NEWSLETTER November 2022

The Andersen Employment Brief

Employment and labor laws update

LEGISLATION

Coal mining

- Order ISM/992/2022, of 11 October. In accordance with the provisions of Article 106.9 of Law 22/2021, of 28 December, on General State Budgets for 2022, the contribution bases for common contingencies in the Special Social Security Scheme for Coal Mining, standardised for each of the professional categories and specialties, to be applied during the financial year 2022, are for each of the mining areas, those contained in the annex to the aforementioned Order.

Compensation fund for asbestos victims

- Law 21/2022 of 19 October. The Compensation Fund for Asbestos Victims is created to provide full compensation of damages to health resulting from exposure to asbestos, to any person at work, domestic or environmental environment in Spain, as well as to their successors.

Disability

- Royal Decree 888/2022, of 18 October. This regulates the procedure for the recognition, declaration and qualification of the disability level, the establishment of the applicable scales, as well as the determination of the competent bodies, with the aim of ensuring that the assessment of the disability level affecting the person is uniform throughout the territory of the State.

Pension plans and funds

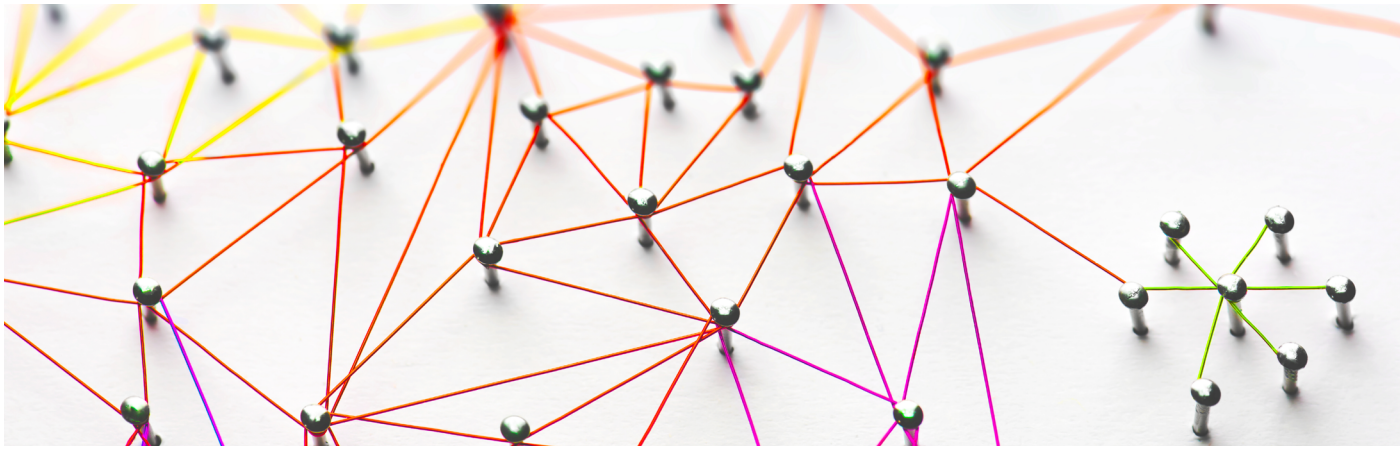
- Royal Decree 885/2022 of 18 October. This amends the Regulation on pension plans and funds, approved by Royal Decree 304/2004, of 20 February, to promote occupational pension plans. Among other aspects, it regulates the organisation and functioning of the Promotion and Monitoring Committee of open public employment pension funds in order to give effect to its constitution.

Labour calendar

- Resolution of the Directorate General for Labour of 7 October 2022. It publishes the list of public holidays for the year 2023.

Household assistants

- Resolution of the Congress of Deputies of 29 September 2022. It orders the publication of the Agreement on the validation of Royal Decree-Law 16/2022, of 6 September, for the improvement of working conditions and Social Security for household assistants.



JUDGEMENTS OF INTEREST

Adjustment of work time for legal guardianship

Judgment of the High Court of Justice of the Canary Islands, Las Palmas (Social Division) no. 931/2022, of 12 September 2022, App. 759/2022. The employee is a salesperson in a large department store, where she has a reduced working day. In a previous procedure, she had requested a reduction in her working hours to meet the schooling needs of her 12-year-old daughter, which, after the employer's refusal and her legal challenge, was recognised by the court.

The employee made a new request for a new adjustment of her working hours, alleging identical circumstances and, after being rejected by the company, she again obtained a favourable judicial resolution, ordering the company not only to recognise the new adjustment, but also to pay 1,250 euros in damages.

The court held that, even based on the same circumstances, the requested adjustment met the criteria of reasonableness and proportionality, and was not merely a whim of the employee, nor an abusive exercise of the right to conciliation. Nor is it considered incompatible with the specific organisational or production needs of the company.

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Payment of attendance and punctuality salary supplement in reduced working hours

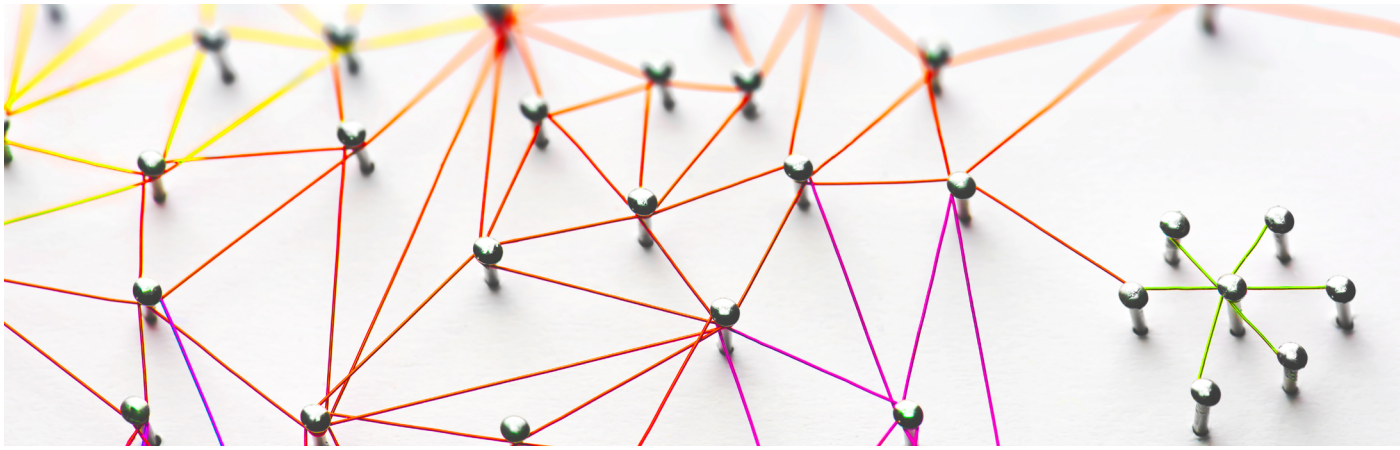
Judgment of the Supreme Court (Fourth Chamber), no. 795/2022, of 4 October 2022, Rec. 574/2019. There is no justification for a salary supplement that encourages attendance and punctuality to be paid at a lower rate because the employee has a reduced working day. If an employee with a shorter working day attends work and keeps to his/her working day and timetable, he/she is entitled to the full amount of the attendance and punctuality supplement.

The nature of this payment does not depend on the time worked, but on the punctual fulfilment of the working day and the timetable that each employee has.

Holidays are not subject to prescription if the company does not encourage its enjoyment

Judgment of the Court of Justice of the European Union of 22 September 2022, Case C 120/21. Following the termination of the employment relationship, the employee claimed compensation for the 101 days of annual leave accrued and not taken between 2013 and 2017 and, due to the employer's refusal, the employee filed a lawsuit in German courts, which referred a question to the Court of Justice of the European Union for a preliminary ruling.

The Court rules that the right to paid annual leave must not be borne entirely by the employee, so the employer must encourage the employee to take it. Therefore, the Company may not rely on the prescription of the right when the employee has not been given an effective opportunity to exercise it. Otherwise, the employer would be unjustly enriched, contrary to the very objective of preserving the employee's health in the Charter of Fundamental Rights of the European Union.



Company succession and mandate of the employee representatives

- **Judgment of the Supreme Court (Fourth Chamber) no. 744/2022 of 20 September 2022, Rec. 1265/2019.** From the fifth paragraph of Article 44 of the Workers' Statute, it can be inferred that the transfer of a company does not determine itself the termination of the mandate of the workers' representatives, who will therefore continue to exercise their functions "on the same terms and under the same conditions as before", as indicated in the provision.

  However, there are exceptions that must be proven, such as those arising from the loss of identity of the transferred entity due to its being taken over or dissolved, in the context of a new corporate structure.

Unfair dismissal. Periods that must be taken into account for the severance pay in the event of suspension of the contract

- **Judgment of the Supreme Court (Fourth Chamber) no. 638/2022, of 7 July 2022, Rec. 2604/2021**. If the dismissal took place while the employee was under the situation of the suspension of his/her employment contract, the average of the irregular income that he/she may have received in the year prior to the dismissal that can be considered cannot be obtained by taking the period of suspension of the contract.

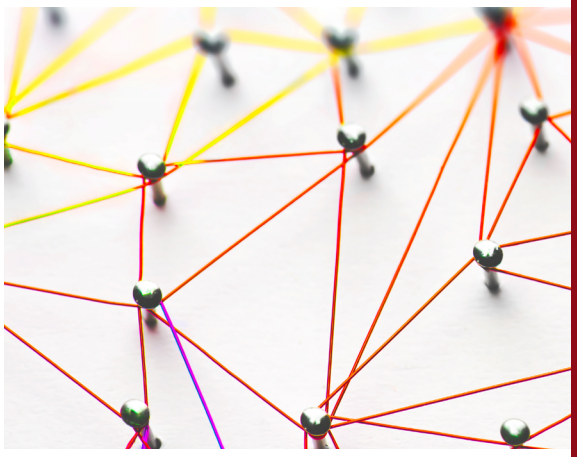
  This is because when we are dealing with regular but intermittent or irregular wage concepts, the time reference is that of the year immediately prior to the termination, and it is not possible to take as a time parameter to obtain an average irregular remuneration the periods in which the contract was suspended, as this would not be acting on elements with correspondence.

Evidence of video surveillance in disciplinary dismissals

- **Judgment of the Constitutional Court no. 119/2022, 29 September 2022, Rec. 7211/2021.** A construction materials company dismissed an employee based on disciplinary reasons after he was recorded by the video surveillance camera committing a flagrant act: delivering products owned by the company to a third party without a delivery note or receipt of payment, misappropriating the cash he received for it.

  Although the dismissed employee knew that years earlier a colleague was dismissed due to images captured by the same cameras, the employees did not receive prior and explicit information from the company about their installation and their possible use for disciplinary purposes. The company warned of the presence of video surveillance with a distinctive sign.

  The Constitutional Court concludes that the evidence obtained is lawful, as the dismissal. Consent to the use of images for monitoring purposes is implicit, as long as the company inform in advance to the workforce, which is fulfilled with a distinctive sign that complies with data protection regulations, as in the scenario studied.



Automatic approval of equality plans not resolved in due time by the labour authority

- **Judgment of the High Court of Justice of Madrid (Social Division) no. 533/2022, 30 September 2022, Rec. 437/2022.** The ruling is in favour of the application of positive administrative silence in those cases in which the labour authority does not answer to the request for registration of equality plans within the legal deadline -3 months-. Although it should be noted that the ruling is not yet a final judgement, it is a relevant pronouncement for all those companies that applied for the registration of their equality plans more than three months ago, which can be automatically approved without prior review by the labour authority.

Key Contact Andersen Employment Law

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COMMENT OF THE MONTH

Conciliation and business (dis)organisation

When Royal Decree Law 6/2019, of 1 March, introduced the modification of article 34.8 of the Workers' Statute, the newspaper headlines were absolutely sensationalist. I remember some of them: "*The employee will be able to ask for a timetable on demand to reconcile work and family life without reducing the working day*" (La Voz de Galicia, 12/6/19); or "*Alert in companies: on demandworking day is coming*" (Expansión, 19/6/19).

At the time, I did not consider a high scope for this innovation in terms of work-life balance, because I could not conceive that, organisationally, it would be possible to adapt working hours or working time without the usual reduction in working hours. However, I admit that I was wrong, because as this new piece of legislation hold in society, requests to adapt working hours for reasons of work-life balance increased exponentially, to the point that they now far outnumber requests for reductions in working hours.

This has complicated business organisation even more, since, as no one will be unaware, on many situations it is not at all easy to harmonise personal and business interests, and in conflictive cases, in a very high percentage, our courts end up positioning themselves in favour of the employee, requiring companies to make a significant effort to prove the organisational difficulties that support their refusal to access to the employee's request.

That is why I believe that the Judgment of the High Court of Justice of the Canary Islands, Las Palmas app. no. 759/2022, of 12 September 2022, deserves the comment of the month because it makes a very novel (and very correct) interpretation of article 34. 8 ET by requiring the employee to exhaust the required diligence by providing the Company with all personal information of interest to assess the request, including their status as mother, father and the relationship of caring whose satisfaction is sought, as well as the personal and professional circumstances that accredit the interest, information that must be extended not only to the personal or family circumstances of the applicant, but also to those of the other parent, in a logical attempt to achieve a balanced distribution of family responsibilities. The well-known principle of "*co-responsibility*".

Therefore, we are not dealing with an absolute subjective right, but one that is conditional on the existence of parameters of proportionality, with no free configuration of the working day by the employee, without "*the gender perspective being applicable in any case, at the risk of trivialising its use, or transforming, by extension, the limited nature of a right outside what is expressly provided for by the legislator*".

For this reason, companies should not hesitate, in the case of generic requests for working time adjustments that lack a minimum justification, to ask employees for this information in the negotiation process, as the weighing of all these circumstances will be key in the event that the final decision is taken in court.

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