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PRACTICE AREA **DECEMBER 2014**

Different approaches to the same dismissal: The USA vs. Spain

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Given the task of analyzing the regulatory framework of contractual terminations in the United States, we find that, in contrast to the European Union, and particularly in Spain, Companies barely have any restrictions on the termination of contractual relations with their employees, which can even be described as *free dismissal.*

In this regard, it is noteworthy that in the US companies do not find themselves obliged to provide any reason for the dismissal of employees nor to provide dismissed employees with compensation, unless such circumstances were previously agreed contractually.

Notwithstanding the above, and although there are generally no restrictions on redundancy, we find the following exceptions which require that the contractual termination be subject to requirements and formalities:

(i) Firstly, the ***Worker Adjustment and Retraining Notification*** (or **WARN**) Act must be considered.

This Act regulates the cases in which a considerable number of employees from the same Company are made redundant, which is known in Spain as the *Expediente de Regulación de Empleo* (meaning 'lay-off proceedings', or 'collective dismissal') and is only applicable to companies with more than 100 full-time employees, or part-time employees who work a minimum total of 4,000 regular hours per week.

The cases in which this Act is applicable are mass lay-offs and plant closures.

In order to consider the case a "**mass lay-off**", the following characteristics are required: **(i)** that the Company has a workforce of at least 500 employees working full-time in the same workplace or **(ii)** that at least 33% of staff undergo a job loss in the same workplace over a 30-day period. It must be highlighted, however, that if the redundancies occur during a 90-day period this could be taken into account in order to reach the **WARN** Act threshold.

"**Plant closure**" refers to a permanent or temporary closure of a single workplace, or of one or more facilities or operating units within a single workplace, where a total of fifty (50) or more employees undergo job losses during any period of a minimum of 30 days.

In these cases, the **WARN** Act requires that companies provide affected employees and their union representatives with written notice at least 60 days in advance, informing them of the *closure of the Company for whom and/or the plant where* they work, or of the *mass contractual termination*, as well as the date of effect of said

termination and the name and contact details of a legal representative of the Company who can provide them with additional information, if requested.

The Act does not address payment in lieu of the 60-day advance notice, although in practice there are indeed Companies who do this.

Regardless of whether the federal **WARN** Act is applicable, Companies should check as to whether the State in which its operations are located has a State **WARN** Act, as sometimes these "mini-**WARN** Acts" have lower jurisdictional thresholds.

(ii) Secondly, and just like in Spain, the US is protectionist with its workers when **redundancies are based on discriminatory reasons**, such as gender, race, religion, nationality or age, which applies to workers aged 40 or above. Specifically the ***Older Workers Benefit Protection Act*** (or **OWBPA**), which was passed in 1990, provides certain additional protective measures for older workers in case of individual or collective contractual terminations known as ***Reductions in Force*** (**RIF**s).

(iii) Finally, before terminating any job position, companies must review the terms of the contract, as it may contain an agreement concerning some form of benefit or restriction upon the termination of the contract, for example the payment of a certain amount in the event of the contract being terminated without just cause. They should also verify that the Collective Agreement applicable to the employment relationship of the employee they wish to dismiss does not contain any restrictions or conditions that could prevent redundancy proceedings.

In contrast to the flexibility of dismissal in the US, in Spain the employer must exhaustively justify the reasons for the termination of the contract.

Contrary to the "simplicity" of dismissal is the United States, in Spain we find ourselves in different circumstances.

On the one hand, we have objective dismissals, occurring as a result of any of the causes addressed in Article 52 of the Statute of Workers, in which companies must provide - along with notice - compensation equivalent to 20 days per year of service in a maximum of 12 monthly payments.

When this kind of redundancy is considered unjust, the Company has two options: to provide the worker with the compensation equivalent to 33 days for each year they have worked, or reinstate them in the same working conditions they had prior to the termination of the contract.

On the other hand, Spanish legislation provides for disciplinary dismissals, which are due to a severe and wilful breach on behalf of the employee. In this case no form of compensation will be provided, but written communication, just like in the event of an objective dismissal, must explicitly state the factual reasons for the dismissal and its date of effect, under penalty of being classified as inappropriate with the consequences it entails.

Regarding the classification of the dismissal, as well as its appropriate or inappropriate nature, the Statute of Workers states that dismissals may be null when they are based on any of the discriminatory grounds prohibited by the Constitution or the law, or when they violate the fundamental rights or public freedom of the worker. In the event of nullity, the employer is required to reinstate the worker and provide them with the procedural salaries accrued from the date of dismissal up until the sentence is passed.

Finally, collective dismissals must be based upon economic, technical, organizational or production reasons as long as the measure reaches the number of workers stated in Article 51 of the Statute of Workers. That is, 10 workers in companies that employ less than 10 workers, 10% of workers in companies that employ between 100 and 300, and 30 workers in companies that employ more than 300 workers. These contractual terminations are carried out following a special procedure (*Expediente de Regulación de Empleo*) in which the employer, together with the representatives of the workers, must open a consultation period in order to try and reach some kind of agreement regarding the layoff, and to fix the amount of compensation that affected workers should receive.

In short, from comparing the laws on dismissal in the United States and in Spain, we can see that in contrast to the restrictions and complexity involved in any kind of contractual termination in Spain, North American companies (with exceptions) have great flexibility, both formally and materially, in terminating the contracts of their employees.

FOR MORE INFORMATION

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