NEWSLETTER March 2023

Andersen up to date
Employment news

LEGISLATION

"Whistleblower protection"

- Law 2/2023, of 20 February, regulating the protection of persons reporting regulatory infringements and the fight against corruption. This new law transposes into Spanish law Directive (EU) 2019/1937 of the European Parliament and of the Council (the so-called "Whistleblowing Directive") on the protection of persons who report breaches of EU law. It requires companies with more than 50 employees and all public entities to set up an internal reporting system whereby employees can report breaches of the law in the context of an employment relationship. It also establishes protection measures for those who make use of this system, both whistleblowers and affected parties.

Minimum inter-professional wage 2023

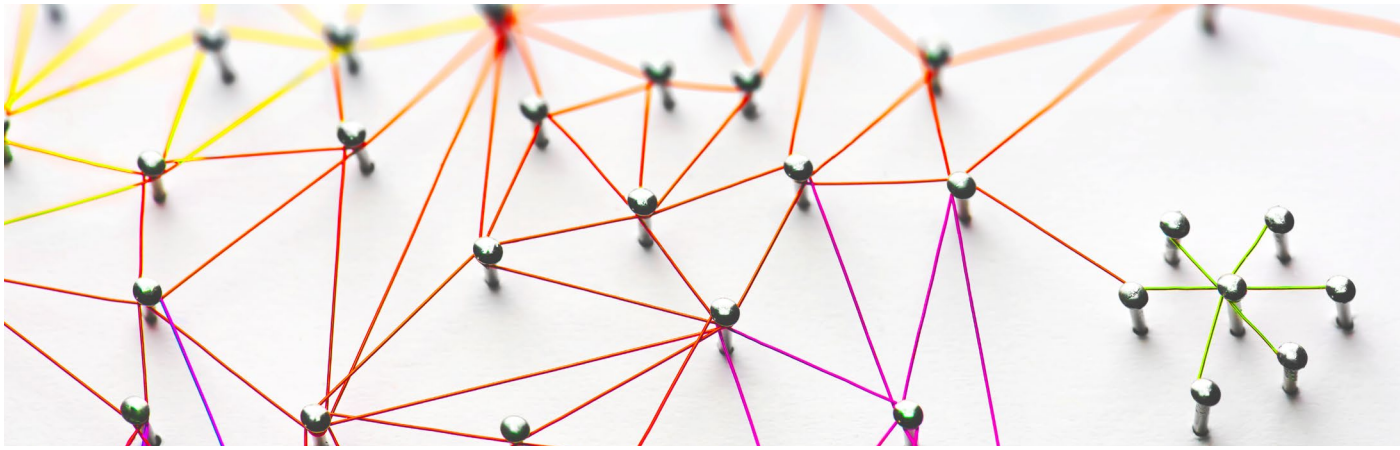
- Royal Decree 99/2023, of 14 February, which sets the minimum interprofessional wage for 2023, setting it to Euro 1,080 gross per month in 14 payments, i.e. Euro 15,120 gross per year. This increase applies retroactively to 1 January 2023.

Employment law

- Law 3/2023, of 28 February, on Employment. The aim of this law is to promote and develop the planning, coordination, and execution of employment policy, and to guarantee the exercise of guaranteed services and the offer of an adequate portfolio of services to persons or entities demanding public employment services, in order to contribute to job creation and the reduction of unemployment, improve employability, reduce structural gender gaps and boost social and territorial cohesion.

Sexual and reproductive health and voluntary discontinuation of pregnancy

- Organic Law 1/2023, of 28 February, which modifies Organic Law 2/2010, of 3 March, on sexual and reproductive health and the voluntary discontinuation of pregnancy. Among its measures, this law improves the treatment of pathological situations that affect health during menstruation, as well as the usual medical leave from the first day of the thirty-ninth week of gestation.



Equality of trans people and guarantee of LGTBI people's rights

Law 4/2023, of 28 February, for the real and effective equality of trans people and for the guarantee of LGTBI people's rights. This law guarantees and promotes the right to real and effective equality of lesbian, gay, trans, bisexual and intersex (LGTBI) people, as well as their families. It establishes the action principles of the public authorities, regulates the rights and duties of natural and legal entities (both public and private entities), and provides for specific measures aimed at the prevention, correction, and elimination, in the public and private fields, of all forms of discrimination. It also promotes the participation of LGTBI people in all areas of social life and the overcoming of stereotypes that negatively affect their social perception. In addition, it regulates the procedure and requirements for the rectification of the sex within the register and, where appropriate, name of persons in the register, as well as its effects, and provides for specific measures derived from this rectification in the public and private sectors.

RELEVANT JUDGMENTS

Null and void dismissal

Judgment of the High Court of Justice of Madrid (Labor Section), no. 1151/2022, of 23 December 2022, Rec. 1009/2022. The Court declares the dismissal of an employee who claimed to be pregnant after the filing of the lawsuit to be null and void, admitting its modification with this fact, as the employee was unaware of this circumstance at the time of the filing of the lawsuit.

The employee challenged the dismissal only on grounds of formal defects and did not claim it to be null and void on grounds that she was pregnant. However, after finding out that she was pregnant, the employee extended her lawsuit to allege this fact and to claim that the dismissal should be considered null and void.

The Court ruled that, in the case of new (or newly discovered) facts, they can be alleged, even if they involve a substantial modification of the claim, since the prohibition on introducing such a modification is limited only to the trial hearing, but nothing prevents the modification at an earlier stage, provided that it is done within the relevant deadline and the defendant is given notice in order to defend himself / herself. In the case at hand, taking into account that the pregnancy was a new fact unknown to the employee at the time of filing the lawsuit, the Court admits its extension to include this fact, and finds the dismissal null and void, as the objective circumstance of the employee's pregnancy was present at the time of dismissal.

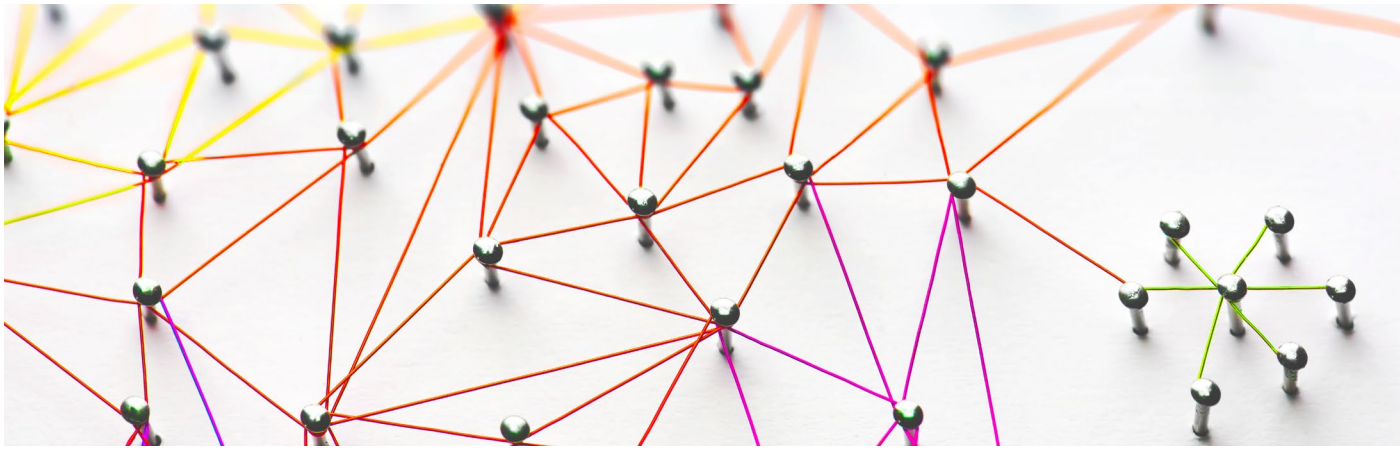
Effective working time

Judgment of the National High Court (Labor Section), no. 5/2023, of 23 January 2023, Rec. 333/2022. The Court considers the so-called "Tyco case" doctrine of the Supreme Court (Labor Section) to apply, as all the criteria and circumstances coincide with the present case.

The company argued that travelling time from the employee's home to the first client's offices (even if predefined by the company), could not be considered as working time, nor could travelling time from the last client's offices to the employee's home, because the employees were not at a location determined by the company, nor were they at its disposal or subject to its instructions.

In the "Tyco case", the Supreme Court considered the travel time from the employee's home to the client's offices and vice versa as effective working time, because the company's activity was not possible without such travel time. In this case, the National High Court, applying these criteria, has ruled in the same direction.

The Court does not agree with the company's reasoning, has it was fully proven, as in the "Tyco case", nothing had changed with respect to the previous situation, except for the place of departure, which was previously the local offices and now the employees' home, which does not affect the legal nature of the obligation on these employees to follow the company's instructions.



This is because, during these journeys, employees are subject to the company's instructions, which can change the order of clients or cancel or add an appointment, meaning that, during the journey, the employees cannot freely use their time and attend personal matters, and are therefore at the disposal of their employers.

Severance compensation higher than the statutory severance compensation

- Judgment of the High Court of Justice of Catalonia (Labor Section), no. 469/2023, of 30 January 2023, Rec. 6219/2022. The Court opens the possibility for other courts being able to establish a higher compensation for unfair dismissal than the statutory one, in order to better compensate the damages caused to the employee.

  In this respect, the judgment states that it is possible to raise the severance compensation for the employee when the it is "insufficient, exiguous and does not have a dissuasive effect for the company on the dismissal in order to compensate the total damages caused" to the employee by the company's decision.

  In this specific case, the Court raises the severance compensation for unfair dismissal to an amount equivalent to 48 days' salary per year of service, with a maximum of 36 months of salary, as opposed to the statutory severance compensation for unfair dismissal, which is calculated at a rate of 33 days' salary per year of service, with a maximum of 24 months of salary.

  This ruling will be controversial until the Supreme Court (Labor Section) rules on the matter, confirming whether or not it is possible to raise the statutory compensation for unfair dismissal when it is an insignificant amount that does not have the effect of dissuading the company from dismissing the employee.

Collective dismissal and ageism

- Judgment of the Supreme Court (Labor Section), no. 62/2023, of 24 January 2023, Rec. 2785/2021. The Court confirms that employees over the age of 60 receive a lower severance compensation than the statutory one in a collective dismissal, without this entailing age discrimination.

  The Court considers that this is an agreement reached between the company and the employee representatives in the context of a collective negotiation, and that there is an objective, reasonable and proportionate justification, considering that the employees over 60 years of age are closer to retirement and enjoy a higher level of social security protection.

  The Court dismisses the employee's appeal, who was 60 years old at the time of dismissal and rules out the possibility that the agreement reached in the context of a collective dismissal is discriminatory on grounds of age.

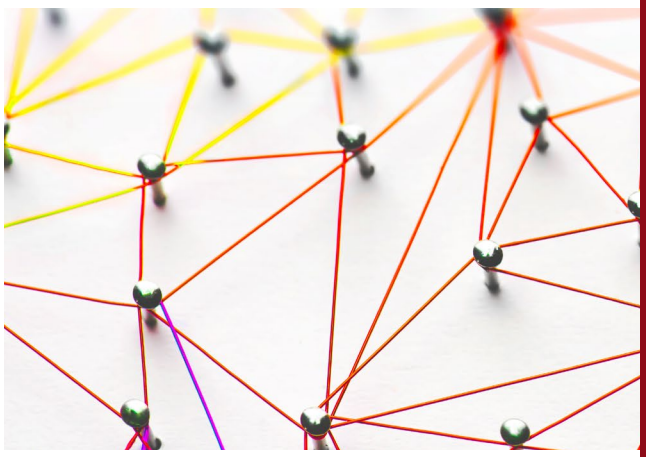
Dismissal. Guarantee of indemnity

- Judgment of the High Court of Justice of Madrid (Social Division), no. 13/2023, of 16 January 2023, Rec. 640/2022. The Court confirms that the dismissal of an employee who complained to her employer, via "Whatsapp", about the employment contract formalized by the parties, was null and void.

  In the case at hand, the employee communicated and reiterated to the company's human resources department her disagreement with her (fixed term) employment contract, warning the company that she would proceed to file the corresponding complaint with the Labor Inspectorate if such contract was not formalized as a permanent contract.

  The company dismissed the employee without justifying the grounds for the dismissal and without a minimum time lapse between the employee's complaint and the dismissal.

  The judgment recalls that the Supreme Court (Labor Section) has ruled that, as a general rule, internal complaints within the company do not trigger the guarantee of indemnity, although if an employee makes an internal complaint and is immediately dismissed, without the company proving the existence of breaches that justify the termination of the contract, this circumstance is an indication of the violation of the guarantee of indemnity and the qualification of the dismissal as null and void.



Dismissal for sexual harassment against a coworker

Judgment of the High Court of Justice of Madrid (Labor Section), no. 47/2023, of 26 January 2023, Rec. 859/2022. The Court confirms that the disciplinary dismissal of an employee who sent messages to a colleague via "Whatsapp", both during and outside working hours, was justified.

The employee continuously and insistently sent these messages, some of which were of a sexual nature. The employee reported the situation to the company, and which launched the sexual harassment protocol and initiated an investigation that allowed evidence and testimonies to be gathered in order to dismiss the employee on disciplinary grounds.

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COMMENT OF THE MONTH

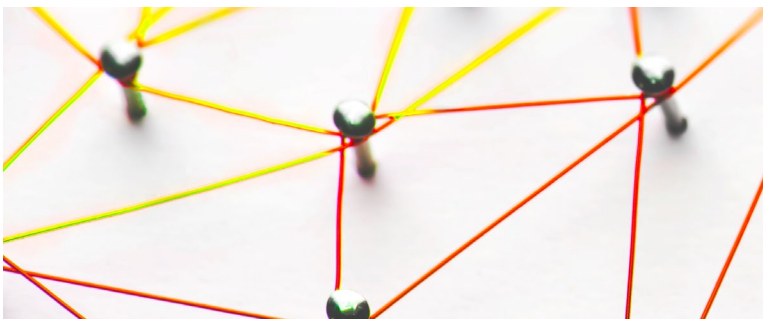
Glasses for everyone: the truth behind the headline

It has certainly been a lot of hype about the ruling of the Court of Justice of the European Union ("CJEU") in case C-392/21, concerning the obligation for companies to pay for glasses worn by employees providing services with display screens, but it has been more journalistic literature and headlines that have led to confusion than anything else.

What is the reality behind the headline? To answer this question, it is necessary to ask what has changed in the employer's liability and obligations since the CJEU ruling of 22 December 2022. Clearly speaking, not much, although there are changes to be taken into account in order to adapt the company's internal regulations to them.

The regulation on which the CJEU ruling is based is Council Directive 90/270/EEC of 29 May 1990, on the minimum safety and health requirements for work with display screen equipment, which was transposed in Spain by Royal Decree 488/1997 of 14 April 1997, on minimum safety and health requirements for work with display screen equipment, which complies with all the requirements of the European regulation.

This regulation establishes that the health check of an employee using display screens, at any of the times legally established, must determine whether the employee requires any special corrective device (including glasses and corrective lenses) to carry out his/her work (normal corrective devices, i.e. anti-glare glasses and similar systems, intended to protect against annoying reflections, radiation, etc., are not adequate).



How should such an examination be conducted, and is any examination valid, for example by an optician? The answer is necessarily no. The examination must be made by competent health personnel, and the employee may be referred for an ophthalmological examination after the appropriate health surveillance examinations. The requirement of regularity in the provision of services is fundamental, as well as a connection between the provision of work services with visual display screens.

Therefore, an examination carried out by an optician is not valid and does not meet the requirements set out in the regulations, without any obligation for the employer, even if in cases where an invoice for glasses or an optician's prescription is submitted, and the employee regularly works with display screens.

So, what is really new in the CJEU ruling? It is the option of reimbursement of the expenses incurred by the employee due to the purchase of the glasses or corrective lenses, instead of the delivery of the special and specific corrective device, on the understanding that this option guarantees greater protection of the health and safety of employees and is not excluded from Article 9 of Directive 90/270. This circumstance is not included in Royal Decree 488/1997, but interestingly, the Spanish Labor Courts have already ruled on this possibility on some occasions .

This issue can lead to conflict in cases where employees buy their own glasses and spend more than necessary, so it would be advisable for the company to establish, within the internal risk prevention management regulations, limits to such expenses, where appropriate.

As a final development, the CJEU ruling dated 22 December 2022 also includes the possibility of covering the costs arising from the use of special corrective eyewear (glasses or prescription lenses) by means of a specific payroll allowance.

Such an allowance cannot be a generic one, covering distressing situations in general. It must be a specific allowance to be considered valid. In other words, it is possible to establish, within the compensation policy or the negotiation of a collective bargaining agreement, a specific payroll allowance to be paid when the requirements are met to cover the expenses derived from visual impairments derived from working with display screens.

In sum, the CJEU ruling was somewhat innovative, but at no time did it establish a general obligation to compensate for expenses or to pay for glasses for all employees. As always, one must dive into the headlines and see what lies behind them.

Raquel de la Viña
Director at Andersen