Employment Update

Preponderant criterion of adaptation to the existing risk in the specific occupation in terms of contributions for accidents at work and occupational disease.

1st February 2019

Regarding the Supreme Court Judgment of October 26th, 2018

It is well known that in recent years the Labour and Social Security Inspectorate ("ITSS") has carried out different action plans in the context of different campaigns, either general or special (territorial, sectorial, large companies, etc.), with the aim of reviewing and verifying the appropriate contribution by the Companies of their tariffs in matters of professional contingencies (occupational accident and illness -ATEP-) applicable to workers.

Thus, with regard to contributions for accidents at work and occupational diseases, since the entry into force of the Fourth DA of Law 42/2006, of 28 December, on General State Budgets for 2007, it has been established that employers' Social Security contributions for such contingencies will be made according to economic activity, occupation or situation, through the application of the corresponding tariffs, which are set by the Government.

This norm provides that for the determination of the specific contribution rate in each specific case (Table I), the rate assigned to each company shall be based on its main economic activity, as established in the National Classification of Economic Activities ("CNAE") and, therefore, on the rates applicable to the codes contained therein. An exception to this criterion is the fact that different main activities may exist within the same company, in which case the application of different types of contributions would be validated, depending on each main economic activity. A table of contribution rates applicable to 2019 is attached for your convenience.

Notwithstanding the foregoing rule, following the reform of the Fourth DA of Law 42/2006 by the Eighth Final Provision of Law 48/2015 -with entry into force on 1 January 2016-, when the occupation performed by the employee corresponds to any of those listed in Table II, the applicable contribution rate shall be that provided for in said table for the occupation in question, insofar as the rate corresponding to such occupation differs from that corresponding to the activity of the company. And finally, for the purposes of determining the type of contribution applicable to the occupations referred to in letter "a" of Table II (personnel in exclusive office work), employees who, without being subject to the risks of the economic activity of the company, carry out their occupation exclusively in carrying out their own office work, even when this corresponds to the activity of the company, and provided that such work is carried out only in the places assigned to the company's offices, shall be considered as such.

Having established the legal framework applicable for the purposes of this commentary, mention should be made of how ITSS has been paying special attention to situations in which it detects the application of different types of tariffs/CNAE in the same company.

As a result of this, an interesting controversy has arisen which gave rise to an initial Judgment of the Contentious-Administrative Chamber of the National High Court dated 4 December 2013, in which it was concluded that in the field of engineering and consulting, office employees linked to the main activity had to be included in the tariff applicable to the type of CNAE specific to the company's main activity or activities, since that group should not be understood to be administrative or administrative

- irrespective of whether their functions were carried out in an office and whether they had a risk modulated in the light of that circumstance; This interpretation would have been overcome after the modification introduced by the Eighth Final Provision of Law 48/2015 mentioned above.

This gave rise to a not inconsiderable debate regarding the correct interpretation of the rule (DA Fourth of Law 42/2006) and, specifically, whether, both before and after its new wording / entry into force - January 1, 2016 - the worker assigned to the occupations or situations in Table II, the type of contribution provided for in the same or, on the contrary, the one established for the main economic activity of the company, is applicable to them.

This, given its economic importance (especially in companies with a large number of employees), led to a novel revision of the standard in terms of its wording, spirit and correct application. And it is worth stressing the importance of the term given that, as was reported in the Labour Alert published on 8 January 2019, with the entry into force on 1 January of this month and year of Royal Decree-Law 28/2018 of 28 December, for the revaluation of public pensions and other urgent measures in social, labour and employment matters, **the Fourth DA of Law 42/2006 has been modified in the sense of increasing the rates/rates of Tables I and II for the ATEP** contribution, being, among others, noteworthy:

Table I:

"CNAE 61 - Telecommunications", whose contribution rate increased from 1.40% to 1.50%.

"CNAE 62 - Programming, consultancy and other activities related to information technology", whose contribution rate increased from 1.35% to 1.50%.

"CNAE 70 - Activities of head offices; business management consultancy activities", whose contribution rate increases from 1.35% to 1.50%.

"CNAE 8220 - Activities of call centres", whose contribution rate increases from 1.40% to 1.50%.

"CNAE 64 - Financial services, except insurance and pension funds", whose contribution rate increased from 1% to 1.50%.

Table II:

This only affects staff in exclusive office work, increasing the previously applicable quotation rate (1%) to 1.50% as from 1 January 2019.

At this point, the recent Judgment of the Contentious-Administrative Chamber of the Supreme Court dated October 26, 2018 (Transportes Hermanos Laredo Case) is analyzed below. This Judgment is of great interest given that, although it ratifies the criteria of certain immediate previous pronouncements, it does not coincide in the majority with the one that had been maintained to date.

In the case under analysis, the relevant factual background is as follows:

a.- The Contentious-Administrative Chamber of the High Court of Justice of Cantabria issued a judgement on 6th June 2017, by virtue of which the contentious-administrative appeal filed by Transportes Hermanos Laredo, S.A. was upheld, against the Resolution dated 17th May 2016 of the Provincial Directorate of the General Treasury of the Social Security of Cantabria - by which the appeal filed against the resolution of 5th April 2016 rejecting the return of undue income that the plaintiff had presented on 18th February 2016 was rejected - the General Treasury of the Social Security being the party appealed, annulling the contested resolution and ordering the return to the company of the amount of 70,888.71 € plus interest.

b.- The lawyer of the Social Security Administration prepared a cassation appeal against the aforementioned ruling, specifying that the question in which there is an objective housing interest for the formation of jurisprudence is understood to be the following:

"Before the reform of rule three, paragraph two, of the fourth additional provision of Law 42/2006, of 28 December, on General State Budgets for 2007, carried out by the eighth final provision of Law 48/2015, of 29 October, on General State Budgets for 2016, the companies included in the corresponding CNAE code of those included in Table I, with workers performing functions included in Table II (in this case, drivers of goods vehicles with a load capacity greater than 3.5 MT) had to pay contributions for professional contingencies and occupational accidents for the type corresponding to Table II or for the corresponding tariff in Table I for the main activity of the company."

c.- The legal rules subject to interpretation would be the Fourth DA of Law 42/2006 and the new wording given by the eighth final provision of Law 48/2015, of 29th October, on General State Budgets for 2016.

d.- The Social Security Administration states in its brief that the judgment under appeal is based on a literal interpretation of both wording, whereas the new wording - applicable from 1st January 2016 - establishes the legal consequence **when the rate corresponding to the employee's occupation and the company's own type of activity differ, and yet the old wording established the legal consequence when the employee's occupation in itself differs from the company's activity** (that is, without the **contribution rate** being the differentiating element).

Thus, the Social Security maintains that the intention of the rule is the same in both versions and acknowledges that the wording in force before 2016 was deficient but that the new wording has corrected these deficiencies, clarifying an issue that had given rise to pronouncements such as that of the instance, but also to those that follow the Social Security thesis.

In short, it argues that both before 1st January 2016 and after the new wording of the fourth DA of Law 42/2006, **if the worker is in any of the occupations or situations in Table II, this type of contribution would be applied and not any of those provided for in Table I corresponding to the activity of the company.** Therefore, it concludes that Transportes Hermanos Laredo, S.A., in particular, and in general any company included in CNAE code 494 "Road transport of goods and removal services" -included in Table I-, that has workers who perform functions specifically included in Table II (in the case of drivers of goods transport vehicles with a load capacity greater than 3.5 mt) must apply the highest contribution rate (6.70% corresponding to Table II) and not the rate foreseen for the main activity of the company, corresponding to Table I (3.70%).

e.- For its part, the company shows its opposition by stating the absence of any grammatical error in the initial legal text, defending that the legislator has tried to avoid fraud by under-pricing, allocating contributions on the basis of economic activity (CNAE), so that if the business activity, as is the case, is the transport of goods by road, that of the worker (driver) does not differ from that, the rate of contribution corresponding to the CNAE of the same must be applied.

Once the question has been raised in this way, it is convenient to recover the wording of the controversial norm in order to identify which is the grammatical error denounced, on this occasion, by the Administration -and in many others by the companies inspected- in order to understand the question to be elucidated and the solution already given by the Supreme Court.

With effect from 1st January 2016 and indefinite validity, the third rule of section two of the Fourth DA of Law 42/2006 is modified, and is worded as follows:

"Third. Notwithstanding the foregoing rule, when the occupation performed by the employed person corresponds to any of those listed in Table II, the applicable contribution rate shall be that provided for in said table for the occupation in question, insofar as the rate corresponding to such occupation differs from that corresponding to the activity of the company."

Prior to this amendment, rule three of section two of the Fourth DA of Law 42/2006 stated:

"Notwithstanding the foregoing rule, when the occupation performed by the employee, or the situation in which the employee finds himself, corresponds to any of those listed in Table II,

the applicable contribution rate shall be that provided for in said Table for the occupation or situation in question, insofar as it differs from **that** which corresponds by reason of the activity of the company."

As is well identified in the Judgment that is the subject of this commentary, the problem lies in whether the incorporation of the pronoun "this" completely alters what was previously regulated or, on the contrary, it must be understood that there is a grammatical error that should not affect the purpose intended by the norm. In this regard, as already stated in certain pronouncements, the wording was very confusing and could be clearly improved, especially with respect to the third rule transcribed (in which the rule of concordance in gender between the subject and the predicate is not respected: "this" -the occupation- differs in gender "from the corresponding one": "This" is feminine and "corresponding" is masculine and should be agreed upon) and **it had been generally held that the employers' Social Security contribution, for the contingencies of occupational accidents and illnesses, had to be made according to the corresponding main economic activity of the company** and that, in order to be able to go to Table II, it was necessary not only that the occupation carried out by the employee, or the situation in which the employee finds himself, corresponded to any of those listed in Table II, but **also that it was different from the main activity of the company (that is, it was not included in its productive cycle).**

However, the thesis maintained by the Social Security in the aforementioned Judgment would imply admitting that the purpose intended by the norm would not have changed with the new wording in open contradiction with the thesis also maintained by the Administration -especially when it was a question of *"personnel in exclusive office work"* in which the contribution rates in Table II tended to be lower than those established in Table I for the main activity of the company in question-.

Faced with this situation, what was the response of the Contentious-Administrative Chamber of the Supreme Court?

Well, taking into account the **risk assumed by the worker in his task and occupation** as a transcendental issue with regard to the regulations for contribution purposes, it concludes that the consideration of the particularity of the job position with respect to the business activity for the contribution for work accidents and occupational diseases has always been taken into account by the basic legal norm of Social Security and must prevail.

Thus, the **risk assumed is presented as an essential issue in the regulations for these purposes independently of business economic activity** -contrary to the criterion that on many occasions has been followed and adopted by the ITSS with respect to "personnel in exclusive office work"-, which is why Table II provides for low-risk occupations (personnel in exclusive office work or trade representatives) to higher-risk activities (trade personnel in installations and repairs in buildings, works and construction work in general, or drivers of goods transport vehicles with a payload capacity greater than 3.5 MT).

The Judgment analyzed is in line with the previous ruling of the Superior Court of Justice of Madrid dated April 30, 2018, and understands that, according to a finalist interpretation, the end of the Social Security rules has not changed in that a **higher-risk employee's work entails the need for a higher Social Security contribution** to cover the pertinent benefits for work accidents, as established by legislation prior to the aforementioned modification.

In view of the foregoing, the doctrine is fixed in the following terms:

> *"Before the reform of the third rule, paragraph two, of the fourth additional provision of Law 42/2006, of 28th December, on General State Budgets for 2007, carried out by the eighth final provision of Law 48/2015, of 29th October, on General State Budgets for 2016, the companies included in Table I under CNAE code 494 "Transport of goods by road and removal services", with workers performing functions included in Table II (in this case, drivers of goods vehicles with a load capacity greater than 3.5 mt) must pay contributions for professional contingencies and occupational accidents for the highest type (tariff 6.70% corresponding to Table II and not for the tariff 3.70% corresponding to Table I)."*

By way of **conclusion** in relation to the Supreme Court's interpretation of the rule set forth above, the following reflection on the significance of this doctrine and the consequences of its application in a twofold manner is appropriate:

I.- In the first place, in those cases of liquidation acts pending resolution with respect to other occupations included in Table II, such as the deserving "personnel in exclusive office work", and whose application could imply the revocation of the same in favor of the inspected companies.

II.- And, secondly, given the increase in the rates/prices for the ATEP contribution that came into force on 1st January, this doctrine would be clarifying to a certain extent the criteria to be followed for the classification of certain groups of workers of the companies in occupations in Table II, adapting their contribution to the risks existing in the performance of the job activity, regardless of the main activity or activities of their employer; all of this without prejudice to the necessary/recommendable analysis of the specific case,

You can read the complete sentence for more information.

For more information please contact:

Alfredo Aspra

alfredo.aspra@AndersenTaxLegal.es

José Antonio Sanfulgencio

jose.sanfulgencio@AndersenTaxLegal.es