



# GUIDE TO GOING GLOBAL EMPLOYMENT

*Spain*



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## INTRODUCTION

Welcome to the 2023 edition of DLA Piper's *Guide to Going Global – Employment*.

### GUIDE TO GOING GLOBAL SERIES

Many companies today aim to scale their businesses globally and into multiple countries simultaneously. In order to help clients meet this challenge, we have created a handy set of global guides that cover the basics that companies need to know. The *Guide to Going Global* series reviews business-relevant corporate, employment, equity compensation, intellectual property and technology, and tax laws in key jurisdictions around the world.

### EMPLOYMENT

As business grows more global, the challenge for in-house counsel and HR professionals responsible for workforce issues and employment law compliance is intensifying. This guide is designed to meet that challenge head on and has been produced in response to feedback from clients in both established and emerging international businesses. We hope it will become an invaluable resource for you.

This 2021 edition of our popular guide covers all of the employment and labor law basics in 63 key jurisdictions across the Americas, Asia Pacific, Europe, the Middle East and Africa. From corporate presence and payroll set-up requirements, language rules, minimum employment rights, business transfer rules, through to termination and post-termination restraints, we cover the whole employment life span.

We have used our global experience and local knowledge to bring you this newest edition of our guide. With over 300 lawyers, DLA Piper's global Employment group is one of the largest in the world, with one of the widest geographical footprints of any global law firm. We partner with our clients, wherever they do business, to find solutions and manage risk in relation to their legal challenges and objectives.

While this guide provides high-level guidance, it is not a substitute for legal advice, and we encourage you to take advice in relation to specific matters. If you wish to speak to any of our contributors, their contact details are set out towards the back.

We hope that you find this guide valuable and we welcome your feedback.

To learn more about DLA Piper's global Employment practice, visit [www.dlapiper.com](http://www.dlapiper.com) or contact:

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## SPAIN



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### LEGAL SYSTEM, CURRENCY, LANGUAGE

Civil law. Member of European Union (EU), so required to implement relevant EU directives. The official currency is the Euro (EUR). The official language is Spanish.

### CORPORATE PRESENCE REQUIREMENTS & PAYROLL SET-UP

A foreign entity may engage employees in Spain with proper payroll registrations, subject to business, corporate, social security and tax considerations. Withholdings for income tax and social security are to be done through payroll.

### PRE-HIRE CHECKS

#### Required

Immigration compliance. For certain roles (eg. security guards), the employee must provide the potential employer with a certificate proving that they do not have a criminal record. These certificates cannot be stored by the employer nor transferred to any other entity.

#### Permissible

Reference and education checks are permissible with the applicant's consent only. Most companies and institutions prefer to deliver the information directly to the applicant so that they may supply it to the potential new employer directly and personally.

### IMMIGRATION

Nationals of the European Economic Area (EEA) and Switzerland have a right to work in Spain. Residency and work permits are required for non-EEA/Swiss nationals.

As of January 1, 2021, UK nationals are considered non-EU nationals for the purposes of immigration rules.

## New Labor Reform

Royal Decree-Law 32/2021 of December 28 enacted labor reform that revised four main aspects of employment law:

- Training contracts, temporary contracts and the regulations governing discontinuous permanent contracts
- Temporary layoff plans and the creation of the RED mechanism for employment flexibility and stability
- Collective bargaining, rules on automatic extension and collective agreements and
- Contracting and subcontracting.

## HIRING OPTIONS

### Employee

Indefinite or fixed-term (subject to strict limitations) and full-time or part-time. Part-time and fixed-term employees have the right not to be discriminated against due to their status.

The new labor reform redefined fixed-term contracts, establishing two main types: (i) a contract due to production circumstances and (ii) a worker replacement contract. If the employees are hired through temporary contracts but the engagement is based on permanent grounds, they will be considered indefinite employees.

The presumption that an employment contract is for an indefinite term is reinforced, and a discontinuous permanent contract for intermittent activities is preferred in opposition to a temporary one.

Additionally, the new labor reform redrafted training contracts, setting up two new options: (i) a contract for training in alternation with salaried employment and (ii) a training contract to obtain professional experience appropriate to the individual's level of studies.

### Independent contractor

Independent contractors may be engaged directly by the company. It is important to ensure that they are not misclassified as this may create liability under employment and Social Security laws.

A recent amendment to article 311 of the Spanish Criminal Code addresses fraudulent contracting with independent contractors. A new provision included through Law 14/2022 and effective on January 12, 2023 provides that “[t]hose who impose illegal conditions on their workers by hiring them under formulas outside the employment contract, or maintain them against a requirement or administrative sanction” is a criminal offense. The reform is intended to address the market model of platform delivery companies using new digital technologies. Liability is for company managers and directors.

### Agency worker

Agency workers may only be engaged for a fixed-term or a training situation. Agency workers have the right to equal treatment as compared to employees, in relation to their essential labor conditions, through the entire length of the relationship. In addition, the new labor reform has introduced new violations and penalties.

Monetary penalties for hiring services in cases other than those provided for by law have been increased and will be considered for each agency worker.

## EMPLOYMENT CONTRACTS & POLICIES

### Employment contracts

Verbal employment contracts are legal in certain cases but are not market practice. In any case, for employment relationships which exceed 4 weeks, certain minimum information must be put in writing, and, in all cases, a summary of the main terms of the contract (*copia básica*) must be lodged with the Employment Office. For certain types of contracts (eg. seasonal employment agreements), an official template of the employment agreement is also required, as provided by the Employment Office.

As of 2022, violations of the law are considered for each employee in the case of non-compliance with the type of contract.

Mandatory employment legislation and the applicable collective bargaining agreement (CBA) must be honored.

Law 10/2021 on remote work addresses the following key points in relation to employees working remotely:

- The regulation applies to employees who work from home – or any other remote location of their choice for at least 30 percent of their statutory hours, computed over a 3-month reference period.
- Working from home cannot be imposed unilaterally either by the employer or the employee.
- A written agreement with mandatory minimum provisions is required between the employer and the employee.
- Burden of expenses derived from remote work is placed on the employer.

### Probationary periods

Permissible. Subject to the limits fixed by the applicable CBA. Where the CBA is silent, the term is 6 months for qualified employees, 2 months for unqualified employees, and 3 months in companies with fewer than 25 employees.

### Policies

Not formally required, although it is common practice for major companies and multinational employers to have specific policies in place.

### Third-party approval

Apart from the filing of the basic copy of the employment agreement (*copia básica*) mentioned above, there are no requirements for employment contracts or policies to get approved by any third party. However, if policies include work control systems (eg. policy regarding the use of the IT systems) or professional formation plans, then employees' representatives should be invited to provide a non-binding report.

## RED employment and flexibility mechanism

Included in the new labor reform, is an employment flexibility and stabilization mechanism to be activated by the Council of Ministers, which will allow companies to apply for measures to reduce working hours and suspend employment contracts subject to consultation with the workers' representatives and authorization by the labor authorities.

## LANGUAGE REQUIREMENTS

The basic copy of the employment agreement (*copia basica*) must be in Spanish. The official template employment contract is provided by the Employment Office in Spanish only. If companies issue additional employment agreements, they may technically be in any language, but a Spanish version is highly recommended as, in case of conflict, the judge will make a decision based on the Spanish translation.

## WORKING TIME, TIME OFF WORK & MINIMUM WAGE

### Employees entitled to minimum employment rights

All employees, except employees subject to special employment regulation of senior management (Royal Decree 1382/1985) who are not subject to the minimum employment rights established by the Workers' Statute, unless otherwise agreed. In addition, most CBAs exclude senior managers from their scope.

### Working hours

As a general rule, there is a 40-hour-per-week limit on working time. CBAs may establish reduced working hours. All companies should have a working time register in order to keep a record of the employees' workdays, and any employee, representative or labor inspector may access the register at any time in the workplace.

### Overtime

Only with employee consent, except in cases of force majeure. Overtime must be compensated in cash (with a value at least equivalent to an ordinary hour's work) or time off in the following 4 months. CBAs may establish more beneficial treatment for the employee.

### Wages

The national minimum wage for full-time positions in 2023 still amounts to EUR 36 gross per day, or EUR 1,080 gross per month (14 payments, 12 monthly payments and 2 extraordinary payments in July and December).

These amounts were published in the Royal Decree 99/2023 of February 14, by which the inter-professional minimum wage is fixed.

The applicable CBA also may set out a salary chart with a higher minimum wage.

### Vacation

30 calendar days' vacation per year plus 14 public holidays. CBAs may establish longer vacation periods.

## Sick leave & pay

Employees are entitled to take time off for sick leave, usually up to 18 months. There is mandatory sick pay, which is borne by the Social Security Scheme. CBAs may require the employer to improve upon the mandatory social security benefits.

On December 27, 2022, Royal Decree 1060/2022 was published in the Official Spanish Gazette, amending Royal Decree 625/2014, which regulates certain aspects of the management and control of the first 365 days of temporary incapacity.

Key changes under the new rules include the following:

- Employees are no longer required to submit sick leave and/or medical discharge certificates to the company.
- Communication relating to medical certificates will be carried out between the administration and the company.
- In cases of temporary incapacity, the doctor may schedule a medical check in a shorter period of time than previously provided.
- The Royal Decree applies to any temporary incapacity which, as of April 1, 2023, has already begun and has not exceeded 365 days in duration. Accordingly, there may be cases where the previous processes for successive discharge and/or sick leave confirmation certificates must be modified.

## Maternity/parental leave & pay

16 weeks' paid maternity leave and, from 2021, 16 weeks' paid paternity leave. The first six weeks of the 16-week leave are mandatory for the employees and must be taken immediately after the birth of the child. In both cases, the pay is borne by the Social Security Scheme and is equivalent to 100 percent of the regulatory base (that is, the employee's salary determined pursuant to a specific formula over which public benefits are calculated). Employees have a right to return to work. CBAs may require the employer to improve social security benefits. In some cases, the father may take a part of the maternity leave days.

## Parental leave for breastfeeding

Employees are entitled to a daily one-hour leave from work, which may be divided into two periods, to breastfeed a child until the child reaches the age of nine months. It is also possible to accumulate the hours of this leave into full working days that can be taken.

## Other leave/time off work

Employees may be entitled to leave for other reasons, such as paid days for the death, accident, severe illness, hospitalization, or major surgery of family up to 2nd degree kinship; marriage; birth of a child; moving; public or personal duties; trade union functions; and prenatal examinations and preparation for childbirth. In addition, all employees with at least 1 year of service are entitled to 20 hours paid leave per year to pursue professional training related to the employer's activity. Duration of time off work under these situations is provided for in any applicable CBA. CBAs may improve employee's time-off rights.



## DISCRIMINATION & HARASSMENT

The following characteristics are protected: age, disability, ethnic origin, gender reassignment, gender identity or expression, health condition, marriage or civil status, pregnancy or maternity, race, religion or belief, sex, sexual orientation or identity, political ideas, union membership, family relationships with coworkers, language, socioeconomic status, and any other personal or social condition or circumstance that could cause discrimination.

Discrimination cases are not frequent in Spain, with the exception of trade union-related issues or discrimination based on family-related rights (ie, maternity and paternity). However, on July 13, 2022, the Spanish Official Gazette published Law 15/2022 on equal treatment and non-discrimination (effective from July 14, 2022). The Law, which aims to promote the right to equal treatment and non-discrimination and to respect the equality and dignity of individuals in accordance with the Spanish Constitution, protects against discriminatory dismissals and other causes for termination of the employment contract. New court resolutions declaring unlawful discriminatory terminations null and void are expected.

Royal Decree 901/2020 regulates the way equality plans are to be produced, registered and accessed. All companies, regardless of the number of workers, must adopt, after negotiation, measures aimed at avoiding discrimination between women and men, promoting working conditions that avoid sexual harassment and harassment on the grounds of sex, and providing procedures for the prevention of discrimination and creating channels for complaints and claims.

All companies with 50 or more employees are obliged to implement an Equality Plan. Companies with between 50 and 100 employees have a deadline of March 7, 2022. Companies with over 100 employees must have implemented the Equality Plan by March 7, 2021.

In addition, Royal Decree 902/2020 establishes specific measures to reinforce the right to equal treatment and non-discrimination between women and men in relation to remuneration. This regulation establishes a principle of transparency in remuneration to enable direct and indirect discrimination to be identified. In particular where discrimination arises when individuals do not receive equal pay for work of equal value, unless the difference can be lawfully justified. This will require steps from employers in the following areas: remuneration records, a remuneration audit or a job evaluation system of the professional classification.

## WHISTLEBLOWING

On February 21, 2023, Law 2/2023 of February 20 on the protection of persons who report breaches of the law and on combating corruption was published in the Official Spanish Gazette. This new law transposes the EU Whistleblowing Directive and requires certain entities to have in place an internal information channel (ie, reporting channel), together with a management and protection system for the persons who report breaches of the law and prevents retaliation against them.

## BENEFITS & PENSIONS

Minimum benefits and pensions fixed by law and covered by the Social Security Scheme. CBAs may establish further benefits or pensions complementing those set out by the public system.

## DATA PRIVACY

Spain is subject to the General Data Protection Regulation of the European Union (GDPR). The Spanish legislation that implements the GDPR is the Organic Law 3/2018 on data protection and guarantee of digital rights (*Ley Orgánica 3/2018 de protección de datos y garantía de los derechos digitales*). Employees must generally be notified of personal data processing. Consent should not be relied upon for processing employee's data except in very extraordinary cases. Registration of databases with the Spanish Data Protection Commissioner (AEPD) is no longer required. Special rules apply to data transfers, even between companies belonging to the same group. Although authorization from AEPD to conduct international data transfers is now exceptional and monitoring email and internet use in the workplace and video surveillance at work have been eased and aligned with the GDPR, significant compliance requirements remain. International data transfers are subject to significant controls and adequacy requirements.

## RULES IN TRANSACTIONS/BUSINESS TRANSFERS

Automatic transfer under the EU Acquired Rights Directive and Section 44 of the Workers' Statute in case of change of employer (eg. sale of an independent stand-alone business unit, merger or spinoff). Right of the employees to maintain the same terms and conditions of employment. The transfer is not by itself a cause for fair dismissal. Duty to inform, and in case labor measures are planned (eg. change of work center, change of employment conditions, collective dismissal), duty to consult with employee representatives.

## EMPLOYEE REPRESENTATION

Both trade unions and works councils occupy a pre-eminent position in Spanish labor law. Industry-level CBAs are very common. They may co-exist with CBAs agreed at a company level.

In companies with 11 to 49 employees (or in companies with 6 to 10 employees, if requested by the majority of employees), employees may initiate elections to choose personnel delegates; in companies with 50 or more employees, they may hold elections to a works council. Personnel delegates and works councils have the same rights. The company cannot initiate such elections, but also cannot hinder employee rights in that regard.

## TERMINATION

### Grounds

Decided unilaterally by the employer: redundancy of the job position based on economic, organizational, productivity or technological reasons, on individual or on a collective basis; or disciplinary dismissal, including based on performance.

Other termination grounds: employee resignation; constructive dismissal; mutual agreement; grounds legally agreed upon in the contract; expiration of a fixed-term contract; employee's retirement; force majeure; death or permanent disability.

### Employees subject to termination laws

All.

## Restricted or prohibited terminations

Some employees are protected against unfair dismissal (e.g., pregnant employees, employees enjoying reduced working time to take care of a child, employee representatives or employees who have filed a claim against the company may also receive protection based on retaliation grounds). Protected employees may be terminated, but only for fair cause, or they will be entitled to re-instatement and back wages.

## Third-party approval for termination/termination documents

Third-party approval is not required for terminations. Termination documents in accordance with employment legislation are required.

## Mass layoff rules

Collective dismissal rules are triggered in the event that the number of affected employees exceeds the legal thresholds (eg. 10 terminations in a 90-day period in companies with fewer than 100 employees).

Strict information and consultation rules apply, which require involving both the employees' representatives and the labor authority. However, there is no need to obtain approval for termination.

Terminations may be challenged by the employees, the employees' legal representatives and, in exceptional cases, by the administration.

## Notice

15 days' notice in case of redundancy of common employees. Senior managers are entitled to a minimum 3 months' notice.

Not required in case of disciplinary dismissal.

## Statutory right to pay in lieu of notice or garden leave

If the 15 days' notice is not honored, payment in lieu of notice is required.

Garden leave is not expressly regulated, although employers sometimes use garden leave, which may result in certain issues given the employee's right to work.

## Severance

Fair individual redundancy: 20 days of salary pay per year of service, up to 12 months. For collective layoffs, this is usually increased through collective consultations.

Fair disciplinary dismissal: no severance.

## POST-TERMINATION RESTRAINTS

Those aimed at protecting the employer's legitimate business interests may be enforced provided that:

- The employee receives adequate consideration
- The restraints do not exceed 2 years for qualified employees and 6 months for non-qualified employees

## Non-competes

Permissible under the abovementioned rules.

Once agreed upon, the employer cannot unilaterally waive, and therefore must pay the agreed-upon compensation. This restriction is usually agreed upon with high-profile employees only.

## Customer non-solicits

Permissible under the abovementioned rules. Extensive solicitation may also be subject to civil law claims under unfair competition rules.

## Employee non-solicits

Permissible under the abovementioned rules. Extensive solicitation may also be subject to civil law claims under unfair competition rules.

## WAIVERS

In principle, statutory rights cannot be waived, and any waiver of the rights will be null and void. However, some exceptions apply.

## REMEDIES

### Discrimination

Remedies include declaration of nullity of the company's decision, order to immediately stop the discriminatory practice, damages compensation and/or reinstatement of the employee to their position prior to the violation of the fundamental right. The new law on equal treatment on non-discrimination, approved in 2022, establishes the liability for damages and relevant sanctions for employers. If discrimination can be proven, moral damage is presumed to exist. Minor breaches will incur fines between EUR300 and EUR10,000; serious breaches between EUR10,001 and EUR40,000; and very serious breaches between EUR40,001 and EUR500,000 plus possible additional sanctions, such as withdrawal from public benefits. Fines are subject to appeal, firstly before higher administrative bodies and subsequently before the labor courts.

### Unfair dismissal

In case of null and void redundancy or disciplinary dismissal (eg. due to breach of fundamental rights or due to discrimination): automatic reinstatement plus payment of back wages; in some cases, additional damages compensation.

In the case of unfair redundancy or disciplinary dismissal, the employer must choose between:

- Reinstatement plus payment of back wages or
- Payment of a severance compensation, as follows:
  - From the hire date until February 11, 2012: 45 days of salary per year of service capped at 42 monthly installments, plus
  - From February 12, 2012 to the termination date: 33 days of salary per year of service capped at 24 monthly installments.

In principle, the total severance cannot exceed compensation for 720 days of work, except that the employee is entitled to a higher severance by application of the 45-day rate, in which case compensation is capped at 42 monthly installments.

Employee representatives who are unfairly terminated will have the right to choose between payment or reinstatement.

## Failure to inform & consult

Failure to inform the employee representatives of individual redundancy will lead to the declaration of unfairness of the termination.

Failure to comply with information and consultation duties in a collective dismissal will lead to the declaration that the terminations are void and a fine ranging from EUR7,501 to EUR225,018. If the rights of the trade union are violated, an additional uncapped compensation may be imposed (normally between EUR3,000 and EUR6,000).

Failure to inform or entrust in the start of TUPE will result in a fine ranging from EUR751 to EUR7,500, and, in exceptional circumstances, the declaration that the transfer of employees is void.

## CRIMINAL SANCTIONS

There are criminal sanctions related to employment issues, such as those linked to work-related accidents and social security fraud.

Additionally, the recent amendment made to Article 311 of the Spanish Criminal Code provides for individual liability for company managers and directors who engage in the criminal offense of “impos[ing] illegal conditions on their workers by hiring them under formulas outside the employment contract, or maintain them against a requirement or administrative sanction”.

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