

**COMPARATIVE LABOR LAW DOSSIER**  
**MODIFICATION OF WORKING CONDITIONS IN SPAIN**

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**Introduction**

The Spanish labor reform of 2012 (introduced by the Decree 3/2012, February 10, and Law 3/2012, July 6, on urgent measures to reform the labor market) introduced important changes in, among others, the legal regime of the modification of working conditions. Specifically, as will be analyzed in further detail in this section of the *Comparative Labor Law Dossier*, increasing the employer's faculties to unilaterally modify employees' working conditions and allowing the modification of –in addition to wages– essential labor conditions regulation in collective bargaining agreements, with the aim of increasing internal flexibility and allowing companies to adapt working conditions to the economic situation (preamble of the RD 3/2012 and Law 3/2012).

As intended by the legislator with this labor reform, there has been an exponential increase in the number of modification processes of employee's working conditions. The Survey of Collective Agreements shows that number of modifications of working conditions regulated in collective bargaining agreements tripled in 2013 in comparison with 2012, from 748 to 2.512.<sup>1</sup> Until November of 2014, the number of temporary modified collective bargaining agreements was 1.960, 91.5% of which modified the regulation regarding wages and/or the remuneration system. In this sense, according to the Third Monitoring Observatory of the Labor Reform,<sup>2</sup> wages have decreased, on average, 10% since the adoption of the 2012 labor reform.

**1. Is it possible in Spain for the employer to unilaterally modify the worker's functions? If the answer is yes or if it is only allowed in cases of agreement with workers' representatives, public authority or a third party (for example, Labor Administration or arbitrator), what are the causes that allow this modification? What are the formal or procedural limits that must be followed?**

Yes. In the Spanish legal system the modification of workers' functions (functional mobility) is regulated in article 39 of the Worker's Statute (ET, hereinafter).

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<sup>1</sup> Available at: <http://www.empleo.gob.es/estadisticas/cct/welcome.htm>

<sup>2</sup> Available at: [http://www.adecco.es/\\_data/NotasPrensa/pdf/540.pdf](http://www.adecco.es/_data/NotasPrensa/pdf/540.pdf)

The formal/procedural and causal limits that must be observed by the employer to proceed to such mobility depend on whether it is a horizontal mobility (that is, when there is equivalence between the functions of origin and destination: for example, administrative assistant → administrative) or vertical mobility (that is, when there is no equivalence between the origin and destination functions: for example: lawyer → administrative).

In this sense, the employer has greater freedom to operate with respect to horizontal mobility, not requiring business reasons to justify its decisions and allowing a permanent modification of functions (articles 20 and 39.1 ET). Nonetheless, to perform a vertical mobility, article 39 ET requires the existence of an appropriate technical or organizational cause and it requires modifications to be temporary; when the mobility is descending (for example, lawyer → administrative) courts don't usually accept the modification of functions to exceed 2 or 3 months.

In spite of what is said in other answers, the Spanish legal system does not recognize the right of workers affected by a functional mobility to terminate their employment relationship and obtain an economic compensation. If the worker opts for terminating its labor contract, he/she is not entitled to compensation nor has the right to unemployment.

**2. Is it possible for the employer to unilaterally modify the employee's workplace? If appropriate, what are the causes that allow this modification? What are the formal or procedural limits that must be followed?**

Yes. In the Spanish legal system we must distinguish 4 types of geographic mobility in terms of the causal and/or formal legal limits that the employer must observe for the decision to be correct.

1. Temporary or indefinite geographical mobility that doesn't involve a change of residence. Imagine the case of a shopkeeper that the company decides to locate him/her in a different store but in the same city.

In this case, the Spanish rule (article 20 ET) does not require the employer to justify its decision causally and it is not limited in time. In this case, if the employee terminates his or her employment relationship, he or she will not be entitled to any compensation or unemployment benefits.

2. Geographical mobility involving a change of residence that does not exceed 12 months in any period of 3 years. Imagine the case of an industrial engineer that has

been employed for several years in Barcelona for a telecommunications company and the company wants to move him or her for 3 months to Seville.

This case is qualified by article 40.3 ET as «displacement» (*desplazamiento*) and requires the company to claim economic, technical, organizational or production reasons to justify it. Continuing with our example, the cause would exist if the work center of Seville has been recently created and is required the presence of an experienced engineer during the startup period.

In cases of «displacement», the employer must inform the employee giving notice of no less than 5 working days and must bear the relocation costs. Furthermore, the worker has the right to a paid leave of 4 working days in his/her old residence when the displacement is for more than 3 months.

As with the first case of geographical mobility analyzed and unlike the remaining two, if the employee terminates his or her employment relationship, he or she will not be entitled to any compensation or unemployment benefits.

3. Geographical mobility involving a change of residence permanent or for more than 12 months over a period of 3 years, and that does not affects a group of workers. Imagine the same example of the industrial engineer that provides services in Barcelona, but –in this case– the company wants to transfer him or her to Seville for 2 years.

The geographical mobility that requires involving a change of residence permanently or for more than 12 months in 3 years is called, in the Spanish legal system, «transfer» (*traslado*) (article 40.1 ET).

The Spanish rule requires the corporate decision to be justified in terms of competitiveness, productivity or technical or work organization. Following up with our example, imagine that the workplace in Seville has been recently created and its special productive complexity requires the presence of an industrial engineer with proven experience for two years.

The worker must be informed of the decision at least 30 days in advance, as well as the company's workers' representatives (Works Council or workers' delegates). In addition, the employer must bear the worker's relocation costs and those of his or her family members.

Unlike the two previous cases analyzed, the worker affected by a «transfer» has the right to terminate his or her employment contract with the right to compensation of

20 days' salary per year of service with a maximum of 12 months, in addition to unemployment benefits.

4. Geographical mobility involving a change of residence permanent or for more than 12 months in a period of 3 years and that affects a group of employees. Imagine the case of a telecommunications company with a staff of 80 employees, which seeks to transfer a group of 10 engineers for 2 years to its recently created work center in Seville.

When the employer's transfer decision has collective nature,<sup>3</sup> in addition to the existence of a cause that justifies the measure in terms of competitiveness (for example, the workplace Barcelona is closed and all of its previous workers are transferred to the work center in Seville), the business decisions must be negotiated with workers' representatives for at least 15 days. The negotiation must be done in good faith (requiring proposals and counterproposals) and must deal with the possibility of avoiding or reducing its effects, as well as with necessary measures to mitigate its consequences for affected workers.

In the same sense as the third case of geographic mobility, workers affected by a «collective transfer» have the right to extinguish their employment contract with the right to compensation of 20 days' salary per year of service with a maximum of 12 months, in addition to unemployment benefits.

**3. Is it possible for the employer to unilaterally decide a permanent or temporary transnational geographic mobility? In that case, what are the causes that allow this modification? And what are the formal or procedural limits that must be followed?**

No. It is beyond doubt that international geographic mobility is an increasingly common for companies and, therefore, it is necessary to ask about the existence of a specific regulation that solves, not only problems related with the governing law and jurisdiction, but –singularly– what causes can justify a transnational geographic mobility and the procedure that the employer must follow to carry out this decision.

For the purposes of this study, the above analyzed article 40 ET does not mention at any time if its regulation, that –ultimately– allows the employer to unilaterally decide the

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<sup>3</sup> The decision is considered collective when, in a period of 90 days, it affects a number of workers of, at least, 10 workers in companies with less than 100 workers; 10% workers in companies that occupy more than 100 and less than 300 workers; or 30 workers in companies that occupy 300 or more workers. Or then the decision affects all of the workers of a workplace, when there are more than 5 workers.

«displacement» or «transfer» of workers, is also applicable in cases where the geographical mobility is transnational.

In fact, there are many norms that regulate the governing law and jurisdiction in cases of transnational geographic mobility (article 8 of the Rome I Regulation, EC Regulation 593/2008; Law 45/1999, of November 29<sup>th</sup>, on the posting of workers in the framework of the transnational provision of services; RD 557/2011, of April 20<sup>th</sup>, regarding the Regulation of Immigration, etc.), but none of these rules addressed the initial issue, that is, whether these cases of transnational geographical mobility, (i) temporary or permanent, (ii) bound for EU/EEA or International required in any case or in some cases an agreement with the affected worker.

Without a doubt, we believe that, even though companies don't usually transfer employees to another country without their consent –because this transnational geographic mobility often occurs when there is a special interest of the worker to represent the company in the destination country– we believe that the norm should give a clear answer to this question. At this point, we understand that a maximalist position that defends the short-term transnational geographical mobility requires, legally speaking, the consent of the employee is too strict; not in the cases of permanent or long term transnational geographical mobility.

**4. Is it possible for the employer to unilaterally modify the regulation established in collective bargaining agreements regarding working conditions (working hours, salary, holidays...)? If applicable, what are the causes that allow this modification? And what are the formal or procedural limits that must be followed?**

No. Article 82.3 ET regulates (i) which are the working conditions regulated in the collective bargaining agreement<sup>4</sup> that can be modified, (ii) the causes or circumstances for this modification to be legal and, specially, (iii) the strict procedure that the employer must follow so as to proceed with this modification.

In relation to the working conditions whose regulation in the collective bargaining agreement can be modified, the law lists the following:

- a) Working time.
- b) Work schedule and distribution of working time.

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<sup>4</sup> Remember that the collective bargaining agreement is an agreement between the employer and the workers' representatives that regulates working conditions, is registered in the Public Administration and published in the Official Gazette (*Boletín Oficial del Estado*). The collective bargaining agreement is considered, technically, a judicial norm (articles 3 and 90 ET).

- c) Regime of shift work.
- d) Remuneration system and salary.
- e) Working system and performance.
- f) Functions.<sup>5</sup>
- g) Employer provided benefits on Social Security benefits.<sup>6</sup>

From the list above it is clear that the Spanish legal system allows the modification of the regulation established in collective bargaining agreements of the most important working conditions. However, it is important to note that not all working conditions are included: holidays, disciplinary procedures, health and safety, etc.

As for the causes/circumstances that must concur for the company to proceed with the modification of the above working conditions regulated in the collective bargaining agreement, the Spanish norm distinguishes between two cases: when the alleged cause is an economic cause and when it is a technical, organizational or productive cause (TOP, hereinafter). The rule, as it is analyzed below, is stricter when the cause alleged is purely economic because the modification is a reactive measure (reduce costs) than when it is a TOP as it can be considered as an offensive or defensive situation.

When the cause alleged by the company so as to proceed with the modification of the collective bargaining agreement is economic, the Spanish norm requires that *“from the results of the company derives a negative economic situation, in cases such as the existent of current or expected losses or the persistent decline in the level of ordinary revenues or sales. In any case, the decrease is considered persistent if for two consecutive quarters the level of ordinary revenues or sales of each quarter is lower than in the same quarter of the previous year”* (article 82.3 ET).

When the alleged causes are TOP, *“it is understood that there exist technical causes when changes occur, among others, in the field of the means or instruments of production; organizational causes when changes occur, among others, in the field of systems and working methods and the organization of production, and productive*

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<sup>5</sup> In spite of what was established in questions 1, note that when the change of functions is vertical and descendent –question 1– but permanent (creating polyvalent categories or jobs) the modification will have to follow that stated in article 41 ET, provided that the modification doesn't affect the description of functions established in the collective bargaining agreement; in this case, the modification would not be possible without the adoption of a new collective agreement.

<sup>6</sup> In the Spanish legal system, employer provided benefits on Social Security benefits are improvements on Social Security benefits that the employer has recognized to its workers. For example, the commitment by which the employer decides to improve by 10%, for example, Social Security benefit for temporary disability, permanent disability or even retirement pension.

*causes when changes occur, among others, on the demand for the products or services that the company intends to place on the market” (article 82.3 ET).*

Nevertheless, the greatest difficulty for the employer to carry out a modification of working conditions provided established in the collective bargaining agreement is not the concurrence of the cause, but the need to reach an agreement with workers’ representatives regarding the modification and its scope. In the case of absence of agreement, the modification of the collective agreement is decided by a third party (the Labor Authority and/or an arbitrator).

Indeed, the Spanish rule requires for modifying labor conditions regulated in a collective bargaining agreement the negotiation and agreement with workers’ representatives. A regulation that is coherent with the recognition of legal status of collective bargaining agreements. Until 2012, the lack of agreement with workers’ representatives precluded any modification of the collective agreement. However, since the 2012 Labor reform (Law 3/2012), in case of disagreement either party (employer and/or workers’ representatives) can attend, as a compulsory arbitration, the Labor Administration (*Comisión Consultiva Nacional de Convenios Colectivos* or equivalent autonomic body) to resolve the employer’s claim to modify the collective bargaining agreement.

In any case, the modification of the regulations of a working condition established by a collective agreement will only be valid until the expiration of the validity/applicability of the collective bargaining agreement. For example, the collective agreement has validity from 2014 to December 31<sup>st</sup>, 2016. However, if in January 2015 the employer and worker’s representatives agree (or is decided by the Labor Administration) the inapplicability (i.e. modification) of the remuneration established in the collective agreement, this inapplicability is only valid until December 31<sup>st</sup>, 2016, the end date of the validity of the collective bargaining agreement.

Finally, workers affected by a modification of the regulation of the collective bargaining agreement that decide to terminate their employment contract are not entitled to any type compensation or unemployment benefits.

**5. Is it possible for the employer to unilaterally modify the regulation of working conditions (working hours, salary, holidays...) not established in collective bargaining agreements? If applicable, what are the causes that allow this modification? And what are the formal or procedural limits that must be followed?**

Yes. Article 41 ET establishes the causes/circumstances and the procedure that allows the employer to modify the regulation of working conditions not established in a collective bargaining agreement; that is, regulated in the employment contract, in an agreement with the workers' representatives or considered a company practice.

Imagine the case of a company that wants to reduce the salary and/or increase the working hours of its employees. Knowing that the applicable collective agreement establishes an annual salary of 20,000€ and working time of 1,780 hours a year, the company has actually been recognizing its workers an annual salary of 24,000€ and working time of 1,750 hours.

The company, following what is established in article 41 ET and analyzed in this Q5, reduces the salary to 20,000€ per year and increases the working hours up to 1,780 hours, eliminating the "improvement" that existed of the regulation of the collective agreement.

If the company needs to reduce wages below 20,000€ per year or increase working hours above 1,780 hours, it will need to affect the regulation established in the collective bargaining agreement and, therefore, the company will have to follow that established in article 82.3 ET (Q4).

Unlike the modification of working conditions regulated in the collective bargaining agreement (Q4), when the regulation to be modified is not contained in a collective bargaining agreement (i) it is possible to modify any working condition and not just some, (ii) the employer is allowed to do so unilaterally, sometimes requiring a previous negotiation (not requiring, however, an agreement) with workers' representatives, (iii) the modification can be temporary or permanent and (iv) affected workers have, as a general rule, the right to extinguish their employment contract and receive a compensation of 20 days' salary per year worked, with a maximum of 9 monthly payments.

Indeed, there is no limitation with respect to working conditions, whose regulation can be modified, requiring, in any cases, the existence of causes or circumstances that justify the modification. However, the regulation understands that this cause or

circumstance concurs when it is related “*with the competitiveness, productivity or technical organization or work in the company*”. Therefore, the Spanish norm allows a very flexible sense of the cause that justifies a modification of working conditions (as was the case with functional and geographical mobility, Q1 and 2).

In those cases in which the modification of working conditions is collective,<sup>7</sup> the decision must be negotiated with workers’ representatives during, at least, 15 days. The negotiation must be developed in good faith (requiring proposals and counterproposals) and must deal with the possibility of avoiding or reducing its effects, as well as with the necessary measures to mitigate its consequences for affected workers. If this consultation period ends without an agreement, the employer may unilaterally implement the modification, requiring the notification of affected workers, at least, 7 days prior the implementation of the new working conditions.

When the modification is not collective, from a formal or procedural point of view, the employer is only required to give notice to the affected worker and inform workers’ at least 15 days in advance.

**6. With regard to modification of working conditions (functions, geographic mobility, working time, salary, holidays...), is there a different treatment depending on the size of the company? If applicable, what is the different regulation?**

No. In the Spanish legal system there is no different treatment depending on the size of the company in relation to the modification of working conditions.

**7. With regard to modification of working conditions (functions, geographic mobility, working time, salary, holidays...), is there a different treatment in the event of business transfers (when the modification of working conditions is needed to cause the transfer)?**

Yes. In accordance with Directive 2001/23/EC, sections 4 and 9 of article 44 ET state which limits, basically formal and procedural, must the employer respect when, as a result of a process of business transfer, it is necessary to modify the working conditions of the workers assigned to this process.

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<sup>7</sup> The decision is considered collective when, in a period of 90 days, it affects a number of workers of, at least, 10 workers in companies with less than 100 workers; 10% workers in companies that occupy more than 100 and less than 300 workers; or 30 workers in companies that occupy 300 or more workers. Or then the decision affects all of the workers of a workplace, when there are more than 5 workers.

Imagine the acquisition of Company A with 100 workers whose gross monthly salary is 1,500€ and annual working hours of 1,820 by Company B whose workforce has a gross monthly salary of 2,000€ and 1,800 annual working hours.

The Spanish rule, in logic with the regulation explained in Q4 and 5, distinguishes two situations, depending on whether the working conditions that are intended to be modified are regulated in a collective bargaining agreement (article 44.4 ET) or not (article 44.9 ET).

If the working conditions are regulated in the collective agreement, its modification can only be done once the transmission is effective and not before, and it requires an agreement between the transferee and workers representatives. If there is no such agreement, the conditions of the workers affected by the business transfer will continue to be regulated by the previous collective bargaining agreement –the one applicable prior to the transfer– until the end date of its validity or, if earlier, the entry into force of a new collective agreement applicable to the transferred business.

If the working conditions that want to be modified are not regulated in a collective bargaining agreement, article 44.9 ET –in logic with what is established in article 41 ET (Q5)– requires this modification to be negotiation (not requiring agreement) with workers’ representatives, allowing for this negotiation to begin before the effectiveness of the business transfer.

**8. With regard to modification of working conditions (functions, geographic mobility, working time, salary, holidays...), is there any specialty when the modification of working conditions is intended in an insolvent/bankrupt company?**

Yes. Articles 64 and 66 of Law 22/2003, of July 9<sup>th</sup>, of Insolvency (LC, hereinafter) establish the applicable regulation to companies that are in situation of insolvency or bankruptcy and need to modify working conditions, suspend or terminate employment relationships.

The regulation regarding modification of working conditions in insolvent or bankrupt companies only differs from the one established in the Worker’s Statute (Q1 to 5) in that the negotiation will take place, in general, between workers’ representatives and the insolvency administrators; the insolvency Judge will, eventually, decide about the convenience or not of the agreed or negotiated modification and always “in the interest of the state of insolvency”.

In any case, if the modification affects the regulation of the collective bargaining agreement, article 66 LC requires that there be an agreement between workers representatives and the insolvency administrators, in logic with that explained in Q5.

**9. The worker affected by a modification of his or her working conditions (functions, geographic mobility, working hours, salary, holidays...), does he or she have the right to terminate the employment relationship with right to compensation?**

Yes. As answered in Q3 and 5, workers affected by a «transfer» and in most cases of modification of working conditions not regulated in a collective agreement, workers can terminate their employment relationship and are entitled to a compensation of 20 days' salary per year of service with a maximum of 12 («transfer») or 9 monthly payments (modification of other conditions).

Similarly, article 50 ET establishes that in those –unusual– cases in which the modification of working conditions has been adopted without following the causal and formal limits of article 41 ET (Q5) and provided the worker can prove that the modification affects his or her dignity, he or she may request the termination of the employment contract and is entitled to compensation of, depending on the contract, 33 to 45 days of salary per year of service with a maximum of 24 to 42 monthly payments, respectively.

**10. Is there a special judicial procedure to substantiate claims regarding modification of working conditions?**

Yes and no. Indeed, of the four cases of modification of working conditions analyzed (functional mobility, geographical mobility, modification of the regulation of working conditions established in the collective agreement and other not contained in such agreements), only in the cases of geographical mobility (article 40 ET; Q2) and modification of working conditions not regulated in a collective bargaining agreement (article 41 ET, Q5) there is a special, urgent and preferential judicial procedure. For the two other cases analyzed (article 39 ET, Q1; article 82.3 ET, Q4), claims must follow the general judicial procedure. In our opinion, there is little logic to the fact that procedural rules don't establish one same judicial procedure for claims related with the modification of working conditions.

To initiate this judicial procedure, the worker has an expiration period of 20 working days from the notification of the modification of his or her working conditions.

The court must rule within five days and there is no appeal, except for cases of collective transfers and collective modifications of working conditions. The court ruling will declare justified or unjustified the employer's decision to modify the employee's working conditions, depending on whether the employer has accredited or not the alleged causes or circumstances to justify such modification.

The court's decision declaring the modification to be unjustified recognizes the right of affected workers to be restored to its previous working conditions, as well as the payment of the damages that could have resulted as a consequence of the employer's decision.

The employer's decision will be declared void, singularly, when it has as motive one of the reasons of discrimination prohibited by the Spanish Constitution and the Law, or when it has been adopted in violation of the worker's fundamental rights and freedoms. Note, at this point, that the worker cannot bring a legal claim against the employer's decision to modify his or her working conditions, if he or she has opted for the termination of the employment contract and perceiving the economic compensation.