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EMPLOYMENT

International remote working: reflection on the possible consequences of remote working in Spain

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Companies have had to make numerous changes over the past year in order to adapt their work systems to the needs arising from the Covid-19 situation. However, even though many of these changes came about rather hastily, a series of situations have arisen that require an analysis of the main potential future consequences.

In this context, there is a relatively new regulation published in Royal Decree-Law 28/2020, of 22 September, on remote working. An analysis of the open points that this regulation leaves for many companies is beyond the scope of this article, and in fact this Decree-Law does not provide with an answer to the complex labour-contractual and tax situation that may arise from what we call international remote working. Therefore, the aim of this article is to focus on situations involving employees of foreign companies who are remote working from Spain on a permanent basis or situations in which remote working from Spain is combined with working on-site for a given number of days in another country. In most cases these are countries relatively close to Spain, such as the United Kingdom, Italy, or France.

These situations can create certain points of conflict, some of them are highlighted below:

The main and most relevant would be to identify the law applicable to the employment contract. In this regard, in most cases there is employment under foreign applicable law, when in fact the employee is actually providing effective services in Spain. This can clearly give rise to conflicts, especially when the employment contract has to be terminated and, obviously, the compensation regulations in Spain are more favourable to the relevant employee. According to the current regulations, following the Labour Reform, the compensation for unfair dismissal is 33 days' salary per year of work with a maximum of 24 monthly payments.

The second important issue concerns the tax residence and taxation of the relevant employee. This is certainly a very sensitive issue that will require an analysis of the criteria defined in Spain to assess whether, after checking the connection points (such as residence for more than 183 days, centre of vital interests, economic and family interests), they can be considered as a tax resident in Spain. This point will have an impact both for the company, for the purposes of tax withholdings to be made from the salary and, with regard to the employee, for their tax

return. This is not a trivial issue given all the implications that it may involve.

A third issue, also of particular importance, is related to social security contributions. As with the previous one, an error in the place of quotation may imply employer liabilities in terms of contribution fees and potential employer liabilities in terms of benefits.

In both tax and social security matters, the existence of bilateral agreements should be analysed to define the criteria to be taken into account to determine the place of residence for tax and social security contributions.

Furthermore, it is important to bear in mind the potential residence and work authorisations that may be required in Spain in the case of non-EU employees, and also of EU staff as it would be necessary to obtain a Foreigner Identification Number for periods of more than 90 days.

Finally, in the context of remote work, it is necessary to require suitable counselling and assessment of occupational risks.

Thus, there are quite a number of issues that arise in connection with international remote working. Given that the Law does not provide a specific and univocal response to this situation, it is certain that each specific case will require an individual analysis in order to adopt the most appropriate solution and legal model in order to control and / or eliminate the legal risks that may arise from this type of work, a way of working that, in view of new technologies and the current environment, is here to stay.

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MEDIA

Non-Fungible Tokens and Copyright

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Non-fungible tokens or NFTs have sparked high levels of interest, not only because of the recent multi-million-dollar auctions, but also because of what they could mean in terms of copyright.

However, before analysing the implications of NFTs for authors of works of art, it is important to differentiate an NFT from the work it represents.

What are non-fungible tokens?

NFTs are digital assets that create and use blockchain-based technologies. They are cryptographic tokens, i.e., a digital representation of something that is stored in a database (Distributed Ledger Technology), in which the transactions are recorded in multiple places at the same time. An agreed system validates that each entry in the database matches the previous data, thus providing unforgeable traceability.

NFTs are indivisible and represent unique physical or digital assets which are "non-interchangeable" in nature.

In short, an NFT is metadata written on a blockchain representing a physical or digital object and all details about it, including its location. However, it is worth highlighting that an NFT is not the physical or digital object, but rather a link to it.

Copyright management using blockchain technology

A series of initiatives have emerged since 2018 involving the use blockchain to license copyrighted works. Its main advantage is that blockchain offers a virtually immutable ownership record. Therefore, management bodies have become interested in solutions that use blockchain to manage licenses for use.

The World Intellectual Property Organisation is studying the creation of a platform to register unregistered intellectual property rights, such as copyrights, which do not need to be registered in order to exist and therefore prevent third parties from using them.

NFTs: all that glitters is not gold

Banksy artwork has been turned into an NFT, as well as the image of the first ever tweet. However, it is worth noting that an NFT does not constitute a work, but rather representations of it. First, the seller of an NFT cannot be the owner of the rights to the work it represents. Second, the buyer of a NFT does not acquire ownership of the work copyright, but only the metadata indicating where a digital object is located, unless otherwise contractually stipulated, i.e., that

the copyright in the work in question is sold in parallel to the sale of the NFT.

Consequently, the application of the exhaustion right is also called into question in relation to an NFT. Article 4(2) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, states:

"*2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent*."

This means that once a work is marketed within the European Union, the rightsholder cannot prevent third parties from selling the original or copies that have already been distributed.

However, the same Directive establishes that acts of communication to the public shall not be exhausted. According to the case law of the Court of Justice of the European Union, the distribution right is exhausted in the case of works on tangible media, such as DVDs or CDs. On the other hand, the right of communication to the public, which is not subject to exhaustion, applies to the distribution of content over the internet, for example e-books. Therefore, once introduced in the European Union, e-books cannot be resold without the consent of the rightsholder. Along these lines, given that the sale of an NFT is not made on a tangible medium, it does not seem tenable to argue that the right of communication to the public is exhausted after it is first made available within the European territory.

Furthermore, Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art grants the author an "*inalienable right, which cannot be waived, even in advance, to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author*".

However, the resale right can only be exercised in relation to "original works of art". This means, inter alia, graphic, or visual works of art, that is, pictures, paintings, prints or sculptures. Consequently, an NFT, which, as noted before, is a collection of data, does not meet this requirement and is not subject to the resale right.

Therefore, the acquisition of an NFT should be carried out with caution, since, for example, the purchase of an NFT does not entitle the owner of the NFT to prohibit third parties from using the represented work. Moreover, the owner of the NFT cannot exploit or advertise the work it represents. This is because the NFT is not the copyrighted work, but only a metadata representing it.

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ENERGY

Law 7/2021 of 20 May on climate change and energy transition

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On 21 May 2021, the BOE published Law 7/2021, of 20 May, on climate change and energy transition (hereinafter, "Law 7/2021"), which aims to ensure compliance with Spain's international commitments in the fight against climate change.

The text includes the minimum national targets for reducing greenhouse gas emissions, renewable energies and energy efficiency in the Spanish economy by 2030, which are as follows: (i) to reduce emissions in the Spanish economy as a whole by at least 23% compared to 1990; (ii) to achieve a penetration of renewable energies in final energy consumption of at least 42% (compared to the current 20%); and (iii) to achieve an electricity system with at least 74% of generation from renewable energies (compared to the current 40% at). With all these changes, the regulation considers that climate neutrality should be achieved by 2050 at the latest, in line with the objectives of the Paris Agreement.

Other measures addressed by Law 7/2021 relate to ecological transition and fuels. The text expressly prohibits new hydrocarbon exploitation and extraction projects throughout the Spanish territory, as well as hydraulic fracturing and radioactive mining. Furthermore, it establishes that the application of new tax benefits to energy products of fossil origin must be duly justified for reasons of social and economic interest or due to the inexistence of technological alternatives.

In terms of emission-free mobility, the new law states that measures will be adopted to achieve a fleet of passenger cars and light commercial vehicles without direct CO2 emissions by 2050. To this end, it provides for the adoption of the necessary measures in accordance with European regulations so that new passenger cars and light commercial vehicles gradually reduce their emissions.

It also includes a series of sections referring to climate change adaptation. In this regard, the text establishes that the National Plan for Adaptation to Climate Change (PNACC) is the planning instrument to promote coordinated action against the effects of climate change, which must include strategic objectives and the definition of a system of impact indicators and climate change adaptation, as well as the preparation of risk reports.

Law 7/2021 also regulates the cease of domestic coal production. Thus, the text provides that the granting of exploitation authorisations, permits, concessions, extensions or transfers of coal resources of the production units registered in the Closure Plan of the Kingdom of Spain for Non-Competitive Coal Mining in the framework of

Decision 2010/787/EU, will be subject to the repayment of the aid granted under this rule and corresponding to the entire period covered by the closure plan, which will be enforceable to applications for operating authorisations, permits or concessions regulated by mining legislation, as well as to extensions or transfers being processed at the time of entry into force of the new law.

Another issue regulated by the text is the governance of climate change and energy transition in Spain. It contemplates the creation of the Committee of Experts on Climate Change and Energy Transition as the body responsible for evaluating and making recommendations on energy and climate change policies and measures, including regulations. Moreover, it also imposes an obligation on the Autonomous Communities to report to the Climate Change Policy Coordination Commission on energy and climate plans as of December 31, 2021.

Finally, Law 7/2021 stipulates that within six months of its approval as law, the Government will set up a group of experts to evaluate a tax reform that will also assess green taxation.

This new regulation entered into force on May 22, 2021. However, in the case of concession contracts in execution at the entry into force of this law, paragraph 11 of article 15 will not enter into force until the regulatory provision that determines the obligations regarding the installation of electric charging points in order to guarantee sufficient supply conditions for the traffic of electric vehicles circulating on the aforementioned roads is in force.

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*This text is for information purposes only and does not constitute legal advice.