LEGAL UPDATE N. 1

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WHAT CHANGES WITH THE THIRD AMENDMENT TO THE LABOUR CODE

Act 23/2012 of 25 June has enacted the Third Amendment of the Labour Code.

In order to improve labour legislation, promote in-house flexibility for companies and encourage collective bargaining, it has introduced significant changes to the system of organisation of working hours, eliminated the employer's obligations before the Authority for Working Conditions, defined a new method of calculating compensation payable to the employee on termination of the employment contract and amended the collective-bargaining agreements legislation.

Notification of the Authority for Working Conditions

The employer's obligations of reporting to the Authority for Working Conditions its name, corporate object, registered office and other workplaces, articles of association, the identity and domicile of its directors, the number of employees in service and workmen's compensation insurance policy have been eliminated.

Also eliminated are the obligations of sending to the Authority for Working Conditions the schedule of working hours, the working-hours waiver agreement and the company's internal regulations.

Changes to the organisation of working hours

As regards the organisation of working hours, the changes relate to several aspects, such as the ability of the employee to provide 6 hours of continuous work when the working day is longer than 10 hours. It also increases the duration of very short duration employment contracts to fifteen days.

Another of the alterations introduced by the Act is the reduction by half of the remuneration for overtime for working on a holiday.

It should be noted that during the first two years of life of the Act, the provisions of collective bargaining agreements and of individual employment contracts that refer to remuneration for overtime and for normal work provided on a holiday are suspended, that is, the rules stemming from the Third Amendment of the Labour Code that reduce to half the payment of such work apply.

After this transitional period of two years, should the rul ment contract not have been altered, the amounts provid than those established by the Labour Code.

A legislative novelty is the creation of an individual worki ee, normal working hours can be increased up to two hour hundred and fifty hours per year.

A group working-hours bank is also instituted, applicable to a number of workers in a team, section or economic unit, provided that the creation of a working-hours bank is stipulated in a collective bargaining agreement.

Holidays, vacations and absences legislation

The holidays, vacations and absences legislation is also subject to various amendments.

Also eliminated is the the increase of up to three days' vacation days in the event of no absence or of a small number of justified absences.

However, the Act provides for the continuation of the increase provided it is stipulated in employment contracts or collective bargaining agreements subsequent to December 1, 2003 and prior to August 1, 2012, though always observing the maximum limit of three days.

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With effect from January 1, 2013, four holidays are eliminated: Corpus Christi, October 5, November 1 and December 1.

Also eliminated is the the increase of up to three days' vacation days in the event of no absence or of a small number of justified absences.

However, the Act provides for the continuation of the increase provided it is stipulated in employment contracts or collective bargaining agreements subsequent to December 1, 2003 and prior to August 1, 2012, though always observing the maximum limit of three days.

It should be noted that the legislation does not stipulate anything with regard to the date on which the elimination of the increase of the vacation entitlement takes effect.

Also in the matter of vacations, the Third Amendment to the Labour Code stipulates:

- The possibility of increasing employees' period of vacation, as a result of work provided under the working-hours bank scheme introduced by collective bargaining agreements;

- When the employee's days of rest coincide with working days, Saturdays and Sundays other than holidays are considered in place thereof for the purpose of calculation of the days of vacation;

- Unjustified absences that result in loss of pay now cover the days or half-days or rest or holidays immediately before or after the day of absence.

The ability of the employer to shut the company for employees' vacation was already provided for under the Labour Code, though two new situations are now stipulated that allow the closure of the company: (i) during five consecutive working days at the time of school holidays and Christmas, and (ii) a day that is between a holiday on a Tuesday or Thursday and a weekly day or rest (so-called "long weekend" or "bridge").

In the situation described in point (ii) above, the employer is entitled to decide that the employee compensate the day of closure for holiday, and this shall not be deemed overtime.

Reduction or suspension in a business crisis (lay-off)

With regard to the procedure for the reduction or suspension of normal work hours during a business crisis, new consultation and provision of documentation obligations are instituted, the company must have its contributions in order (unless it is in a difficult economic position or undergoing company recovery procedures), and there is also a greater flexibility of the period in which the employer can make a start to the reduction or suspension.

With regard to the payment of compensation due to employees covered by the reduction or suspension decision, the law sets the percentages for the account of the employer (30%) and of public service competent in the area of social security (70%).

Also underscored is the obligation to reimburse the support received should the employer terminate the employment contract of an employee covered by these measures during the reduction or suspension and also during the thirty or sixty days following the application of the measures (except for termination of secondment, fixed-term contracts or dismissal for reasons attributable to the employee).

Termination of employment contracts

In order to stimulate job creation and promote worker mobility the criteria underlying dismissal for the termination of the job and dismissal for unsuitability are altered.

In the matter of termination of employment for elimination of the job, the employer now has to define, in determining the job to be eliminated, what the law calls "*relevant, non-discriminatory criteria in the light of the objectives underlying the elimination of the job*".

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Thus, the current criteria of the least length of service, or seniority, in the job, least seniority in the professional career, lower class of the same professional category and least seniority in the company are eliminated in the definition of the job to be eliminated.

Also eliminated is the obligation to place the employee in job compatible with his professional category.

Recourse to dismissal for unsuitability is now also possible in situations where there is a modification of the job.

-Reduction of compensation - Transitional mechanism

Act 53/2011 of October 14, which enacted the Second Amendment of the Labour Code, amended the legislation relating to compensation for termination of employment contracts, with or without term, reducing the amount of compensation from thirty to twenty days of basic pay and seniority bonus for each full year of seniority or part thereof, though this limit of twenty days' compensation applies only to contracts entered into as from November 1, 2011.

The new Act extended the situations where the compensation is twenty days, as we shall see.

Under the Third Amendment to the Labour Code, for the purpose of calculating the compensation on termination of employment contracts of indefinite duration concluded before November 1, 2011, for the period until October 31, 2012, the employee continues to be entitled to compensation of thirty days of base salary and seniority bonus for each full year of seniority or part thereof. However, if the termination of the contract occurs after October 31, 2012, for the period reckoned between this date and the date of its termination the employee only shall be entitled to a compensation of twenty days of base salary and seniority bonus for each full year of seniority or part thereof.

For example, an employee whose contract was concluded in November 1, 2003 and ceases on November 1, 2013, will be entitled to compensation calculated as follows:

- Thirty days for the period from November 1, 2003 to October 31, 2012; and

- Twenty-days for the period between November 1, 2012 and November 1, 2013.

For the purpose of calculating the compensation for termination of fixed-term contracts concluded before November 1, 2011, for the period of time elapsed between its conclusion and October 31, 2012 or, should they be subject to extraordinary renewal (introduced by Act 3/2012, of January 10), until the date of this extraordinary renewal if this is earlier than October 31, 2012, the employee continues to be entitled to compensation of two or three days (depending on whether its duration is equal to or greater than six months). For the period from November 1, 2012 or from the date of the extraordinary renewal of the contract, if this occurs before November 1, 2012, the employee is entitled to compensation of twenty days of base salary and seniority bonus for each full year of seniority or part thereof.

For example, an employee whose contract was concluded on June 1, 2009, which has been subject to extraordinary renewal on 1 June 2012 and ceases on June 1, 2013, will be entitled to compensation calculated as follows:

- Two days for the period from November 1, 2003 to October 31, 2012; and

- Twenty-days for the period between November 1, 2012 and November 1, 2013.

Note that the Third Amendment to the Labour Code also introduced ceilings for total compensation due on termination of employment contracts. In the case of fixed-term or indefinite-duration employment contracts entered into as from November 1, 2011, the total amount of compensation may not exceed:

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-twelve times the employee's monthly base salary and seniority bonus; or

-two hundred and forty times the guaranteed minimum monthly wage.

Note that in the case of the first limit (twelve times the monthly base salary and seniority bonus) the base salary and seniority bonus to be considered for the overall calculation of the compensation may not exceed twenty times the minimum monthly wage (currently €9,500.00). Should this limit be exceeded the second limit shall apply, i.e., the total compensation payable to the worker may not exceed two hundred and forty times the minimum monthly wage (currently €114,000.00).

As regards employment contracts concluded before November 1, 2011, a mechanism is established that also takes into account the limits to which we refer above relating to the overall amount of compensation.

In the case of open-ended contracts, the total compensation payable to the employee for the period until October 31, 2012, may not exceed such limits under penalty of the work time elapsed as from November 1, 2012 not being considered.

In turn, in the calculation of compensation for fixed-term employment contracts concluded before 1 November 2011, there does not appear to be in the new legislation a limit to the total amount of compensation due to the work, except the legal stipulation that the employee's basic pay and seniority bonus to be considered shall not exceed twenty times the guaranteed minimum wage for the period from October 31, 2011 or from the date of the first extraordinary renewal.

In particular: the Work Compensation Fund

The expected compensation fund to ensure the employee actual payment of a portion of his entitlement to compensation on termination of his employment contract is still awaiting approval of the legislation governing how the fund is to be set up.

In addition to the existing provisions of the Second Amendment of the Labour Code, several obligations of the employer are now defined, always dependent on approval of specific legislation, such as the obligation to subscribe to the work compensation fund, payment of the contributions due and and the obligation of notifying the Authority for Working Conditions of the subscription to the work compensation fund, whenever entering into a new employment contract.

Lastly, we would mention the employer's obligation of answering for the payment of part of the compensation owed by the work compensation fund, without prejudice to taking the employee's place in relation to the fund, in an equivalent amount.

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