended contract for promotion of employment will no longer exist and will be replaced by another, also open-ended, to encourage entrepreneurs, for companies with less than 50 employees, with a one-year probationary period (which is being criticised and the constitutionality of which is dubious), significant tax incentives and bonuses in contributions (if the contract lasts for more than 3 years) and, if the employee is receiving an unemployment benefit, the possibility to receive monthly, along with salary, 25 percent of the amount of benefit acknowledged and pending receipt at the time of contracting.

– It is intended to give priority to hiring. Accordingly, Temporary Employment Agencies [ETTs] (and those in the administrative process to become ETTs) are allowed to act as private employment agencies, following a mere responsible declaration that they will comply with certain requirements.

– The end of suspension of application of the rules that sanction the linking of temporary contracts (art. 15.5 of the Spanish Workers' Statute [ET]) is brought forward to January 2013.

– As for training matters, the monopoly of business organisations and the most representative trade unions will cease to exist and will be replaced by other duly accredited training centres and enterprises.

– A legal turnaround will mean that training schemes will once again be State-controlled, but their management is entrusted to the Autonomous Communities.

4. Collective Bargaining

– The review of the Collective Bargaining Agreement is admitted while it is in force: not by the Joint Committee, but by the Negotiating Committee.

– The *salary opt-out clause* is promoted, which extends to matters other than salary: working hours (working schedule, timetable, distribution, shifts), remuneration (system, amount), working system and performance, duties and voluntary improvements, as well as substantial modifications are avoided. Causes are maintained (although those of an economic nature related to the persistent decrease in the level of revenue or sales are reformulated, and are considered concurrent "when they occur for two consecutive quarters"), as well as the requirement for it to be agreed or arbitrated when included in the Collective Bargaining Agreement. Otherwise, one of the parties will take the disagreement to the National Consulting Committee for Collective Bargaining Agreements, or its regional equivalent, which will appoint an arbitrator to resolve within a maximum term of 25 days.

– Priority is given to the company agreement, which cannot be fulfilled by higher ranking agreements in respect of a significant number of matters, such as: amount of base salary and salary complements, including those related

to the company's situation and results; payment or compensation of overtime and specific remuneration for shift work; timetable and distribution of working hours, system of shift work and annual holiday planning; adaptation of the professional classification system of employees to the company; adaptation of types of contracting attributed to company agreements; in short, measures that favour reconciliation amongst work, family and personal life.

- Ultra activity: this is limited to a maximum of two years. At the end of this term, the higher-ranking agreement will be applied (if any).

- As a consequence of the elimination of professional categories, Collective Bargaining Agreements are subject to one-year period in order to adapt to the new classification system based on professional groups.

- Minimum content: no reference is made to the maximum deadline to begin negotiations, their maximum duration, the need to adhere to agreements for extrajudicial solution, the specific duties of the Joint Committee, the adoption of internal flexibility measures, etc.

5. Internal flexibility

- Professional classification and functional mobility: professional category no longer exists; framing now centres on the professional group, which is "that which groups professional aptitudes, qualifications and general content of the services, and may include several duties, functions, professional specialisations or responsibilities assigned to the employee". Accordingly, "ordinary" mobility takes place within each group.

- Irregular distribution of working time: Companies are allowed, if necessary and in the absence of agreement, to a minimum percentage (5%) of irregular working hours (new art. 34.2 ET).

- Both for geographical mobility and for substantial modification of working conditions, the causes are more generic and are disconnected from the purpose traditionally required. They refer to those related to competitiveness, productivity or technical organisation or work in the company.

- Geographical mobility acknowledges possible priorities for permanence additional to the ones for representatives: employees with family responsibilities, those over a certain age or disabled.

- In substantial modifications, the notice period is reduced from 30 to 15 days, and the possibility to modify the "amount of salary" is expressly included, along with the salary structure; the term for effect is reduced from 30 to 7 days in the event that the Collective Bargaining Agreement is adopted without agreement.

- Suspension of contract and reduction in working hours for economic causes: administrative authorisation is no longer required; if agreed, the presumption of concurrence of causes is maintained and, consequently, the possibilities of rejection are limited; supporting measures are established through bonuses and coordination with unemployment benefit; the suspension of the contract does not apply to the public sector.

- The "Negotiating passivity" or the "blocking" of sector agreements does not prevent a company from adopting relevant decisions on professional

classification (now by groups, not by categories), linking salaries to productivity/results, deciding, if necessary, a minimum percentage of irregular working hours (5%), there is an opt-out not only from salary but also from working hours, of the working system, of duties, or voluntary improvements, etc.

6. Unfair dismissal

- Highly relevant changes in economic effects, compensations and procedural salaries.

- In general, procedural salaries are eliminated. They are only maintained in cases of nullity, when admission is obligatory, in cases where the company opts for readmission (and indeed readmits) or when a workers' representative opts for this.

- Although procedural salaries are eliminated in general, art. 105.3 of the Employment Procedural Law is revoked to enable the company to defend the fairness of the dismissal, even if it was previously recognised unfair in order to try to avoid a judicial procedure.

- The termination compensation of the open-ended contract is generalised, and will be 33 days per year of service in the event of unfair dismissal, with a maximum of 24 months. Accordingly, 33 days per year will be paid, with a maximum of 24 months for new contracts. For contracts prior to 12th February 2012, a dual module is imposed (45 days with a maximum of 42 hypothetical months for services rendered until 12th February 2012; 33 days with a maximum of 42 hypothetical months for services rendered after 12th February 2012), with a maximum of 720 days, unless the privileged module is higher (up to 42 months).

7. Economic dismissals ("external flexibility")

- Collective dismissals: administrative authorisation is eliminated and the procedure centres on negotiation and on the social plan.

- In companies with more than 50 employees, an outplacement plan is additionally required, whose non-fulfilment represents a very serious infringement. The obligation is introduced for companies that dismiss more than 100 employees to implement an external outplacement plan designed for a period of, at least, six months.

- The reference to reasonability of the measure and to accreditation of the results alleged is eliminated.

- It is intended to offer legal certainty by linking the persistent decrease in revenue (as an adverse economic situation) to ongoing losses for three consecutive quarters.

- The procedure is significantly simplified: the Employment Authority acts in coordination with the Employment Inspection and with the Public Employment Service, but does not intervene in the final decision.

- The Salary Guarantee Fund reimburses the company with payment of 8 days of compensation, but only in fair dismissals of open-ended contracts in companies with less than 25 employees.

- The control of dismissals is entrusted to the Employment Courts of the High Courts of Justice or the National Court, with no preliminary formalities.

– The legal viability of these dismissals in the public sector is acknowledged in cases of sudden and persistent budget insufficiency. This measure is intended to facilitate redimensioning of those administrative structures that excessively increased during the period of strong economic growth and that are now unsustainable from a financial perspective, and neither is there any forecast that this will occur in the next few years.

  - Dismissals for objective non-economic causes.

  - Failure to adapt requires the company to provide training.

  - In dismissals for absenteeism, the reference to 2.5% of the work centre is eliminated.

8. Collaboration in the urgent search for employment

To unite the urgent efforts of all those who can collaborate in the search for a job, Temporary Employment Agencies, which have a broad network of branches distributed throughout Spain and vast experience in the employment market, are authorised to act as private outplacement agencies. In no event will Temporary Employment Agencies charge workers.

9. Types of contract: training contract

– The maximum age to be entitled to this type of contract is raised, bearing in mind the length of study periods and the high unemployment rate among the under-30s, until this rate falls from 15%.

– Having expired the period of training in an activity, the employee can use this type of contract in other sectors, which will improve his employability and allow him a second chance. Furthermore, he can receive training from the company itself, if the appropriate installations and personnel are available.

10. Specific measures against absenteeism and fraud

– Unemployed who now receive the unemployment benefit will be encouraged to render services of general interest to the community through collaboration agreements with the public Administrations.

– To fight against individual conducts of unjustified absenteeism that cause the company to incur a high economic and organisational cost. The link between the degree of absenteeism of the employee and the personnel is eliminated to justify absenteeism as a cause for dismissal. As from now on, only the employee's absenteeism will be taken into account.

– Effectiveness of the assessment of temporary disability will be improved through working accident Mutual companies.

FINAL ASSESSMENT

The changes are full of possibilities for interpretation; the wording of rules is generally better than the precedent; the organisation by thematic blocks seems pretentious; the extraordinary and urgent need that any Legislative Royal Decree requires does not arise for certain matters; initially it represents a logical reductionism when considering that the rule merely cheapens and facilitates dismissal, in the same way as it is an illusion to consider that it will *per se* lead to massive job creation.

It is undeniable that, such as Law 35/2010 or LRD 7/2011, it modernises and tackles burning issues, which are also relevant for the system of employment relationships. As occurred at that time, the trade unions' response, experts' criticism, observers' disdain, the rejection by other political parties or claims from employers' associations are reactions that are as logical as they are innocuous when examining and applying a rule with the rank of Law that, *per se,* only insofar as it is declared contrary to our Constitution by the Constitutional Court, can fail to be applied.

In the light of the aspects that are modified and the intensity of the changes, there are some who are talking about "a new model of employment relationships", which is indubitably exaggerated. It is a different matter that we are facing modifications with a similar scope to those of year 1994.

LRD 3/2012 wishes the employee to abandon his condition of the weak contracting party; the trade unions, albeit reinforced in the company, to also lose important prerogatives -the most significant-: exclusivity in training, sector negotiation; in short, the Administration reaches its legal age for employment regulation and abandons controls inherent to a different age (collective dismissals, relocations).

When eliminating cautions, authorisations, prohibitions, guarantees, formalities or generalisations, the importance of technical advice for all those involved increases. The role of Human Resources Managers, Labour Graduates, Lawyers or other related professionals is increasingly more decisive because reality depends less and less on what is stated by heteronymous rules and more and more on practices, agreements or Collective Bargaining Agreements.