

NEW TECHNOLOGIES AND LABOR RELATIONS IN SPAIN: SOME GENERAL ISSUES

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I. TELEWORKING

From a Spanish law viewpoint, teleworking can be defined using two main points:

1. Teleworkers work all or most of the time outside employers' premises ("outside the company"). It could be at the worker's home, but it could be in another place, such as municipal teleworking facilities or teleworking parks.
2. Teleworkers perform their work with the extensive use of electronic media.

Therefore, home teleworking is a specific kind of teleworking, although it is the most legally complicated.

In Spain, there is no specific regulation for teleworkers; they are ruled by general labor law. Although, there are some minor specific rules for home workers that are considered applicable to home teleworkers, these specific rules for home workers are barely adequate for teleworkers, since they were enacted many years ago for the earliest sectors of the industrial revolution—mainly for textile home workers. Ironically, rules rooted in the 19th century are now called upon to rule the newest ways of working in the 21st century. Although Spanish labor law does not yet have concrete rules for teleworking, this legal void will soon be filled, since some teleworking bills are now under consideration and the Spanish legislature is also waiting for the possibility of a teleworking directive from the EU.

In recent years, the legal void has been partly filled because some collective agreements have adopted specific rules for teleworkers. This collective bargaining role is very important, since it can develop

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rules on issues such as health and safety or working hours, which are currently difficult to regulate under the general rules of labor law.

One of the most difficult legal problems employers face if they wish to develop a teleworking system is resolving the extent to which they can impose this new system upon employees currently working on company premises. Can an employer legally tell all or part of its workforce that they will have to work for the company from their homes? Here, it is essential to differentiate between home teleworking and the other forms of teleworking.

An employer can ask its employees to change to a teleworking system. If, on a collective or individual basis they do not agree, the employer can impose the change if the company has sound economic, organizational, technological, or productive reasons for the change. The employees will have the right to go to the labor courts to challenge the reasons given by the employer. If the courts agree with the employer's reasons, the change to the new working system is definitive. If not, the employer must go back to the original working system. These rules apply to teleworking in general. However, and although we are still waiting for the courts' final decisions on this issue, it is doubtful that these rules will apply to home teleworking. In other words, if the new system that the employer wishes to develop is home teleworking, the employer cannot impose the change on the worker, even if the company has economic, organizational, technological, or productive reasons for the change. In the situation of home teleworking, the change can only be the result of a specific agreement between the employees and the employer.

The main reason for prohibiting unilaterally changing the workplace to the employee's home is that the change could affect constitutional rights and, above all, the right to privacy. The home is one of the main areas protected by this fundamental right.

An employer can hire new workers for the teleworking system with contracts in which, from the beginning, the workplace is designated as the employees' homes. However, the mere fact of hiring new workers for the teleworking system would not be a "*per se*" sound legal reason for dismissal of existing workforce. The employer would have to base the eventual dismissal of these employees on economic, technological, organizational, or productive reasons.

As previously mentioned, besides the specific rules for working from home, the general legal framework of Spanish labor and social security law governs the labor and social security conditions of teleworkers. Therefore, wages, working hours, holiday benefits, hiring, dismissal, and other working conditions for teleworkers do not

differ from those of other workers. In particular, health and safety rules apply to teleworkers. Following EU law, Spanish rules on health and safety conditions require employers to take a proactive role in order to prevent risks for the physical and mental well being of workers. These rules do not make any exceptions or differentiate between teleworking and home teleworking.

However, it is clear that home working, and above all home teleworking, present specific problems when implementing health and safety rules. Thus, labor inspectors are also in charge of controlling the application of labor and social security rules, including those related to health and safety. However, in cases of home teleworkers, in order to have access to their (home) workplace, labor inspectors need either a workers' agreement or a court authorization.

In Spain, general labor and social security legislation is uniform for all regions. Therefore, the main source of different working conditions for teleworkers is collective bargaining. Regional or local branch agreements, as well as company agreements, introduce different terms and conditions for teleworking.

II. RESPONSIBILITY FOR HIGH TECHNOLOGY WORK TOOLS

Generally, if a worker has a labor contract, the employer bears the costs of purchasing and maintaining the electronic equipment and software needed to do the work. If the worker contributes to these costs and, therefore, partially owns the electronic working tools, then the worker can use the equipment for other purposes. This includes private use or other work with other employers, unless there is a contractual provision forbidding an employee from working for any other employer. However, in Spanish labor relations, the situation of partial ownership of working tools is unusual because, if the worker has some kind of ownership of these tools, then it is possible that there is no labor contract, but another kind of legal relationship.

Although still not common in Spanish collective bargaining agreements, it is increasing the number of agreements relating to electronic equipment in which the company gives employees hardware and software either free or at a reduced price, but only for private, non work-related use. This is a social benefit and the company's goal is to make its employees familiar with new electronic technologies that are, or will be, used in the workplace.

These apparently simple bargaining agreement provisions present a new set of legal questions such as: Can the company give this "electronic benefit" only to permanent workers, excluding temporary

employees? If, once the company has given the equipment, and the employee owns it, can the company prevent the employee from selling it during a specific period of time? Can the company impose the obligation on the worker to return the equipment in the case of termination of the contract? Of course, if the employee owns the electronic equipment, then the employee—and not the company—would be responsible for its private use (hacking, property rights violations, etc.).

III. ELECTRONIC MONITORING OF PERFORMANCE AND COMMUNICATIONS

There are no specific rules in Spanish law governing electronic monitoring of work activity. Therefore, this type of electronic monitoring is governed by the general rule applicable to management control rights at the workplace. The main general rule is that employers may control work activity as far as employee's dignity and other constitutional fundamental rights—mainly privacy—are preserved.

Two recent decisions by the Spanish Constitutional Court in 2000 illustrate this difficult balance between management rights and workers constitutional rights. In one case, the Constitutional Court confirmed that the worker's right of privacy, which must be respected at the workplace, could be limited due to the logical and intrinsic requirements of the labor contract, such as the need for management to control the working activity. Hence, the Constitutional Court decided that remote monitoring by television cameras is permitted by the Spanish Constitution as long as the cameras are limited to monitoring places where the actual working activity is performed. Therefore, and as a general rule, places such as lunch rooms, restrooms, and the like, must be excluded from the possibility of remote monitoring.

Even when television cameras are used to monitor work activity, the principle of "proportionality" must be preserved. This principle implies that television camera control should be only as intrusive as required for the development of the legal finality of work control, but no more than that. Moreover, tape recording the work activity should be only used for this precise finality of control and the tapes must be destroyed once this finality is fulfilled. Finally, only authorized personnel should have access to the tapes.

In the case before the Constitutional Court, after the company realized that there were some cash irregularities, it used television

cameras to monitor their cash registers. The Court held that the employer's action was constitutionally permitted. However, in the other 2000 case before the Constitutional Court, it decided that the above-mentioned principle of proportionality had not been respected. In that situation, the employer, a casino, placed microphones in some tables and at the cash register, in order to monitor conversations between employees and clients. The implementation of the new system was communicated to the workers' representative, and the microphones were not hidden from either the employees or the clients. Since the company already had television cameras, and the microphone control system is considered by Spanish labor courts and the Constitutional Court as especially intrusive on the privacy of workers and clients, it was observed that the employer had to show a specific and solid business interest in order to legally implement this "audio" control. The employer claimed that this new control system would complement the television camera system, but the Court ruled that it had not demonstrated a sufficient business interest because there was insufficient proof of the indispensability of the new control system. Accordingly, it did not meet the test for the preservation of the principle of proportionality in order to limit intrusions on workers' privacy rights.

The foregoing two cases from the Constitutional Courts, plus several decided by the Spanish Supreme Court in recent years, contain the main relevant guidelines for the legal evaluation of any kind of electronic monitoring including e-mail, Internet access, software programs, and the like. We will look at these points individually.

Several lower courts have already dealt with the issue of management's right to monitor an employee's use of company e-mail. The legal problem arises from the use of the company e-mail for sending non-work related messages to other employees or non-employees.

So far, the lower labor courts' position has been that the employer can take disciplinary action, including dismissal, because of an employee's use of the company e-mail for non-professional purposes. In one of the cases, the Superior Court of Justice of Catalunya upheld the dismissal of a worker who had sent approximately one hundred and forty e-mails to other employees dealing with issues of a private nature. In another case, which is more legally relevant, the Superior Court of Justice of Catalunya upheld the dismissal of two workers that used the company e-mail for the sexual harassment of another worker. In this case, the Court clearly stated that such use must be considered a breach of the employee's

contractual duty of good faith, and that constitutional rights, such as the right of privacy or the so-called "right to the secrecy of communications," were not illegally affected by this contractual limitation.

It is important to note that, in both cases, the Courts considered very relevant that the employers had previously established a specific policy in which the use of company e-mail for non-professional purposes was explicitly forbidden. Therefore, to date, Spanish labor courts assume that the employer may implement some kind of control over the use of the company electronic communication system in order to guarantee that this system is used only for professional reasons.

A related issue is the employers' electronic monitoring of employees' use of the company Internet system from the workplace and during working time. Usually, employees are allowed access for professional goals, and the employer wants to be sure that the Web pages visited by the employee meet these goals. So far, two Superior Courts of Justice decisions have granted companies not only the right to monitor the employee's "surfing" of the Web, to guarantee that the employee visits only professionally significant Web pages, but also, in both cases, the right to dismiss employees for "irregular" surfing, such as visiting inappropriate Web pages.

Finally, another issue relates to employees' irregular use of software installed in company personal computers. Two Superior Courts of Justice decisions have upheld the dismissal of employees who, during working hours, spent some hours playing cards in a software program included in the software package on the company computers. In both cases, the company installed a software program in the central system to monitor the software programs that were being used by the workers and the time that they spent on them. The Courts did not see any legal problem in accepting the results of this monitoring as sufficient and acceptable proof of the employees' irregular behavior.

IV. MISAPPROPRIATION OF ELECTRONIC PROPERTY

From the above, it is clear that, in Spanish labor law, the employer can take disciplinary action, including dismissal, if the employee uses the company's electronic equipment or software for personal purposes. However, at least from a general point of view, it would be convenient for the company to develop and implement an explicit policy forbidding this type of personal use. The development

of management disciplinary faculties must be coherent. Except in the case of employees' gross and clear-cut misuse, it is unlikely that Spanish labor courts will grant a disciplinary action against employees for the personal use of company hardware or software if the employer has a record of tolerating personal use, and has not communicated any kind of notice to warn employees that personal use will no longer be tolerated.

A question that may arise is which kind of action the employer can take if the employees' use of company equipment or software is not only personal, but also illegal, and damage a third party. Besides disciplinary actions, when an employee violates a third party's rights by using company equipment, such as unlicensed copies of electronic software, because this party will have an action against the employer, the employer can later take action against the employee for compensation for the responsibility toward this third party. One of the main reasons for allowing the employer to monitor the employees' use of equipment or software is that the company, and not the employee, is primarily responsible for damaging a third party.

V. USE OF THE EMPLOYERS' TELECOMMUNICATION FACILITIES TO ACCESS WORKERS AND WORKER SUPPORT ENTITIES

Spanish labor law does not specifically regulate the duty of employers to allow workers' representatives to communicate with workers through the company e-mail or Web site. A 1995 Supreme Court decision clearly stated that it could not identify a specific right for representatives to use the company e-mail or Web site, as Spanish law only establishes the right of workers' representatives to have at their disposal board and room facilities at the workplace.

However, recent lower court decisions indicate that, in spite of the legal void, in some cases, workers' representatives general right of freedom of speech and communication could be a sufficient legal basis on which to grant the representatives access to the company e-mail and/or Web site. For instance, a labor court has considered that it would not be legally coherent for a company to implement a "paperless" policy for all kinds of employee communications in favor of the electronic system, except in relation to the communication between representatives and employees. It should be observed that collective bargaining, above all at company level, is now developing rules in relation to this use of electronic equipment for workers' representation purposes.

On the other hand, as a general rule, unless granted by the employer, employees do not have a right to use company electronic communication facilities in order to have access to bulletin boards, Web sites, e-mail addresses, etc., of unions, work councils or similar entities. As far as employees, unions, and work councils can communicate by traditional means, Spanish labor law does not grant a right of "electronic communication" for such purposes, especially during working hours. However, it should not be ruled out that in some cases Spanish labor courts could grant a right to use this electronic communication based on the company's specific circumstances and the general right of freedom of speech and communication.

The same rules would apply in relation to the possibility of employee access, from the company's electronic system, to bulletin boards, Web sites or e-mail addresses of the labor inspectorate, labor court or the like. As a general rule, it is not possible to identify a specific right of employees to this kind of access, although in some specific cases it could be granted.

VI. EMPLOYEE DISSEMINATION OF COMPLAINTS THROUGH ELECTRONIC MEDIA

It is already clear that one of the main consequences of the electronic revolution for labor relations is the great importance that has been placed on identifying the limits of the right of free speech of employees regarding their employers. If radio, newspapers, or television were already important "tribunes" from which employees could express their views about their employers with an immediate and general impact, e-mails and, above all, the Internet, has established a worldwide audience for their views as a general rule, particularly when English is used. Now more than ever, one of the main legal challenges is to look for the appropriate balance between the unquestionable freedom of speech of employees and the rights of employers originated in the labor contract, such as the contractual duty of good faith. Therefore, it is important to determine how this balance has been established in Spanish labor law and, then, how it can be applied to exercising the employees' freedom of speech through the electronic media, taking into account that whistleblowing is the most difficult legal problem in the application of that freedom to the labor contract.

In Spain, as in most of Continental Europe, there is no specific labor legislation dealing with employee freedom of speech, in general,

and whistleblowing, in particular. The legal framework is very limited. There is, however, a constitutional right to freedom of speech and some essential limitations to this freedom in the field of criminal law, such as defamation or calumny. In addition, there are some specific labor rules that relate to the freedom of speech of workers' representatives. Such representatives are guaranteed that freedom "in the exercise of their functions."

With the above exceptions, the general rule is that the balance between employee constitutional freedom of speech and employer rights derived from the labor contract has not been instituted by Acts or Decrees, but by a hesitant and unpredictable sequence of court decisions. This is not an exception in Continental Europe. On the contrary, few countries have dared to make a "normative approach," establishing general rules by legislation; most have preferred a "judicial approach," leaving the judges with the task of deciding each case according to its specific criteria. Therefore, in relation to the question of when employees may legally blow the whistle, or when employers may rightfully discipline whistleblowers, the best, although clearly unsatisfactory, answer that can be given is . . . it depends.

In fact, the main characteristic of the hundreds of decisions by many Spanish labor courts, including the Supreme Court and Constitutional Court, is the great diversity of circumstances in which employee freedom of speech and employer interests collide in the realm of labor relations. However, based on the judicial evolution on this matter throughout the last decades, it is possible to identify "controlling criteria"—i.e., some factors that help us predict the result of a court decision in a specific case of whistleblowing.

Attention must be mainly paid to these factors:

1. Whether the whistleblower is one of the employees' representatives: a member of the workers' committee or a union representative. Workers' representatives have, by law, a much wider freedom of speech than other employees. When the representatives are presenting their views on issues concerning the "collective interest" of their constituency, the courts tend to be tolerant, even when their statements are critical of their employers.
2. Whether the employees' disclosure is primarily directed only to the employer and/or their fellow workers or, on the contrary, if this disclosure was essentially made for the media (television, Internet, newspapers, or radio). When employees go to the mass media to censor their employers, judges tend to make a more detailed examination of the exact

wording of their public comments, especially when these comments refer to the company's product or service.

3. Whether the disclosure was made in the context of a labor collective conflict or was made as the result of an individual conflict. As a general rule, when connected to a collective labor conflict, the courts tend to favor the freedom of speech of employees or their representatives on issues related to their employer. The same public statement can be considered differently when it is declared either by an individual worker, "my employer is a thief, he doesn't pay me a fair wage" or by a collective declaration justifying a strike, "our employer is a thief, he doesn't pay us a fair wage." In the first case, there are many possibilities to discipline the employee, but in the second case, it is very difficult for the employer to legally punish the workers' representatives.

The ultimate reason for the tolerant position of the courts on this issue is that freedom of speech, when exercised by workers in the context of a labor conflict, has become, in our mass-media-dominated society, an instrument of pressure that may be used against employers with the same effect as strikes. The reason is not only that timely, well-designed declarations regarding employers can receive more media attention than a strike, but also because this use of employee expression is more convenient for the employees (and the public) than the right to strike. In the latter case, employees do not have a right to be paid, but this is not the case in the former: employees maintain their salary when, outside of working hours, they talk to the mass media to express negative views about their employer.

4. Fourth, the whistleblower may sometimes have a specific "animus nocendi," which is the prevailing intention of causing maximum damage to the employer with his/her declarations. This is a difficult factor to judge, since it is obvious that, whether intentional or not, disapproving information about the employer will necessarily cause it some damage. Judges are inclined to consider the primary purpose of whistleblowers, but will adopt a negative view when the main cause for their actions is a personal grudge or an employees' reaction to an employers' legitimate decision with negative professional consequences for the employee.
5. The fifth factor is whether the issue on which the whistleblower has "gone public" relates to the

employer as such, as the other party in the labor contract, or, on the contrary, to the company's product or service and, therefore, to the employer as the entrepreneur or business owner.

This last factor is probably the most important in the private sector. Courts tend to be magnanimous with employees and, above all, with their representatives, when they use their freedom of speech to address a labor or labor-related issue. However, they are much stricter when they express their opinions on commercial or financial matters or the quality of the company product or service. In the first case, the workers are discussing their employer in its role as a part of the labor contract. In the second case, the workers are treating the employer in its role as the entrepreneur that introduces a specific product or service in the market and must compete in order to survive in such a market. The public is not usually influenced by the fact that an employee publicly declares disagreement with their employer's labor relations policy. However, if one or several employees of a company publicly question the quality of the product made or the service performed by that specific company, then the public is likely to be influenced when deciding whether to buy the company's product or service. The public would likely think that the employees must know what they are talking about and, if there is any doubt, there is no need to take a risk since competitors provide similar products or services; moreover, perhaps the public will reach the conclusion that the new product or service is better than the other one.

In other words, and as the Spanish Constitutional Court has declared in a sentence dealing with this matter, when employees publicly criticize their employer's product or service, they are jeopardizing the very "stability" of the company, seriously risking the competitive position, or even the survival, of the entrepreneurial project. This market stability of the company cannot be a permanent trade-off in the labor conflict.

A problem arises when an employer's business interest must be balanced with public interest or public safety; for example, when the company's product or service can represent a serious risk for the consumers or, in general, for the community. In the private sector, Spanish courts, as in other European countries, have given a priority to employee freedom of speech as an instrument at the service of public interest only when the possibility of danger resulting from the employers' illicit behavior is evident. However, it is important to point out that, in Spain, as well as in other European countries, the situation is different with regard to Public Administration. Public

servants have a wider freedom of speech, since they can go public not only to denounce illicit behavior by the administrative bodies, but also to inform the public of mere "irregularities." According to our Constitutional Court, since Public Administration is supposed to defend and promote public interest involving public funds, any deviation from this purpose must be immediately known and corrected.

There are no provisions made in either the private sector or in Public Administration for a specific procedure to be followed by whistleblowers prior to going public. According to the Spanish Constitutional Court, there is no requirement that they must first approach their employers or a specific or general law enforcement agency to denounce the illegal facts.

In Spain, as in most European countries, no specific protection exists for whistleblowers from employers' sanctions, at least not in the American legal sense. The protection is "a posteriori"; i.e., once the employer disciplines the whistleblower and he/she brings an action against this sanction before the courts, then the tribunals will decide if the conduct of the punished employee may be considered protected by the constitutional freedom of speech. Therefore, when we look at the extent and the limits of employee freedom of speech in discussing their employers on the Internet, the most important general rule that can be concluded from the decisions rendered by the courts is that employees and, above all, their representatives, have a very wide freedom to express their views when dealing with labor or labor-related issues. Here, the duty of good faith or of loyalty, which is implied in every labor contract, must be understood in a very flexible manner and the frontiers are mainly fixed by the well-known limits established by Criminal Law—defamation, calumny, and the like.

On the other hand, when employees speak out against their company's product or service, the courts are inclined to adopt a restrictive interpretation of their freedom of speech. The need to preserve the "stability" of an employer's business in the market has a clear priority and, only in limited cases in which important community rights, such as health and security, must be protected, is freedom of speech for employees guaranteed. However, whistleblowers do not have a specific temporary legal protection to shield them from eventual retaliation from employers.

It is important to observe that, even when the employees or their representatives are illicitly exercising their right to freedom of speech in relation to their employers, this does not mean that the latter must allow this exercise to be developed by using the company's electronic

equipment such as e-mail or Web page. On the contrary, by the simple fact that employees are using a non-company electronic system for expressing their views about their employers, such as their private e-mail or a third party Web page, it does not mean that the employers cannot legally discipline their employees when they or their representatives have surpassed the limits to the legal use of the right to freedom of speech already indicated.

In any case, it is important to emphasize that electronic communications, such as the Internet, represent a qualitative step in the possibilities for employees to express their views about labor and non-labor matters, reaching an unlimited audience and, therefore, dramatically affecting the public “image” of their companies. This step makes more important and, at the same time, more difficult, the search for a legal balance between employees’ freedom of speech and their duties derived from the labor contract.

VII. TRAINING AND RETRAINING IN NEW TECHNOLOGIES

Spanish collective bargaining is playing a main regulatory role in relation to the consequences of new technologies for the permanent training and retraining of workers. The main branches of the Spanish economic system now have collective agreements specifically and exclusively dealing with the permanent professional training and retraining of employees. These agreements explicitly indicate that the main reason for developing such “continuous training programs” at branch and company levels is the impact on companies of the new technologies. One of the main aims of these agreements is to avoid the dismissal of employees for lack of operative knowledge of these new technologies. These programs provide for paid and unpaid released time to maintain or up-grade workers’ technological knowledge and skills.

Spanish law provides that an employer may dismiss a worker for “lack of adaptation” to the technological changes in his/her job. In this case, the employer must give the employee two months’ notice before dismissal. Before the dismissal, the employer may offer the employee the possibility of taking part in a training or retraining professional program, while maintaining the employee’s salary.

On the other hand, and in relation to the possibilities for employees to use their professional knowledge and experience obtained in a company for the benefit of another company, this is a legal problem that has acquired great relevance in digital companies’ labor contracts. It is unquestionable that, in many cases, the

electronic know-how of the company applied to their product or service is its main asset and that employees have a more than significant share in this asset. The company's competing "edge" in the market can be found this way. Therefore, if former employees use the know-how for the benefit of another company, this "edge" could be lost and, with it, the company's survival.

Spanish labor law, as in other European countries, has a limited answer to the issue of the enforceability of post-employment non-competition provisions. In cases in which the employer can show a business interest, it can include a clause in the labor contract forbidding the employee for working, after the contract terminates, for other companies or jobs that could be considered in competition with his/her former employer. This prohibition of post-contractual competition has a limitation of two years after the contract termination. Moreover, the employer must pay the employee a specific amount of money to compensate for this prohibition, since the employee's constitutionally protected freedom to work would be temporarily limited. If the employee violates this clause, the employer is entitled not only to recoup this compensation, but also to further indemnities for eventual additional damages. In practice, in a market with a lack of human resources in important sectors of the new technologies field, this kind of clause has shown a limited "deterrent" impact, as competitors have been willing to "poach" qualified employees from other companies, paying them not only better salaries, but also the economic compensation originated from post-contractual non-competition clauses.