

Care Crosses the River: the 2012 Spanish Labor Reform

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Abstract: This article provides a complete overview of the 2012 Spanish labor reform. In addition, the author explains the reasons for enacting this law, in particular, the financial framework, the high unemployment rates, the low levels of professional qualification, the persistence in our labor market of high rates of temporary employment and the unique pattern of productivity. This paper reflects on this labor market reform and how it entails a true cultural change in the understanding of labor relations for all protagonists (judges, unions, businesses). Moreover, the article examines the measures of internal and external flexibility and the new kind of contract called employment contract of indefinite duration in support of entrepreneurs which aspires to reduce the labor market segmentation. The main argument of the author is that the 2012 reform produces a new model of labor relations characterized by flexibility and decentralization.

Keywords: Labor Reform, Spain, Labor flexibility, Collective bargaining.

I. A Labor Reform in Disconcerting Times

Social concerns are crossing the deep, fast-flowing river of this economic crisis with great difficulty. The current situation's scope and magnitude are hard to appreciate from an immediate perspective, but they clearly extend beyond mere circumstances surmountable in the short term. The particularity of the Spanish economy makes the stage in which we currently find ourselves without doubt one of the harshest, and most uncertain, that our country has ever experienced, paralleled only by the devastating situation of 1929. The high unemployment rates dramatically affecting young workers, the low levels of professional qualification, the persistence in our labor market of high rates of temporary employment, and the unique pattern of productivity, along with a financial framework that is full of uncertainties, demonstrate the seriousness of the current situation and the need to adopt real and effective measures.

Law 3/2012, urgent measures for the reform of the labor market, proposes a decisive reform whose immediate objective is the creation of jobs, which will be a key factor to measure its level of effectiveness in the future. It supposes a true "cultural" change in the understanding of labor relations for all protagonists (judges, unions, businesses, etc.) and understands the small and medium-sized enterprise as the strategic context in which its consequences will be deployed. In short, it is a reform that moves closer to Europe when it comes to defining a model of labor relations that is more flexible, more modern, and more decentralized, but that errs in being somewhat unbalanced by simultaneously affecting all the possible contexts of flexibility resulting from the dynamics of the labor contract: entry, internal or functional, and exit.

Nevertheless, the diagnosis of the situation it intends to tackle is clear. To respond to this situation, the reform offers a range of measures to encourage employability and reinforce a commitment to

the development of effective education policies in a reality such as the Spanish one, with high rates of lack of qualification. The reform, as we have noted, makes the fostering of permanent contracting its fundamental objective, but also the promotion of job creation at any price in a context of open destruction of the same and with a future scenario that is not conducive to optimism. Similarly, there is a firm commitment to measures favoring internal flexibility in the workplace as an alternative to employment “destruction.”

Without a doubt, the fact that the 2012 reform continues to follow the path of those reforms made without a social agreement, as in 2010 and 2011, is not a good sign. The result of this failure was the recent general strike on March 29. Nonetheless, in this economic context of concern and uncertainty about the future of our productive system in which the sense of failure of the entire labor relations system is evident, moving forward with reforms is necessary. The dark shadow of intervention has been cast over our devalued economy, and the increasing rate of unemployment obliges all the relevant social and political agents to reflect responsibly in light of this situation. It is probably the time for setting differences aside and building, in a responsible way, a joint solution to this crisis that will undoubtedly have consequences for the future, not only for our labor market, but also for our prevailing social model.

II. Measures to Favor Employability

A first line of action of the reform makes employability and education as the main pillars on which the restructuring of our current productive model will be built. Employability, which may be defined as the capacity to take advantage of one’s knowledge and abilities, has two dimensions, one internal and another external: the first refers to the capacity for adjustment of the person with respect to his organization; the second increases the value of the individual in the job market, increasing his capacity for personal and professional fulfillment. The reform is intended to address both dimensions. The labor reform regards education as a fundamental instrument to favor employment and a necessary mechanism to gradually support the changes that must be executed in our obsolete productive model. This explains why, throughout its text, there are continuous references to educational requirements as part of the definition of the legal regime defined for a variety of institutions (economic incentives, objective and collective layoffs, etc.).

1. Employability as Objective and Education as Center of Gravity

This conception, which makes education a basic pillar of contract dynamics, is based upon the recognition of promotion and training at work as a basic labor right, including that which is intended for adaptation to modifications in the nature of the job, as well as those actions meant to favor employability [art. 4.2 b) and 23.1 ET]. Professional retraining also becomes a response to the introduction of technical changes—technological innovations in particular—and the modification of organizational structures deriving from such efforts to modernize the productive structure of the business. The regulation still needs future statutory developments that would define the new, albeit insufficiently precise figures of the “training account,” which is associated with the Social Security registration number and where the training received by the worker throughout her professional career will be recorded (art. 26. 10 LE) [Final Clause 2 Law 3/2012], or, upon prior consulting with the worker representatives, the training check intended to finance the worker’s individual right to training (Final Clause 3 Law 3/2012).

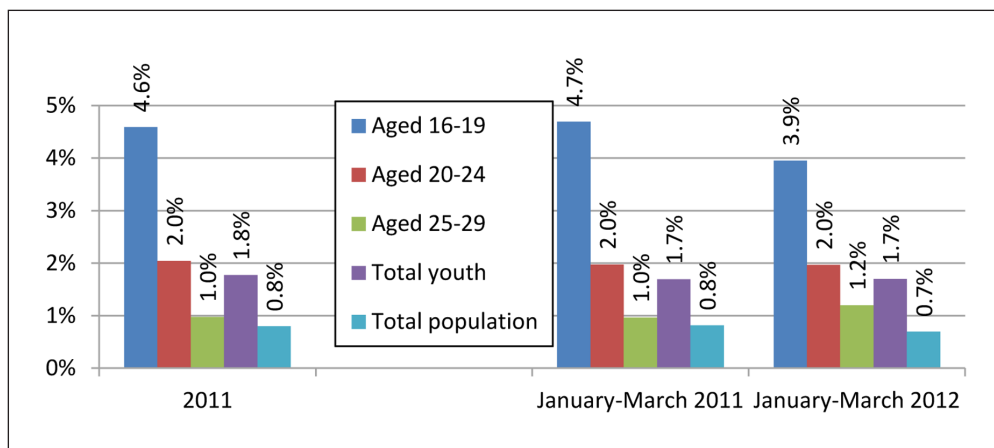
Training leave is, without a doubt, one of the most significant innovations. It provides workers with seniority of at least one year the right to paid training leave of 20 hours per year for training related to the company’s activity. This leave may be accrued during a period of up to 5 years; its details will be arranged through mutual agreement between employers and workers whenever the issue is not specified in a collective agreement.

1.2. Persevering in the (Failed) Reform of Training Contracts

There is no need to be reminded of the curse of youth unemployment in our country. Spain is the country in Europe with the highest youth unemployment rate, affecting more than 45% of the economically active population, and surpassing countries like Austria, Germany, and Holland (with rates around 5%) by more than 40 points, placing us with rates close to those in Estonia, Lithuania, and Greece (which hover around 37%). The Spanish youth unemployment rate is three times greater than that of Denmark's, four-and-a-half times that of Germany, five times that of Austria and Holland, and 18 points higher than France. Data from the survey of the Economically Active Population suggest that unemployment is concentrated among those young adults with limited education, many of them, with only Primary Education completed. 31.2% of the population younger than 24 years old has not completed compulsory secondary education, which makes us the third highest country in school failure, doubling the average in Europe. The high percentage of young people who drop out prematurely continues to increase, in contrast to a decreasing tendency in most of the member states of the European Union.

One of the measures adopted to favor the insertion of young people has been the so-called training contracts. Despite the numerous reforms that these contracts have experienced throughout the last years, the results remain frustrating. The reforms adopted by Law 35/2010 in the contract for training and in apprenticeships looked to increase training opportunities for workers but only resulted in greater rigidity in the use of this contract. The Royal Decree-Law 10/2011 created, a few months later, a new contract type that led to the reemergence of the classic concept of apprenticeship: the contract for training and apprenticeship. Its objective is to increase employment among youth lacking education, going beyond the present contract for training through the simplification of the complex regulation that rendered it, as we have seen, seldom used in practice. Results remained discouraging according to the statistics (Figure 1).

Figure 1. Percentage of Training Contracts over Total of First Employment Contracts (excluding conversions to contracts of indefinite duration)



Source: Personal compilation based on the National Public Employment Service data

Law 3/2012 modifies, for the fourth time in less than two years, the training and learning contracts. The labor reform persists in the mistake of maintaining the existing contract type, incorporating different modifications that attempt to encourage its use: its minimum duration is decreased, and it can be extended and succeeded by other contracts of the same kind as long as they are linked to the achievement of a different professional qualification. The maximum percentages of effective working

time are set so that effective working time may not exceed 75% during the first year or 85% during the second and third years. The location of training is made more flexible by allowing the worker to receive the training at the workplace when it has the appropriate facilities and personnel for the purposes of the accreditation of the particular competence or professional qualification under the terms contemplated by the Organic Law 5/2002, “without affecting the requirement, if applicable, of carrying out complementary training periods in the training centers of the above mentioned network” (art. 11.2d ET).

As a provisional rule, using an entirely new technique in our legislation, it is established that, until the unemployment rate falls below 15%, training and learning contracts can continue to be offered to workers under 30 years of age (Transitory Disposition 9 Law 3/2012). The *raison d’être* of this measure is to be found, among other reasons, in the negative effects produced by the expansion of the construction sector. The development of the sector was characterized by a demand for low qualification jobs, especially those of manual labor (non-qualified workers, installation workers, and qualified manual workers), which represented almost 90% of the total. This demand encouraged, in many cases, premature drop-outs from the education system, with the result that, today, many of these workers find themselves unemployed and unqualified.

1.3. The Elimination (as a Rule) of Economic Incentives for Employment Development

With regard to hiring incentives, as has been noted repeatedly in the past, the current heterogeneity and range of groups for whom employment is encouraged contribute very little to the incentives’ effectiveness and generates unfair competition among firms. Moreover, the current scheme of incentives is aimed at the promotion of permanent employment contracts instead of job creation or continuity, whatever the nature of the contract, objectives that should prevail in the current situation. Lastly, the different incentives programs for employment development have traditionally been characterized by their dispersal—a complicated set of regulations resulting from the accumulation of programs, each with its own incentive techniques, with different objectives and target groups, and with completely different conceptions of the employment policy.

The Transitory Disposition 6th Royal Decree-Law 20/2012, of July 13th, measures guaranteeing budgetary stability and promoting competitiveness, has in general eliminated the right of companies to receive Social Security reductions for hiring, maintaining employment or encouraging self-employment, when the Royal Decree-Law went into effect “in virtue of any norm, valid or repealed, under which they were established.” The aforementioned rule provides an exception to a series of groups with special difficulties in gaining access to the labor market. These include the handicapped; people who have been officially recognized as victims of gender-based violence, domestic abuse, or terrorism; or, in short, workers suffering from social exclusion.

1.4. Temporary Employment Agencies as Global Employment Agencies

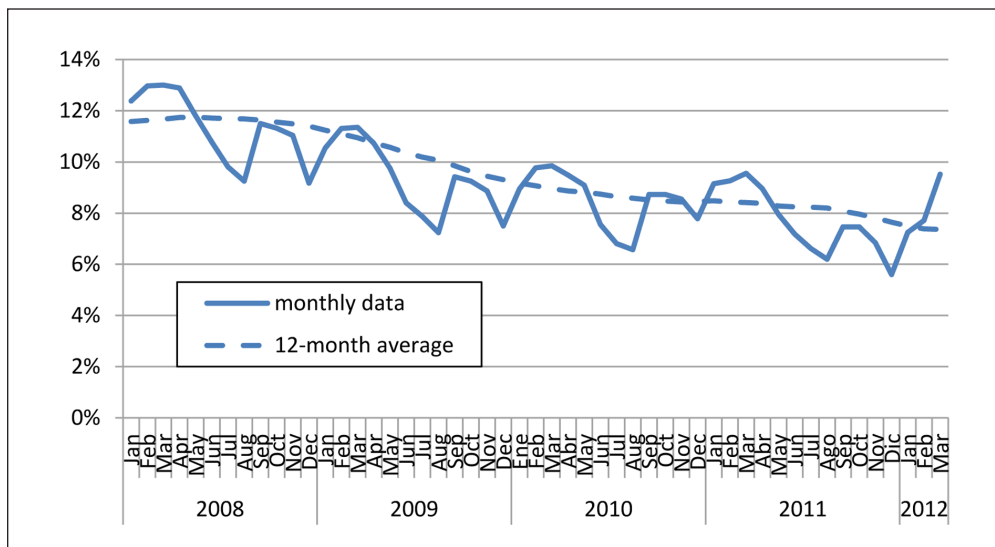
The inadequacy of the public employment systems to face new demands is a reality: among the slightly more than 14.5 million job placements that took place in Spain last year, only 360,000 occurred through the National Public Employment Service (2.5% of the total). The labor reform considers Temporary Employment Agencies as another institutional tool that may facilitate mediation in the job market. The experience, professionalism, geographical spread, and infrastructures that Temporary Employment Agencies currently possess may be, in this way, taken advantage of by the Public Employment Services during such important times for the management of labor market supply and demand. To this end, Temporary Employment Agencies are evolving toward a figure known in comparative law as Global Employment Agencies, entities exclusively authorized for the three-way relationship of legally and temporarily assigning workers, but also authorized to carry out recruitment, orientation, and training activities for any type of contract.

Temporary employment agencies may act as employment services as long as they receive the corresponding administrative authorization. In any case, when temporary job agencies act as employment services, they will need to adapt themselves to the regulations of the latter, including the obligation of guaranteeing the cost-free provision of services to workers.

III. Promoting Permanent Contracting and Other Measures Favoring Job Creation

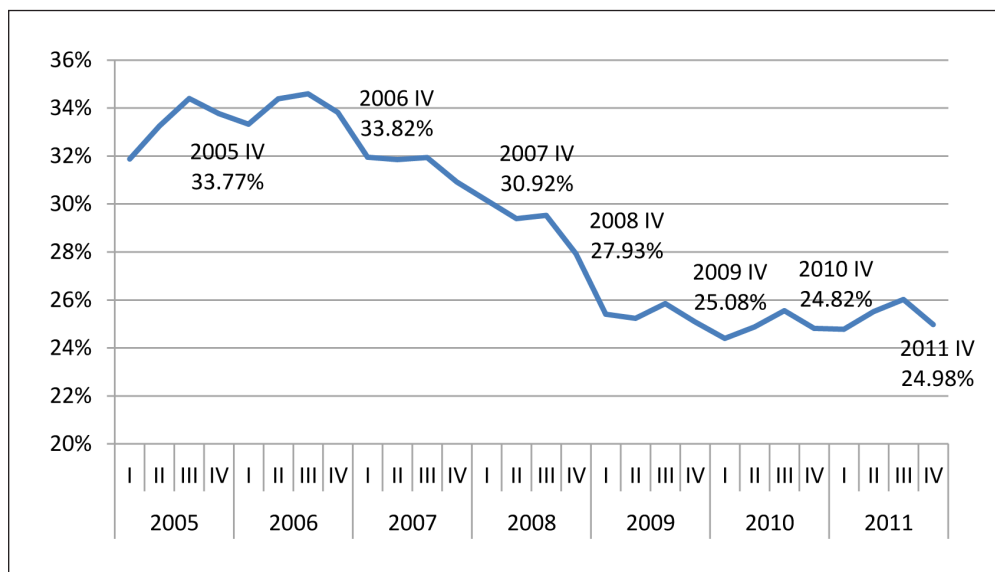
The data on permanent contracting in our country are truly worrisome, for they remain less than 10% of the total number of signed contracts; a percentage that, with some isolated cases of variation, has constituted the general tendency of employment in Spain. With respect to the weight of employment contracts of indefinite duration, in the historic series (since 2002), more than 90% of the monthly figures reveal permanent contracting rates of between 7% and 13%. Indeed, the evolution of permanent hiring has been continuously decreasing since the start of the crisis. It is, therefore, not possible to assert that the measures introduced by the preceding reforms to decrease labor market segmentation by contract type have had any particular effect (as observed in Figure 2).

Figure 2. Percentage of Contracts of Indefinite Duration Signed (including conversions from other contracting categories).



Source: Personal compilation based on the National Public Employment Service data.

The current reform does not, however, provide a thorough readjustment of the system of temporary employment contracts (something that had been requested by employers), but instead keeps its structural definition intact. Temporary employment continues to hold an important role in the structure of our job market, so that approximately one in every four wage earners has a relationship of fixed duration with his company (Figure 3). The desire and need to keep all possible options for job creation available have probably influenced the decision not to reduce the number of existing temporary employment contracts in practice (although it eliminates the contract for the promotion of permanent contracts), while committing to a model of employment contract of indefinite duration —the contract for the support of entrepreneurs— which is intended to become the main contract model and provide an alternative to the controversial “single contract” proposal that caused a huge storm during the previous years.

Figure 3. Rate of Temporariness

Source: Economically Active Population Survey

1. Employment Contract of Indefinite Duration in Support of Entrepreneurs

Companies employing less than 50 workers may offer a new contract called the “employment contract of indefinite duration in support of entrepreneurs.” The contract can be signed for an indefinite term and a full-time position, using a pre-established contract model. The contract’s legal framework and the rights and obligations resulting from it will be governed, in general, by what has been stipulated in the ET (Workers’ Statute) and the relevant collective bargaining agreement for indefinite-term contracts. The sole exception lies in the length of the probation period, referred to by art. 14 ET (which will be of “one year regardless”). The validity of this contract modality will be effective until the unemployment rate falls below 15% (Transitory Disposition 9.2 Law 3/2012).

The regulation excludes part-time positions, which is in some sense contradictory with the law’s Explanatory Statement for this contract modality. The contract is exclusively aimed at companies with less than 50 workers. SMEs represent 99% of Spanish businesses, while social security data (Ministry of Employment and Social Security) indicate that 42% of workers are employed by companies with less than 50 workers, and 59% by companies with less than 250. The question that must thus be asked, given the fundamental role the Legislator has assigned to this contract modality, is whether this legal option should be extended to all businesses, regardless of their size. Should this contract type be generalized to all firms, access to the associated subsidies and reductions in social security contributions could be restricted.

Nonetheless, the application of the regulation raises some questions: What is the relevant unit to define the application of this contract: company or workplace? Does it apply to a group of companies? Who counts as a worker? The regulation forbids the use of this contract modality whenever there have been prior layoffs (“the company that, during the six months prior to the contract celebration, had adopted non-causal layoff decisions”). In any case, the regulation provides an amnesty for terminations that took place before the Law 3/2012 became effective, limiting the prohibition to firms where non-causal layoffs have taken place subsequent to the Law.

However, the issue that raises most doubts has to do with the length of the probation period to which art. 14 ET refers, which will be of “one year in any circumstances.” Doubts immediately follow the interpretation of this precept, and the most significant one is whether said period is contradictory with respect to the Council Directive 99/70/EC or the Convention 158 ILO that imposes a “reasonable-

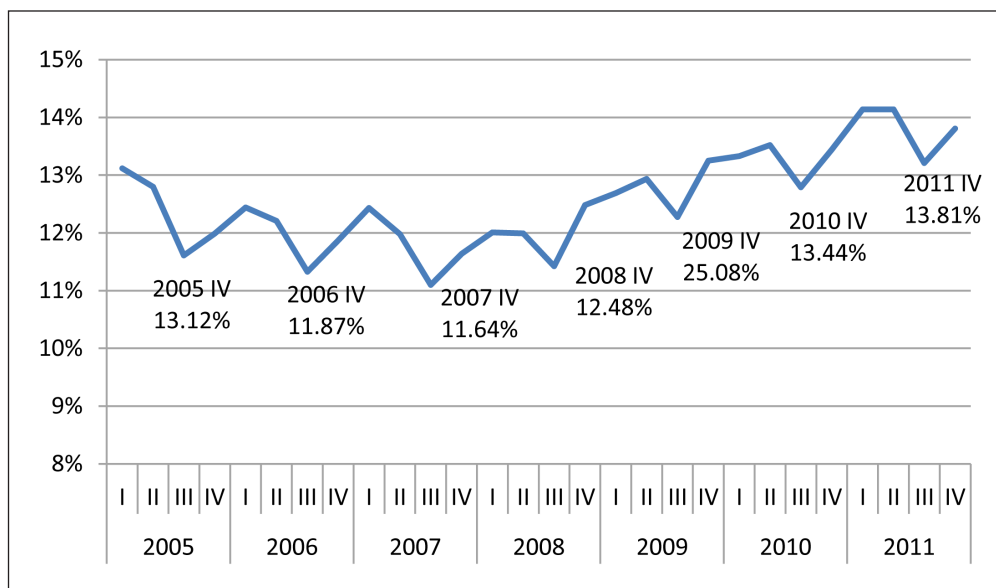
ness” requirement on the length of the probation period (art. 2.2 d). One recalls the conclusion of the decision of the High Court on July 20, 2011 regarding this point: “compliance with a one-year probation period is, by any reckoning, excessive, for the objective of the probation may be more than satisfied during a more reduced time period.” It would have been less problematic to make this contract conditional with respect to a “minimum service time” as its aim is to allow the company to verify the job’s viability and sustainability, and not, as in this case, to put the worker to the test. The experience of the French “*contrat nouvelles embauches*” [for an indefinite period for companies with up to 25 workers, 2-year period for job consolidation (early notice and indemnization (8% of the salary))], which was accepted by the Council of State, questioned by the Court of Cassation for going against ILO Convention 158, and considered by the ILO as contrary to the mentioned Convention for establishing a non-reasonable probation period, may be a good comparison for the legislator and an incentive to create new foundations for this contract. One possible option could have been the establishment of a system of increasing indemnizations based on seniority.

The contract in support of entrepreneurs is accompanied by a considerable number of incentives as long as the employer commits himself to secure employment in his company in accordance with the legal terms (art. 4.7 Law 3/2012 and art. 43 Law on Corporate Income Tax). To that effect, reductions are offered in the firm’s Social Security contributions for the hiring of young adults between 16 and 30 years old, as well as of people older than 45 years old. However, the main tax incentives offered for this contract consist of a reduction in an amount equal to 50% of the worker’s pending unemployment benefits at the time of hiring, with a limit of 12 installments. The hired worker who is eligible for unemployment benefits (based on prior contributions) will be able to receive each month, along with his or her salary, 25% of the amount of the said benefits that have been both recognized and are pending for payment at the time of hiring for up to 12 months. The aim of the system of unemployment protection becomes two-fold: to save the State costs and to promote employment. Contributory unemployment benefits involve a higher cost than non-contributory benefits; their quantity is higher because they are structured according to the principle of contribution. With this measure, the amount that the State had planned to spend in unemployment would be invested instead in the tax reduction for the employer (50% of the total), and, if applicable, in the improvement of the salary (25% of the total), with remainder being saved. The underlying argument is that it is always preferable to promote employment rather than to preserve unemployment.

2.2. Part-Time Employment: A Still Pending Reform

Reform of the part-time employment contract continues to be a pending issue, given the limited use of this modality in comparison with other European countries. The slight increase in the use of this contract observed in the last few years (Figure 4) has failed to encourage the Legislator to promote it more clearly openly. Law 3/2012, despite the declaration of intentions in its Preamble (stating that “part-time jobs constitute one of the unresolved matters of our job market”), limits changes in this modality to allowing for overtime for part-time workers. The purpose of this change is to found in the objective of making the currently existing framework on overtime more flexible. In any case, the sum of standard, additional and overtime hours may not exceed the legal limit of part-time jobs as defined on art. 12.1 ET, and overtime under a part-time employment contract will be taken into account for the purposes of establishing rates for Social Security contributions and the pension-related benefits. Still, the incorporation of this change raises numerous doubts that do not always have easy solutions.

Without the need of introducing in our country the questionable German mini and midi jobs (according to the data from the Federal Employment Agency, these represented 7.3 millions in June 2011), the part-time model should be simplified, which would, no doubt, be very useful when it comes to generalizing its use. Regulation of the part-time employment contract should avoid excessive complexity, reduce legal insecurity in the management the contract, and address problems of rigidity in work organization. The re-elaboration of this contract type could involve the development of a “flexisecurity” part-time employment contract. This contract could be based on the reinforcement of the flexibility of rules

Figure 4. Rate of Part-Time Jobs.

Source: Economically Active Population Survey.

regarding working time organization according to the company's needs while centering its attention on the employment of the young, albeit subject to a reinforced framework of social protection to avoid the possibility of workers being penalized in the course of building a secure career.

2.3. Shortening the Suspension of Limitations on Repeated Temporary Contracting

Royal Decree-Law 10/2011, August 26 (art. 5, which has been redrafted) suspended the limitation on repeated temporary contracting contemplated by art. 15.5 ET for two years (August 31, 2011/August 31, 2013). This suspension is shortened by Law 3/2012, setting December 31 of the present year as the deadline for the above-mentioned suspension. This suspension leaves without application the requirement automatically changing to permanent status those workers who, in a period of 30 months, have been employed for more than 2 years (24 months), with or without continuity, for the same or different job, with the same company or group of companies, by means of two or more contracts of temporary duration.

2.4. The New Telecommuting Contract

Telecommuting is gradually prevailing in our country and in other advanced countries, especially so in times of crisis. For the first time in Spain, the reform legally regulates what is defined as "remote jobs," commonly known as telecommuting. It is true that the 2002 European Framework Agreement on telecommuting had already been annexed to the 2003 Inter-confederation Agreement for Collective Bargaining (ANC). However, there were no previous statutory provisions, and the ANC only had a compulsory effectiveness, for which, as the decision of the High Court on April 11, 2005 highlighted, the European Framework Agreement had not been incorporated into the Spanish Law. With the new denomination of "remote jobs," the new art. 13 ET leaves behind the well-known "home-based jobs," thus opening the way to a detailed regulation of telecommuting as a form of organizing and/or undertaking a job that makes use of information technologies to regularly carry out, within an employment relationship, the provision of services outside of the company's premises.

In line with the fact that telecommuting should be voluntary for the worker and employer, and, therefore, may be specified at the time of hiring or later, art. 13.2 ET establishes that in any of the cases

where a remote job is agreed upon and formalized on paper, the rules regarding the basic copy of the contract will be applicable, as contemplated by art. 8.3 ET. These remote workers will have the same rights as those who provide their services on-site at the company, with a special mention of their right to at least receive the total payment established according to their professional group and position, and adequate protection in terms of security and health. They will be able to exercise their rights to collective representation in compliance with the law, to which end they must be assigned to a specific company workplace. The employer will guarantee their effective access to on-going training and inform them about the existence of vacant, on-site positions at the company.

IV. Measures to Favor More Internal Flexibility at Companies as an Alternative to Job “Destruction”

Our regulatory framework has brought about a very high rate of precarious employment and limited permanent hiring. As a result, there has been less adaptation to new financial circumstances through internal flexibility measures that have been much more developed in other countries (adaptation of working days, salary, functional mobility, etc.). The Preamble or Explanatory Statement of the Law mentions and includes the “scarce development of possibilities for internal flexibility at companies that the current legislation offers” among the “weaknesses of our labor relations model”; a model whose “financially and socially unsustainable nature” has been “demonstrated” by the financial crisis. For the Explanatory Statement, the “general objective” of chapter II of Law 3/2012 is “to set up instruments that allow businesses to improve their competitiveness, safeguarding the rights of workers and specifically making it easier for them to keep their jobs.” The development of measures favoring internal flexibility constitutes a guarantee for job protection and an instrument favoring employability. The aim of the reform is clear, and the heading introducing these measures conceives internal flexibility at companies as an alternative to job “destruction.”

1. Preference for the Professional Group and Functional Mobility

The outdated definition of the professional classification system based on professional categories constitutes a clear factor in our system’s rigidity. Until now, collective bargaining had maintained a dual model in which, on the one hand, there was the so-called “classic” model, defined as a reference to the content of the main tasks of each professional category, and, on the other, the so-called “modern” one, in which different professional groups were defined according to the knowledge, level of autonomy, ranking, or complexity of the tasks carried out by each professional group. The labor reform’s preference is clear: professional classification must be exclusively based on the professional group (art. 22 ET). This option sweeps the reference to professional categories defining in a more precise manner the concept of group as that which includes “the different tasks, functions, professional specializations or responsibilities assigned to the worker.” This categorical preference is intended to materialize itself immediately by establishing that collective agreements have one year to adapt their system of professional classification to the new drafting of art. 22 ET (Additional Clause 9th Law 3/2012). Nevertheless, the effectiveness of the regulation may be, for obvious reasons, more symbolic than real.

The regulation intends to provide companies with a greater employee mobility to carry out functions in other jobs before proceeding to layoffs. As noted, the professional group becomes the axis of functional mobility in a line that has been accepted by the social partners themselves during the 2012-2014 2nd Agreement for Employment and Collective Negotiation. This agreement expressly stipulated that a “professional category will not be considered for reasons of functional mobility” and that collective agreements should specify the “adaptation procedures in case of still being governed by professional categories.” The labor reform makes this framework more flexible by eliminating the reference to functional mobility being carried out “without prejudice to (the) professional training and promotion” of the worker, as well as to the assignment of lower functions to resolve “*urgent and unpredictable needs of production*” (former, art. 39.2 ET). The need, however, to “*communicate the decision*” and its “*reasons*” at all times is established.

2. Legal Attribution of Unilateral Competence for Irregular Distribution of Working Hours to Employers

The intention of opting for the irregular distribution of the work day as a mechanism of internal flexibility is clear. Art. 34.2 ET points out that: “*Through collective agreement or, failing that, through agreement between the company and the workers’ representatives, it will be possible to establish the irregular distribution of working hours throughout the year. If this is not possible, the company will be allowed to irregularly distribute ten percent of the working hours throughout the year. This distribution shall respect the minimum daily and weekly resting periods at all times, in accordance with the Law, and as a result of the same, the worker shall be notified of the work day and time with a minimum five-day prior notice.*” The norm allows the employer to freely manage an annual percentage of irregular distribution set at 10% (around 160 hours annually), although this right is contingent on prior notice to the worker, thus avoiding the possibility for an employer to demand immediate availability for work. This clearly represents a stronger protection of the interests of the worker facing this type of modifications in the structure of his working hours.

3. Substantial Modifications as Engine of Internal Flexibility

As we have been pointing out, our system of labor relations suffers from a notable rigidity that complicates efforts to respond to situations of contract crises through internal flexibility tools. However, a frequently used tool at companies that is meant to achieve the required adjustment between company needs and the employment relationship may be found in substantial modifications of working conditions in the event of economic, technical, organizational, or productive reasons justifying the changes. The labor reform has introduced important changes in the legal framework with the aim to facilitate the use of these modifications.

Even though the causal assumptions required for substantial modification remain (economic, technical, organizational or productive), there is an evident softening of the connection of causality or reasonableness. The labor reform eliminates the abovementioned demand requiring that “the adoption of the proposed measures contribute to the prevention of a negative development of the company or to improve the situation or perspectives of the same through a more appropriate organization of its resources, favoring its competitive market position or a better response to the market’s demands.” The Legislator has clearly opted to focus the measure’s control, solely and exclusively, on the existence of causality without the need for a complementary judgment of proportionality, meaning that in order to resort to a substantial modification, it will only be necessary to justify economic, technical, organizational, or productive reasons related to “the competitiveness, productivity, or technical or work organization at the company.” The employer is thus given broad leeway in the use of this measure as a regular tool of business management.

One of the thorniest and most difficult issues to specify until the labor reform came into force was whether a substantial modification could directly and immediately affect salary. Until then, the qualitative aspects of the internal distribution of salary, i.e., the compensation system, were a matter subject to modification; whereas that which had a bearing on the quantitative aspects of compensation itself, that is, the total wage amount received by the worker, was unchangeable. Nonetheless, the issue was largely artificial because, as we have already pointed out, in the end, any modification of the compensation system, however small, has repercussions for the monthly amount received by the worker. Following the precedent of different rulings that had fully accepted these effects, the labor reform expressly introduces, under the illustrative list of causes, the “wage amount” as one of the working conditions susceptible to modification. It is obvious that the potential decrease will be limited to the appropriate minimum range established by the collective agreement, which can only be altered by means of the opt-out regulated under article 82.3 ET. The scope of this measure may have important financial consequences in the future. Thus, as has been suggested, it should be kept in place only until the accumulated loss of wage competitiveness with respect to the Euro zone is cancelled out and new coordination mechanisms to avoid salary increases that are excessive with respect to the growth of productivity are established.

The new language provided by Law 3/2012 for art. 41 ET makes a new distinction between individual modifications and collective modifications, thus abandoning the definition that depends on the legal source recognizing working conditions (individual contract or collective bargaining agreement). As in the case for collective layoffs, those modifications exceeding a certain numeric (exactly the same ones as in the case of collective layoffs) threshold are now considered collective, while those that do not surpass the same threshold are considered individual. A collective modification is that which, in a period of 90 days, affects at least: 10 employees at companies with less than 100 workers; 10% of the staff at companies employing between 100 and 300 workers; 30 employees at companies with more than 300 workers. An individual modification is that which, in the established period of reference, does not reach the indicated threshold for collective modifications.

The regulation maintains the preexisting procedural duality. If the substantial modification of working conditions is individual, the employer will need to notify the affected employee and his legal representatives at least 15 days (the deadline used to be 30) prior to becoming effective. The employee's options are limited to acceptance, challenging the change before the labor jurisdiction (art. 138 Social Jurisdiction Act), and contract termination. The increase in the number of causes allowing the modification is significant with respect to the preceding regulation. From now on, according to the circumstances outlined in paragraphs a), b), c), d), and f) of art. 41.1 ET (all list items except for those relative to the "system of work and performance"), if the employee is affected by the substantial modification, he will have the right to terminate his contract and receive a compensation of 20 days of salary per year of service, prorated monthly for periods under one year and with a maximum of nine months.

In cases of a collective modification, it will require, "without affecting the specific procedures that may be established in collective bargaining," a consultation period with the legal representatives of employees or their ad hoc legal representation ex art. 41.4 ET during a period of no more than 15 days. Mutual agreement will be assumed to demonstrate that the causes are justifiable; such agreements can now only be challenged before the competent jurisdiction for fraud, bad faith, coercion, or abuse of rights in reaching the agreement. In this case, the terms of the execution of the agreed change will be specified by the agreement itself. In the absence of an agreement, the employer shall notify the employees of his decision, and it shall become effective "in the period of seven days following the notification" (art. 41.5 ET).

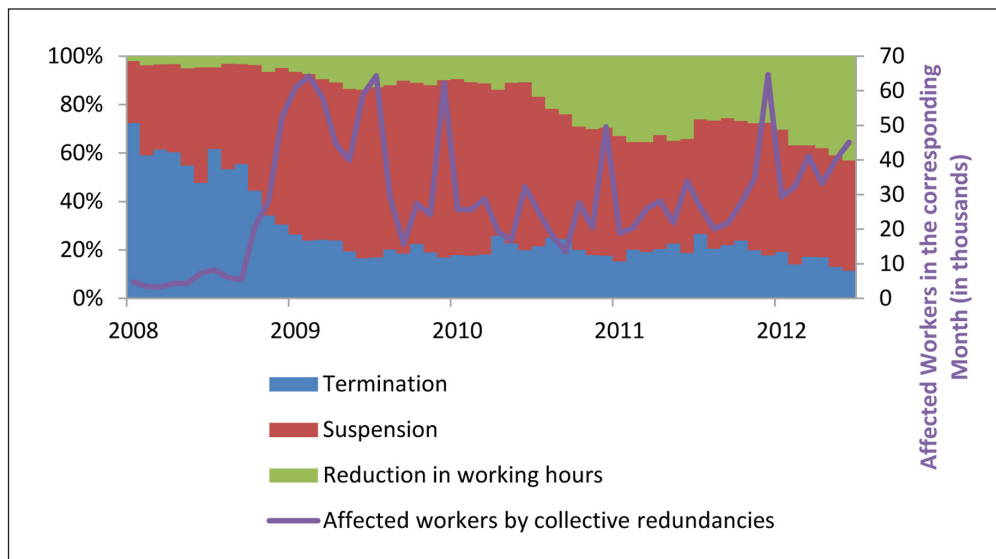
However, the substantial modification of working conditions of art. 41 ET continues to be confined to "the conditions recognized for workers in employment contracts or collective agreements, or the conditions applicable to them by virtue of the employer's decision whose effects have a bearing on groups of workers." The introduction of a quantitative grading criterion in detriment of the preexisting qualitative one now opens the possibility of individually modifying what has been established through a collective agreement, which could raise significant doubts on the possible encumbrance that the right to collective bargaining suffers in this manner, despite the contract validity that the legal system grants to such collective agreements.

Finally, the labor reform does not introduce significant alterations in the system of geographical mobility, limiting itself to applying the relaxation of causes established in art. 41 ET to geographical transfers as a subtype of substantial modifications.

4. Tradition and Reform in the Suspension and Reduction of Working Hours

Our country has successfully followed the steps of the German model with regards to responding to situations of business crisis with suspensions or reductions of working hours. This ordinance, the *Kurzarbeit*, consists in the reduction of ordinary working hours, stemming from a volume decrease of work; a reduction that may be full or partial, and during this period, the worker receives a public subsidy (*Kurzarbeitergeld*). This model, which first appeared with Royal Decree-Law 2/2009, March 6, urgent measures for the maintenance and promotion of employment and the protection of unemployed persons, and has been adapted by subsequent reforms, has provided an important boost to the proceedings for the suspension and reduction of working hours as opposed to terminations (Figure 5), thereby saving an important number of jobs. The 2012 labor reform incorporates this positive tradition

Figure 5: Labor Force Adjustment Plans Authorized and Total of Workers Affected.



Source: Economically Active Population Survey

and continues to support it by extending reductions in Social Security contributions to the common contingencies fund and the subsidizing of unemployment benefits in cases of suspension or reduction of working hours.

In the procedure, established without reference to the precepts for contract termination due to these causes, there is a change in the role of the labor authority, eliminating the requirement of obtaining its authorization, but, nonetheless, maintaining its important intervention and supervision role throughout the same (art. 47 ET). The decision now corresponds to the employer through the applicable legal procedure, regardless of the number of workers at the company and the number of those employees who are affected, during which a consultation period with the employees' legal representatives must be established.

V. Measures Favoring Job Market Efficiency and Reducing Duality

Layoffs are at the epicenter of the seismic zone defined by the institutional framework of labor relations at all times and circumstances. Imbued with this logic, labor market reforms during the last few years have faced the need to permanently adapt their scope and content in order to strengthen the causality of terminations and restrain the continuous evasion of the legal system through formulae such as wrongful dismissals (“express layoffs”). Originally established to dejudicialize layoffs, these express layoffs have become at will terminations. The costs of trials and salaries accrued during proceedings were avoided, thus facilitating and lowering the costs of individual unjust cause dismissals, which, in turn, acted as an incentive for compensated terminations of individual contracts. This allowed for staff reductions outside of art. 51 ET, operating as an indirect mechanism for personnel restructuring. This dynamic completely deformed the entire system, transforming into the rule that which was logically the exception: dismissal on disciplinary grounds.

The Preamble of Law 3/2012 is especially revealing with regard to the executive's motives. The reform's goal is to modify the current situation by increasing the level of legal security in firm restructurings and to shift the system's center of gravity from the dismissal on disciplinary grounds to the natural scenario within a context of crisis: layoffs based on economic, technical, organizational, or productive reasons. The motive of this goal can be found in the additional costs that the disciplinary layoff proceed-

ings entail and in the difficulties firms face in pursuing layoffs for economic causes with with reasonable costs in temporal and financial terms.

1. The Death of the Labor Force Adjustment Procedure and the Automaticity of Causes for Collective Layoffs

The reform of the causality system of layoffs on economic grounds constitutes one of the most significant novelties of this reform. An economic cause for layoff is defined: “when the results of the company stem from a negative economic situation, such as the existence of current or foreseeable losses or the continuous decrease in its ordinary revenues or sales. In any event, it shall be understood that the decrease is continuous if the level of ordinary revenues or sales in each quarter during three consecutive quarters are lower than what was registered during the same quarter in the previous year.” The reform of art. 51 ET has eliminated the requirement for the firm to justify with their financial results the reasonability of contract terminations in order to preserve or favor its competitive market position. The objective of the regulation is to allow for companies to directly and automatically associate the volume of their staff to the development of their revenues or sales. It is thus intended to limit the scope of judicial control by not requiring the courts to assess whether the measure is ideal or proportional to the company’s situation.

The grounds for this legal objective are clear in accordance with what is set out by the Explanatory Statement of Law 3/2012: “The law now restricts itself to delimiting the economic, technical, organizational, or productive causes justifying these layoffs, eliminating other regulatory references that have been introducing elements of uncertainty. Beyond the specific legal meaning introduced by different reforms since Law 11/1994, [...], such references included future projections that are impossible proof, and a conclusive assessment of these layoffs, which has opened the door on many occasions to judgments of opportunity by the courts with regard to the management of the company. It is now clear that judicial control of these layoffs must keep itself to assessing the concurrence of certain facts: the causes.”

A second important modification is the elimination of administrative authorization of collective layoffs. This reform puts an end to a long tradition that, until now, had been offering acceptable results manifested in a high number of proceedings that concluded in settlements by mutual consent, albeit with high compensation costs. The change in the logic, which eliminates the value of these settlements, could pose important practical problems, especially if we take into account that the new drafting by Law 3/2012 of art. 124 of the Social Jurisdiction Act allows open contestation, whether or not there is settlement, against “the workers’ legal or union representatives.”

The regulation incorporates other novelties, such as the so-called mandatory “outplacement,” by which companies carrying out a collective layoff affecting more than 50 workers are obliged to offer the affected employees an outplacement plan through authorized placement agencies. Likewise, and in order to make access to early retirement mechanisms more difficult—a general policy objective that is perfectly acceptable—there is a new drafting of the Final Clause 4th of Law 3/2012 to the 16th Additional Clause of Law 27/2011, whereby in collective layoffs involving employees with more than 50 years of age in companies with benefits, the company shall credit the Treasury a quantity established in accordance with the unemployment benefit costs and Social Security contributions made by the Public Employment Service.

Finally, the application of economic, technical, organizational or production causes is now applied to public organisms and entities in order to justify employment contract terminations by means of both collective and objective layoffs, something that had not been accepted by the Courts in the past. For the purposes of the causes for these layoffs in the Public Administration referred to by the Law of Contracts of the Public Sector (for example, the General State Administration, the Autonomous Community Administrations, and the Entities comprising the Local Administration; autonomous organizations, public business entities, Public Universities, State Agencies, etc.), it shall be understood that economic causes concur when an unexpected and persistent situation of budgetary insufficiency arises, thus affecting the financing of the corresponding public services. In any case, it shall be understood that the budgetary insufficiency is persist-

ent if it occurs during three consecutive, three-month periods. Surprisingly, the Law 3/2012 establishes that what is laid out in art. 47 ET shall not be applicable to Public Administrations and entities of public domain that are associated with or dependent upon one or several of them and on other public organisms, except for those that are mainly financed with the income obtained from market operations.

It is important to remember that the Government should have approved within one month from the date that the Royal Decree-Law 3/2012 came into effect the regulations governing proceedings for collective layoffs, contract suspensions, and reductions of working hours to develop what had been laid out in the Law. Until this intervention takes place, the Order ESS/487/2012, of March 8, on the transitory validity of certain articles of the Regulations of proceedings on employment regulation and administrative actions regarding collective redundancies, passed by Royal Decree 801/2011, June 10, has been in place to clarify this situation.

2. Modifications in the Regime of Objective Layoffs: Training and The Battle Against Absenteeism

There are two significant modifications in relation to objective layoffs. In the first case, the polyvalent dimension of training is now present. The Law 3/2012 establishes that the contract may be terminated by the worker's lack of adaptation to the technical modifications made in his job whenever those changes are reasonable. Previously, the employer will have to have offered the worker a course aimed at facilitating adaptation to the new modifications. During this training, the employment contract shall be suspended and the employer shall pay the worker his average salary. The contract's termination cannot be decided by the employer until at least two months from the date the modification was implemented or from the date that the training aimed at the worker's adjustment concluded.

According to employer associations, absenteeism remains a problem of great impact, especially in medium and large-sized enterprises. Once again, the labor reform deals with this historic demand, and modifies art. 52 d) ET. Through the same, it is established that for the calculation of job absences as an objective cause for contract termination, the staff's absenteeism rate will not be taken into account; and thus, it will be enough for the worker to incur in this cause for layoff when, in a 12-month period, his absences from work, justified albeit intermittent, reach 20% of the working days in two consecutive months as long as the total days of absence during this period reach 5% of the working days, or 25% in four discontinuous months within the 12 months mentioned above. Among others, absences resulting from medical treatments of cancer or serious illness shall not count. In relation to the control of absenteeism, in the case of temporary disability, the Law includes the mandate for the Government to study, in 6 months, the modification of the legal regime governing Mutual Insurance Companies "for a more effective management."

3. Lowering Severance Pay and Other Significant Reforms

One of the most heated debates in recent times has precisely been about the termination costs of employment relationships. The current economic crisis has raised many comments on the rigidity of Spanish regulations and high contract termination costs which make it difficult for our labor market to function properly, placing us at a disadvantageous competitive position with respect to our European partners.

The labor reform has significantly lowered severance pay for unfair dismissals: on the one hand, by lowering severance pay to 33 days per year of service, where periods lower than one year are prorated monthly, with a maximum of 24 monthly payments (a reduction that permits the elimination of the employment contract modality for the encouragement of indefinite-term hiring); and, on the other, by eliminating interim back payments, unless the employer decides to readmit the worker. The abovementioned reduction is logically associated with the cause for contract termination, based on the employer's failure to comply by the law in a serious manner, as regulated by art. 50 ET.

However, the effect of freezing severance payments earned prior to the reform established by the 5th Transitory Disposition of Law 3/2012 constitutes a minor effect in the reduction of layoff costs. For those contracts that have been valid prior to the reform, there will be a double calculation: the seniority accumulated before the reform will receive a severance pay of 45 days of salary per year of service, whereas that

accumulated after the reform will have 33 days of salary per year of service. The main limitation of the severance pay amount, which does affect the rights generated in the past, corresponds to the application of maximum amounts. Before, there was a maximum of 42 monthly installments. The new Law establishes 24. The old contracts continue to be subject to a maximum of 720 days. The only exception to this rule shall be when the days applicable to severance pay corresponding to the seniority prior to the labor reform exceeds the 720 days, in which case severance pay will be set to this maximum amount (Table 1).

Table 1. Transitory Disposition Fifth of the Law 3/2012.

	Before 2/12/2012	After 2/12/2012
Worker's seniority higher than 720 days	Freezing whatever corresponds to 45 days per year of service, up to 42 monthly installments	No severance pay applicable
Worker's seniority lower than 720 days	Calculated as 45 days per year of service	Continuing to calculate the severance pay as 33 days per year of service, up to 24 monthly installments
Contracts signed after RD-L 3/2012 coming into force	No previous period	33 x up to 24 monthly installments

The reform has eliminated interim back payments in case of wrongful dismissal, except in cases where the employer opts for readmission or if it concerns a legal representative of workers or a shop steward. If the layoff is of a legal representative of workers or a shop steward, whether he chooses the severance pay or his readmission, he will have the right to interim back payments. An issue that has especially raised controversy is the source of those interim back payments for layoffs that had taken place prior to the reform. Even though there are contradictory judicial rulings, several have considered interim back payments as appropriate by virtue of their compliance with the principle “tempus regit actum;” and therefore, with the 2nd Transitory Disposition of the Civil Code.

Law 3/2012 has ended what has been known as the “express layoff” (wrongful dismissal, acknowledged as such by the employer) that had become, according to the most recent data, the main channel for the termination of employment contracts of indefinite duration, significantly exceeding collective and objective layoffs in number. According to its Explanatory Statement, the labor reform eliminates it because it “creates insecurity among the employees, for company decisions are probably, and many times, adopted on the grounds of a mere economic computation based on the worker’s seniority, and therefore, on the cost of the layoff, independent of other aspects relative to discipline, productivity, or need of the services provided by the worker.” The question that remains open is whether, in the future, there will be a resurgence of the “express layoff,” considering that the grounds of the new model of collective layoff pose the risk for significant judicialization.

Finally, the labor reform omits any reference to the controversial Austrian Fund, and aware of the budgetary limits of the Wage Guarantee Fund (the Additional Clause 4th Royal Decree-Law 10/2011 included an assessment of the financial situation of the Wage Guarantee Fund), it establishes that this organism reimburse the employer the amount equivalent to eight days of salary per year of service (previously it was 40% of severance pay). Following the Law 3/2012, the abovementioned provision is exclusively limited to terminations of employment contracts of indefinite duration at companies with less than 25 workers, and that have not been legally declared unfair dismissals. The regulation introduces an important and practical detail, declaring that the severance pay corresponding to the worker will be reimbursed to the employer by the Wage Guarantee Fund. Therefore, the organization shall only intervene when the employer has paid the total amount of the severance pay, and it will not be possible to contact the Fund to apply for reimbursement without the prior confirma-

tion that the worker has received the amount due. Additionally, the abovementioned Royal Decree-Law 20/2012 has decreased the amount of benefits paid by the Wage Guarantee Fund, limiting the amount to twice (before, triple) the guaranteed daily minimum wage with a maximum of 120 days (before, 150 days).

VI. Reforms to Collective Bargaining: The Company as New Center of Gravity

The latest reforms on this subject have not reached, or even approached, the desired objectives. The scarce applicative experiences of the last reform, articulated through Royal Decree-Law 7/2011, June 10, urgent measures for the reform of collective bargaining, demonstrated, as will later be confirmed, that it was an incomplete or unfinished reform. It was necessary, therefore, to move forward and suggest new solutions. Law 3/2012 is a strong and solid step toward the renewal of the structure of collective bargaining in our country.

There is no need to remind the reader of the essential role that collective bargaining plays in all the advanced economies. Its economic role, both macro- and micro-economically, is evident, at the same time that it also constitutes the essential backbone of labor relations: their spine and heart. However, precisely for this reason, the host of factors to be taken into account when modifying the regulatory design that supports this negotiation, and the fragile balance on which the same is based, makes any regulatory change a highly complex issue.

1. Full Opt-Outs and the Leading Role of Company Negotiations

Extending the conventional opt-out to issues other than wages has long been demanded by companies as an instrument of internal flexibility that would allow for more flexible management, adapting the more general directives of sectoral negotiations to individual firm conditions. The above claim has been attended to through a new tool established in art. 82.3 ET, whereby the derogation (“*opt-out*”) of the collective agreement is no longer limited to the wage system, but extended to working conditions established in the applicable agreement, whether it is sectoral or company-level.

The reform has shaped a practically full opt-out from working conditions with respect to the single issue (salary) that existed previously. The derogation requires an agreement between the company and the workers’ legal representatives in order to negotiate a collective agreement in compliance with art. 87.1 ET, following a prior consultation period under the terms of art. 41.4 ET. Finally, for its viability, economic, technical, organizational, or production causes will need to concur. With Law 3/2012, these causes are defined in art. 82.3 ET under the same terms defined in the Royal Decree-Law itself for cases of collective layoffs, from art. 51 ET, and objective layoffs, from art. 52 c) ET. In other words, without prejudice to the fact that the former is an internal flexibility measure whose encouragement is actively sought out, and that the latter is an external flexibility measure. This similarity is only broken in case of the accreditation of economic causes. In this latter case, it occurs by specifying the time frame as “two consecutive three-month periods” in order for the decrease of revenues and sales levels to be considered “persistent,” thus defining the cause of the same.

What has been especially controversial is the means articulated to unblock, as a last resort, a possible lack of agreement. For cases in which the derogation of conditions affects company workplaces in more than one Autonomous Community, any of the parties shall be able to take their disagreements, as a last resort, to the National Consultation Commission for Collective Agreements. For other situations, they shall go to the corresponding organs of the Autonomous Community. This solution is not exempt from questions. Doctrinally, it has been pointed out that this mechanism ends up “materially imposing a mandatory arbitration, however much this is camouflaged, once again falling into problems of the unconstitutionality of this type of formulae.” Likewise, some political parties have specified that “the reform imposes a mandatory arbitration” by the National Consultation Commission for Collective Agreement when the parties do not reach an agreement. It is clear that, in order for a mandatory

arbitration to exist, a set of exceptional circumstances must concur, as was set out in the Sentence of the Constitutional Court 11/1981, April 8, whereby it proscribed mandatory arbitration, established in art. 25 b) of the Royal Decree-Law of March 4, 1977, based upon the lack of justifiable, concurring elements to restrict the right to bargaining protected in the Constitution by art. 37 EC. All in all, the issue is questionable.

2. “Relative” Supremacy of the Company Agreement

The wording of the new art. 84.2 ET provided by art. 14.3 of Law 3/2012 modifies the existing concurrence rule to reserve the applicative preference of company agreements for certain subjects. The following are the subjects on which the provision sets, under the terms below, the applicative priority of the company level collective bargaining agreement: “*a) Quantity of base salary and complementary salaries, including those linked to the situation and results of the company. b) Payment or compensation for overtime and the specific salary for shift-based work. c) Schedule and distribution of working time, system of shift-based work, and annual planning of vacation time. d) Adaptation of the system of sectoral professional classification to the company level. e) Adaptation of aspects of contract modalities that are attributed by the present Law to company agreements. f) Measures to favor the reconciliation of professional, family, and private life.*” If the legal proposal materializes in our negotiation practices, these reforms should generate more incentives for wage restraint, which, in the mid-term, should result in a greater economic stability and more creation of jobs.

It is important to point out that the establishment of art. 84.2 ET is not an attribution of absolute or unconditional preference for company agreements in relation to the contents established in higher level agreements. Rather, it is a relative preference within the specific subjects that the Law expressly ascribes to company-level agreements where a sector-wide agreement already exists. This means, of course, that for those subjects that are not expressly reserved for the company level, the prohibition of concurrence that is generally admitted in art. 84.1 ET continues to be fully in force, and, consequently, the “applicative ineffectiveness” or “mere inapplicability” of the company agreement that affects or invades a previous agreement reached at a higher level one. Two additional issues must be highlighted. In the first place, concurrence is admitted according to the precise terms that are legally reserved, that is, either through the provision of full competence (letters a), b), c), and f), of art. 84.2 ET, or under the terms of merely adaptive competence (letters d and e) of the same article. In the second place, the exception of competence operates in relation to national, Autonomous Community, and lower level sectoral agreements, which *contrario sensu* prevents the application of this rule whenever there is an intention to negotiate within the company, group, or cross-sectoral unit.

3. The Rule of Ultra-Activity in the Labyrinth

The objective of the reform that will be incorporated in art. 86.3 ET is clear in the Explanatory Statement of Law 3/2012. It aims, “in the first place, to encourage the renegotiation of a collective agreement before its expiration date and without the need to reject the entire agreement, a situation that is sometimes conflictive and does not facilitate a calm and balanced negotiation. But, also, when this solution is not possible, it seeks to avoid a “petrification” of the working conditions agreed in the agreement and excessive delay in its renegotiation through a temporal limitation of two years on the agreement’s ultra-activity.” Certainly, it makes no sense to preserve the validity of agreements that, due to difficulties of mutual understanding during negotiation or many other causes, continue to be applicable during many more years, thus maintaining in their text working conditions that may be considered “zombies,” in many cases oblivious to the legislation currently in force. In other cases, the strategic conducts of the negotiating agents would lead to negotiations that would go on virtually forever, such as the case of the collective agreement for air traffic controllers.

The new legal option has come from the establishment of a specific deadline, after which, if a new agreement is not reached, will render invalid the existing agreement in favor of the relevant sectoral agreement or, in the case that no such agreement exists, the agreement would be invalidated in favor

of the legislation in force. Thus, the important novelty of Law 3/2012 consists in that, “after one year following the rejection of the collective agreement without the reaching of a new agreement or the approval of an arbitration agreement, the agreement shall lose, unless the parties agree otherwise, validity and, if available, the collective agreement of higher level shall be applied, if it exists.” The fact that the law accepts pacts that will prevent the application of the law is noteworthy. The real scope of this new measure will need to be assessed based on its future practice, but this exception no doubt raises numerous questions.