

## Employment Update

### Possible consequences of Covid-19 on the duration and holiday periods of workers

6th April 2020

Questions raised by employers and employees on the length and days of holidays in the present year 2020

The pandemic that we are experiencing substantially alters the framework of labour relations, not only with the new labour laws resulting from the health scare and the measures decreed by the government, but also with the emergence of many questions and problems that no one had foreseen before.

One of them concerns the length and days of holidays in the present year 2020. The present comments serve to analyse four important issues that are already being raised by many companies and workers.

#### **1. The changing of holiday period dates by the employer:**

The general rule set out in Article 38.2 of the Workers' Statute (ET) is that the period for taking leave is fixed by agreement between the worker and the employer. In principle, therefore, the exceptional situation created by the COVID-19 would not justify a unilateral change in the leave, but any alteration to the agreed arrangements would have to be agreed with the worker concerned.

Of course, that provision gives collective bargaining powers in respect of the annual planning of the taking of leave. That is why several collective agreements stipulate specific months for taking part of the holidays or even provide for the possibility of altering certain days depending on the needs of the company or the concurrence of factors. This is reflected, among others, in the judgement delivered by the high court of Cantabria, of 26th September 2001 (RS 741/2001).

In any case, the annual distribution of holidays must be included in a calendar so that each worker can know the days assigned at least two months in advance.

However, in the absence of entitlement under a collective rule, unforeseeable circumstances cannot lead to a change in the holiday schedule by unilateral decision of the Company, since this would entail the risk of being considered a substantial change in working conditions undertaken without following the legal procedure laid down in Article 41 of the ET, unless it could be ascertained that the measure was not substantial. In this respect, the judgement delivered by the high court of Galicia, 15th February 2019 [RS 4492/2018] did not consider the amendment of a single day of the holiday period initially laid down to be substantial.

In short, the modification of the periods of the already established vacations by the employer must count, either individually or collectively, with the obligatory and previous negotiation with the affected worker or with the legal representation of the workers, respectively.



## **2. The effect of Temporary Incapacity (TI) and ERTes (Records of Temporary Employment Regulation) on the duration and period of the enjoyment of holidays:**

There is a principle of proportionality, according to which, when services have not been provided all year round, the duration of holidays should be proportional to the time of services provided. One exception to this principle is certain absences from work for reasons beyond the worker's control, which must be counted as part of the period of service for which leave is due (ILO Convention 132, Article 5(4)).

Based on these international regulations, the courts and article 38 (last paragraph) of the ET have assimilated, for these purposes, working time to that which is in TI, regardless of the cause that gives rise to it:

"In the event that the period of vacation coincides with a temporary incapacity (...) that makes it impossible for the worker to take all or part of the vacation during the calendar year that it covers, the worker may do so once his incapacity has ended and provided that no more than 18 months have elapsed since the year in which it originated".

What effect will an ERTE have on holidays? It will depend on whether it suspends the entire provision of services, i.e. the employment contract itself, or simply entails a reduction in the working day.

In the first case, during the entire time that the ERTE is in force, the worker does not generate any right to holidays. Logically, as it sometimes happens, the Agreement reached during the consultation period between the Company and the Trade Unions or legal representatives of the workers agreed that there would be no reduction in the enjoyment of vacation days despite the periods of suspension of the established employment contracts.

If, on the other hand, a reduction in the working day and salary has been chosen, the employee has not been in a situation of suspension of the contract, a reduction in the time of vacation is not generated, although his remuneration, which should be so taking into account the percentage of reduction of the working day, is.

## **3. The use of holidays as an alternative measure to mitigate the consequences of an ERTE:**

One possibility for establishing holidays to cope with the reduced workload caused by an unforeseeable, unavoidable or force majeure situation is to offer to take them voluntarily as an alternative to more burdensome measures such as temporary suspension of contracts or reduction of working hours.

Indeed, in order to mitigate or reduce the impact of the collective measure proposed by the company, one of the alternatives that can be taken into consideration would be the voluntary taking of leave by the employees. This possibility has been endorsed by our courts, among others, by the judgement delivered by the high court of Asturias, 14th October 2011 (RS 1784/2011), when validating the tacit agreement with the Works Council that the period of inactivity between the floods (10-6-2010) and the date of effect of the ERE (collective dismissal) (1-7-2010) would be set aside as a period of vacation so that all personnel who went to the ERE could take vacation and be paid in full until 30th June.

#### **4. On the possibility of postponing holidays planned for the period from 30th March to 9th April and/or replacing them with the paid leave established by 29th March RDL (Royal Decree Law) 10/2020**

It is known that Royal Decree 463/2020 of 14 March, which declared the state of alarm for the management of the health crisis situation caused by COVID-19, adopted a series of measures in relation to limiting the mobility of people, as well as social and economic activities in our country. On 29th March, the Government approved Royal Decree-Law 10/2020 of 29 March, regulating recoverable paid leave for employees who do not provide essential services, in order to reduce the mobility of the population in the context of the fight against COVID-19.

Under this regulation and with due regard to the exceptions provided for in Article 1 thereof, a compulsory leave of limited duration between 30th March and 9th April (both included) is established for all employed persons providing services in public or private sector companies or entities carrying out non-essential activities qualified as such in the annex accompanying the Royal Decree-Law itself.

One of the questions, therefore, that arises in connection to this regulation is that relating to the situation of those workers who have planned to take partial holidays during Easter Week and, therefore, coincide totally or partially with the period corresponding to the days of paid leave.

Given the obligation of confinement arising from the state of alarm, a first question is to answer whether the worker can urge the employer, with a view to benefitting, to change the initially agreed days of vacation.

It is not disputed that the purpose of the right to paid annual leave is to allow workers to rest and have a period of leisure and that staying at home, without any possibility of freedom of movement, seems to run counter to the purpose of continuous rest for leisure and switching off. The same doubt arises with workers who, in the current circumstances, provide services by means of teleworking, spending a few days' holiday (normally from Monday to Wednesday of Easter week) at home is, *a priori, sui generis*.

In our opinion, the company's response to the worker's request for a change (while waiting for the next few months and the end of the state of alert) may be negative, since, even if the logic of the request is understood, the fact that we are in a state of confinement must be assimilated to a case of force majeure in which the worker, being not signed off sick, cannot be accused of not having freedom of movement for his sole benefit and against the company's interests.

As always, there will be opinions to suit all tastes, perfectly defensible, and in the end, it will be the Social Courts that will have the last word in the solution of the conflicts that come to their attention.

In this order of things, it would not even be feasible to request that the vacation days agreed for their enjoyment during Easter Week, should be left without effect to be replaced by a paid leave.

Article 1 of Royal Decree Law 10/2020, of 29th March, establishes that workers who fall within the scope of this Royal Decree Law shall be entitled to compulsory recoverable paid leave between 30th March and 9th April 2020, inclusive. The logical and systematic interpretation of this provision, in

relation to the provisions of Article 38 of the ET, leads us to believe that the leave is granted to those who are active during this period and with the programming of providing services in the same, not those who have previously agreed to take partial holidays, so that, except for express agreement with the employer, the holidays foreseen would remain unchanged.

We hope the information is useful and of interest. At Andersen Tax & Legal we have created a multidisciplinary team to deal with all the questions that may arise on this aspect or in relation to the COVID-19.

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