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Gómez-Acebo & Pombo

Key aspects of the new law on teleworking

Lourdes López Cumbre

Professor of Labour and Social Security Law, Universidad de Cantabria

Academic Counsel, Gómez-Acebo & Pombo

In the end, it has been Royal Decree-law 28/2020 of 22 September (Official Journal of Spain [BOE] of 23 September) that has established the regulation of remote working (teleworking included), implementing employee rights and employer duties that weight, inter alia, the required performance and guaranteed privacy.

In this analysis, the following aspects of the new law are highlighted:

First key aspect: its definition

This primary executive legislation applies exclusively to those who fall within the scope of the Workers' Statute Act, and does not extend to other groups. Furthermore, a distinction is drawn between, on the one hand, 'remote work', as the organisation of the work or performance of the work activity that is carried out in the worker's home or in the place chosen by him/her, during all or part of his/her working hours, on a regular basis (a minimum of thirty percent of the working hours or an equivalent percentage depending on the duration of the contract in a baseline period of three months) and, on the other hand, 'teleworking', as a mode of remote working through the exclusive or prevalent use of computer, telematic and telecommunication means and systems; and 'face-to-face work', which shall be work provided at the workplace or at the place determined by the company.

The new regulation applies to employed workers, leaving out personnel in the service of the Public Administrations who will be governed by their own rules and regulations (Additional Provision 2). It has therefore been considered that the public sphere requires, for this purpose, rules of different content, restricting the application of this new piece of legislation to private businesses, principally. Apart from this, the old concept of remote work (former Article 13 of the Workers' Statute Act, hereinafter LET) is quantified since previously such work had to be carried out 'predominantly' in the worker's home or place chosen by him/her as an alternative to face to face, whereas now a percentage of the working hours is required at said home or place. Telework is also introduced when remote work is carried out "exclusively or predominantly" by computer and telematic means, which will be the case in most cases, and therefore the expression "telework", more grounded in common parlance than legal vernacular, will tend to be used more.

Second key aspect: voluntariness

Remote working must be voluntary for both the employee and the employer and will require the signing of an express agreement, which may be part of the initial contract or concluded at a later stage. Without prejudice to the possible right to remote working which may be recognised by subsequent legislation or collective bargaining, and without the possibility of recourse to Article 41 LET in order to implement this form of organisation.

The agreement between an employer and employee must be made in writing and incorporated into the initial contract or concluded at a later date, but in any case before the start of this type of service. With a minimum obligatory content, in addition to what may be determined by the collective agreements in this respect. This content must include, at least, the following: (a) an inventory of the resources, equipment and tools required for the performance of the agreed remote work, including consumables and movable elements, as well as their useful life or maximum period of renewal; (b) a list of the expenses that the worker may incur as a result of providing remote services, as well as the manner of quantifying the compensation that the employer is obliged to pay, and the time and form in which it is to be paid, which shall conform to, if it exists, the provision made in the applicable collective agreement; (c) the employee's hours of work and within them, where applicable, the rules of availability; (d) the percentage and distribution between face-to-face work and remote work, where applicable; (e) the workplace of the employer to which the remote worker is assigned and where, where applicable, he or she will carry out the face-to-face part of the working hours; (f) the remote workplace chosen by the worker for the performance of the remote work; (g) the length of notice for the exercise of the reversibility situations, where applicable; (h) the means of corporate monitoring of the activity; (i) the procedure to be followed in the event of technical difficulties preventing the normal performance of the remote work; j) the instructions given by the employer, with the participation of the worker representatives, on data protection, specifically applicable to remote working; k) the instructions given by the employer, after informing the worker representatives, on information security, specifically applicable to remote working; and l) the term of the remote working agreement.

Failure to formalise the agreement or absence of mandatory content will be considered a serious infringement by the employer. Likewise, the employer must provide the worker representatives with a copy of all the remote working agreements made and their updates, excluding those data that could affect personal privacy and with due protection of personal data. This copy shall be delivered by the employer, within a period not exceeding ten days from its formalisation, to the worker representatives, who shall sign it in order to certify that it has been delivered and, subsequently, the copy shall be sent to the appropriate employment office.

Alterations of the conditions set out in the remote working agreement, including the percentage of face-to-face work, must be the subject of an agreement between the employer and the employee, and must be formalised in writing prior to its application. The worker representatives must also be made informed. The decision to work remotely from a face-to-face work mode shall be reversible for the employer and the employee. The exercise of this reversibility may be carried out under the terms set out in the collective agreement or, in its absence, under those set out in the remote working agreement. In addition, collective bargaining can incorporate mechanisms and criteria by which the person carrying out face-to-face work can switch to remote work or vice versa, or other preferences. The design of these mechanisms should avoid the perpetuation of gender roles and stereotypes and should take into account the promotion of joint responsibility between women and men. In the case of people who work remotely from the beginning of the employment relationship during their entire working hours, they will have priority to occupy face-to-face jobs, and the employer must inform them of any vacancies that may arise.

Any discrepancy regarding access, reversion or modification of remote work will require a special modality included in Article 138 bis of the Employment Jurisdiction Act, which sets out a period of twenty business days to file a claim with the Employment Court, as soon as the employer informs him or her of its refusal or disagreement with the proposal made by the worker. The procedure will be urgent, it will be given preferential treatment and the ruling will be unappealable, unless a claim for damages is joined which, due to its amount, could give rise to a 'recurso de suplicación' (application for review of employment court decision), in which case the ruling will be enforceable from the moment it is issued. If the claim concerning remote work is related to the exercise of the work-life balance rights, recognised under the law or under a collective agreement, it shall be governed by the procedure set out in Article 139 of the aforementioned Act.

The refusal of the worker to work remotely, the exercise of reversibility to face-to-face work and the difficulties for the adequate carrying out of the remote work activity that are exclusively related to the change from a face-to-face service to another one that includes remote work, shall not constitute grounds for termination of the employment or a material alteration of the working conditions.

The voluntary nature with which this device was regulated in Article 13 of the Workers' Statute Act therefore remains. However, a series of legal obligations are now indicated: a minimum content of the agreement, the delivery of its basic copy within a certain period of time, the need

to agree, where appropriate, on an alteration or reversibility, priority in the filling of vacancies of a face-to-face nature, etc. However, two decisive points should be highlighted: the first is that the employer must compensate for the expenses arising from teleworking, which means establishing the premise that there must be a supplement - the form, content, and amount will be specified in each case, in each company, in each sector - for carrying out work remotely; and, the second, that any refusal of this type of work, or the reversibility or lack of adaptation to it, may not result in either an amendment of the contract or its termination. At least, not with just cause, that is, fairly as would be the case in the event of recourse to a redundancy, since, if the employer were to act in this way, its decision would be considered unfair, with a greater financial cost.

Third key aspect: equal rights as face-to-face workers

To this end, the people who carry out remote work will have the same rights that they would have had if they were providing services in the employer's workplace, except for those inherent in carrying out the work face-to-face and may not suffer a disadvantage in any of their working conditions, including remuneration, job stability, working time, training and professional promotion. Without prejudice to the latter, persons who work remotely in full or in part shall be entitled to receive, as a minimum, the total remuneration established in accordance with their staff category, level, position and duties, as well as the supplements established for workers who only provide services face-to-face, particularly those linked to personal conditions, company profits or the characteristics of the job. In this respect, they may not suffer any disadvantage or alteration in the agreed conditions, particularly as regards working time or remuneration, because of any difficulties, technical or other, not attributable to the worker, which may arise, particularly in the case of teleworking. They will have the same rights as face-to-face workers in terms of work-life balance and joint responsibility, including the right to adapt to the working hours in accordance with Article 34(8) LET, in order to avoid this type of work interfering with their personal and family life.

The employer is obliged to avoid any direct or indirect discrimination, particularly on the basis of sex, in this type of service. In this sense, account must be taken of teleworkers or remote workers and their employment characteristics in the diagnosis, implementation, application, monitoring and evaluation of equality measures and plans, especially in the design and application of measures against sexual harassment, harassment on the basis of sex, harassment for discriminatory reasons and harassment at work and in the design of measures for the protection of victims of gender violence.

Along the same lines, the effective participation of people who work remotely in training actions is guaranteed, in terms equivalent to those of people who provide services at the employer's workplace, and the right to their professional promotion, with the employer having to inform them, expressly and in writing, of the possibilities of promotion that may arise, whether they are for face-to-face or remote positions.

In view of the risk of the 'feminisation' of teleworking, the legislators takes every precaution to avoid any discrimination, but especially if it is based on gender. Salary, promotion, training, work-life balance, stability and harassment are concepts that acquire special significance for those who will not have the same connection with the employer as the face-to-face worker. Hence, the initial presumption in the event of any conflict is the full equality of rights, which already existed in the old legislation, although without the specific implementation now introduced. And with the exception - also included here - of everything that is "inherent in the performance of work in a face-to-face manner", which, in the new context, will foreseeably be interpreted restrictively.

Fourth key aspect: teleworkers' rights

Regarding material resources

The right to a sufficient provision and adequate maintenance of the resources, equipment and tools necessary for the carrying out of the activity is guaranteed, in accordance with the inventory incorporated in the signed agreement or, as the case may be, in the applicable collective agreement. Likewise, precise attention is guaranteed in the event of technical difficulties, especially in the case of teleworking. In this sense, the carrying out of remote work must be compensated by the employer, and may not involve the bearing by the worker of the costs involved. Collective agreements may provide the mechanism for the determination and compensation or payment of these expenses.

Regarding working hours

The person carrying out remote work may make the established hours of service more flexible, depending on the agreement reached or the provisions of the collective agreement, while respecting compulsory availability times and legislation on working time and rest. To this end, the system of time recording shall faithfully reflect the time that the worker who performs remote work dedicates to the work activity, without prejudice to time flexibility, and shall include, among other things, the time at which the workday begins and ends.

People who work remotely, particularly teleworking, have the right to digital disconnection outside the hours of work. The employer's duty to guarantee disconnection entails a limitation on the use of technological means of business communication and work during rest periods, as well as respect for the maximum duration of the working hours and any limits and precautions regarding the working hours that are laid down by law or collective agreement. To this end, the employer, after hearing the worker representatives, will draw up an internal policy aimed at its workers, including those in management positions, in which it will define the ways in which they can exercise their right to disconnect and the training and awareness raising of the staff on the reasonable use of technological tools that will avoid the risk of computer fatigue. In particular, this right will be preserved in cases of total or partial remote working, as well as at the employee's home linked to the use of technological tools for work purposes. Collective

agreements may provide for appropriate means and measures to ensure the effective exercise of this right to disconnect whilst teleworking and the appropriate organisation of the working hours in a manner compatible with the guarantee of rest periods.

Regarding occupational health

Adequate protection is also guaranteed in terms of health and safety at work, in accordance with the provisions of the Occupational Hazards Prevention Act. The risk assessment and planning of preventive activity in respect of remote work must take into account the characteristic risks of this type of work, paying special attention to psychosocial, ergonomic and organisational factors. In particular, the distribution of the working hours, availability times and the guarantee of breaks and disconnections during the working hours should be taken into account.

The risk assessment should only cover the area prepared for the provision of services and should not extend to other areas of the dwelling or the place chosen for the place chosen to carry out remote work. The employer must obtain all the information about the risks to which the person working remotely is exposed by means of a methodology that offers confidence in its results, and must provide the protection measures that are most appropriate in each case. When obtaining this information requires a visit by the person with responsibility for prevention to the place where, in accordance with the individual agreement, the remote work is carried out, a written report must be issued justifying this and given to both the worker and the prevention delegates. The visit shall require, in any case, the permission of the worker, if it is his or her home or that of a natural third party. If such permission is not granted, the employer's preventive activity may be carried out on the basis of the determination of the risks arising from the information collected from the worker according to the instructions of the prevention service.

Regarding privacy

The use of telematic means and the monitoring of work performance by means of automatic devices will adequately guarantee the right to privacy and data protection, in accordance with the principles of suitability, necessity and proportionality of the means used. The employer may not require the installation of software or applications on devices owned by the worker, or the use of such devices in the performance of remote work. In turn, employers must establish criteria for the use of digital devices in the development of which the worker representatives will participate and in which, in any case, the minimum standards of protection of their privacy must be respected in accordance with social practices and legally and constitutionally recognised rights. Collective agreements may specify the terms under which workers may use, for personal reasons, the computer equipment made available by the company for the carrying out of remote work, taking into account social practices and the particularities of this type of work.

Regarding collective rights

The collective rights shall have the same content and scope as for the rest of the workers in the workplace to which the remote worker is assigned, with collective agreements being able to establish the necessary qualifications, where appropriate, for those who provide remote services or telework. To this end, the employer shall provide the worker representatives with the necessary elements for the carrying out of their representative activity, including access to communications and electronic addresses used in the company and the implementation of the virtual bulletin board, when compatible with the remote work. It must ensure that there are no obstacles to communication and that they can participate effectively in the activities organised or convened by their representatives, especially participation in their elections.

A catalogue of rights, of a different nature, which seeks to preserve both the remote worker and his personal and family environment, whenever the work carried out may affect the same. Hence, measures to preserve privacy or occupational health and precautions to prevent their violation are considered strictly necessary. There are, however, two salient aspects to this framework. One, all that refers to the computer or telematic means made available by the employer and which must be maintained and paid for by the same but which also allows more exhaustive monitoring to be exercised in an environment outside the workplace. Another is the working hours, since teleworking can mean the full availability of the worker in his or her working hours or no availability at all, with this type of work varying between a lower yield during the same time or an excess yield for the same price. The solution to avoid excesses or shortcomings in compliance is found in the balance between the organisational power of the company and the limitation of the working hours. With special incidence, although at the moment with little significance except in exceptional cases, of the novel requirement of digital disconnection.

Fifth key aspect: the employer's organisational capacity

Remote work will be subject, as with face-to-face work, to compliance with the employer's instructions on data protection or information security specifically set by the company, after informing the worker representatives. Likewise, remote workers or teleworkers shall comply with the conditions and instructions for use and maintenance established in the company in relation to computer equipment or tools, within the terms that, where appropriate, are established in the collective agreement. However, the employer may adopt the measures it deems most appropriate for surveillance and monitoring to verify compliance by the worker with his or her work obligations and duties, including the use of telematic means, taking into account in their adoption and application the consideration due to his or her dignity and taking into account, where appropriate, the real capacity of the workers with disabilities.

Royal Decree-law 28/2020 does not pay much attention to business needs compared to the implementation of employment rights protection for teleworkers. However, it is clear that the employer does not lose organisational capacity, but may even increase it, if, in the instructions

on the use of computer and telematic means for work purposes, it clarifies all those issues that allow it to verify its monitoring of the performance of non-face-to-face activity.

It contains other provisions of interest on remote working [in relation to collective agreements, Additional Provision 1; on infringements and penalties to adapt legislation to this new regulation, Final Provision 1; to adapt the procedural rules to this new body of rules, Final Provision 2; or, finally, to adjust the provisions of the Workers' Statute Act to this new regulation, especially Articles 13, 23 and 37]. However, the regulation of two transitional situations should be emphasised: that of employers that have resorted to teleworking in times of pandemic, Article 5 of Royal Decree-law 8/2020 of 17 March (BOE of 18 March) and for which the application of ordinary employment-related legislation is maintained (Transitory Provision 3) and that of those who were already carrying out their activity remotely when the Royal Decree-law came into force, in which case, this piece of legislation considered to be fully applicable from the moment the collective agreement loses its validity and, in any case, after one year has passed since its publication, unless the parties have provided for a longer period which may be up to three years (Transitory Provision 1). The parties have three months to formalise the agreement or to amend the individual remote working agreements in effect, the entry into force of this new law being twenty days as from publication.