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## *COVID-19: A PRESSURE TEST FOR OCCUPATIONAL HEALTH AND SAFETY*


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## 1. Introduction

The number of deaths due to COVID-19 in Spain (103,721 people as of April 17, 2022), or the number of COVID-19 cases in Spain (11,736,893 people as of April 17, 2022), remind us that our lives will no longer be the same.

Our Constitution, in Article 40.2, entrusts the public authorities with ensuring occupational health and safety (in reality it refers to "hygiene" at work, the prevailing terminology at the time of its adoption). This right is related to another fundamental right "the right to life and physical integrity", established in article 15 of the EC and the right to health protection in article 43 of the EC.

The legal development of occupational risk prevention in Spain was forced by the adoption of the framework directive 89/391/EEC, which gave rise to Law 31/1995.

To this day, there are questions of subjective nature in this respect that are not properly closed, since either total universalization has not been achieved or has not been carried out sufficiently. Among them, the difficulty of providing adequate occupational risk protection in teleworking situations.

It should be considered that a labour market characterized by a high degree of precariousness, such as ours, can not only have a significant negative impact on the health of workers and objectively aggravate exposure to occupational risk, but can also mean that workers lose strength as a claiming collective demanding better measures for the protection and prevention of occupational hazards, this is in addition to establishing rules for the structure of collective negotiation in which the priority of application of lower spheres, such as the company agreement, may have a certain repercussion on the regulation of this issue, as has been said, with the possibility of regulating this matter "*in peius*".

The regulation of occupational health and safety and occupational risk prevention is characterized by technical and sometimes very extensive legislation, a large number of intervening agents, with the protected worker as the epicentre, and a constantly evolving scenario, since the world of work is changing significantly, we face challenges that affect not only labour relations but also the protection of the safety and health of workers, such as, among others: technology, demographics (in the sense of an aging working population), globalization and climate change.

## 2. The legislative framework for the employer's obligations to ensure OHS with a reference to working time

Royal Decree-Law 463/2020 entailed the declaration of a state of alarm in Spain on March 14, 2020, due to the management of the health crisis caused by COVID-19. Three days later, Royal Decree-Law 8/2020 was enacted, which implied the establishment of measures to alleviate the economic and social impact of COVID-19, while establishing various measures to prevent contagion in the workplace.

A) "Plan mecuida"

Another of the elements to be highlighted, imposed by this Royal Decree-Law, is the *Plan Mecuida*, included in its Article 6. It supposes the rights of adaptation and reduction of legal working hours, extending them to cover exceptional circumstances originated by the COVID-19. This plan was aimed at workers who accredited care duties with respect to the spouse or common-law partner, as well as relatives by blood up to the second degree (parents, children, siblings, grandparents, grandchildren) of the worker, provided that any of these situations concurred:

- Reasons of age, illness or disability requiring personal and direct care as a consequence of COVID-19.

- When, due to the closing of schools or educational centers that provide care or attention to the person who needs it.

- When the person responsible for the direct care or assistance could not continue to do so for justified causes related to COVID-19.

This plan provided for the adaptation of the working day, through an agreement between the company and the worker, in which the working time could be modified, altering or adjusting it to allow the worker to provide care and attention for the aforementioned cases. For this adaptation, mechanisms are provided such as change of shift, alteration of the schedule, flexible working hours, split or continuous working day, change of work center, change of functions, or change in the way the work is performed (such as teleworking). It also includes the possibility of a total reduction of the working day, if necessary, with the requirement of at least twenty-four hours' notice. The reduction of the working day implies the proportional reduction of the salary with the maintenance of the guarantees included in the contract, Workers' Statute or other regulations.

B) Temporary suspension of contracts and reduction of working hours (provisional employment restructuring procedure).

Similarly, Royal Decree-Law 8/2020 imposed exceptional measures related to the suspension of contracts and reduction of working hours, both for force majeure and for economic, technical, organizational and production reasons.

*"Article 22. Exceptional measures in relation to the procedures for the suspension of contracts and reduction of working hours due to force majeure.*
*1. The suspensions of contracts and reductions of working day that have their direct cause in losses of activity as a consequence of COVID-19, including the declaration of the state of*

*alarm, which imply suspension or cancellation of activities, temporary closure of premises of public affluence, restrictions in public transport and, in general, of the mobility of persons and/or goods, lack of supplies that seriously impede the continuation of the ordinary development of the activity, or in urgent and extraordinary situations due to the contagion of the workforce or the adoption of preventive isolation measures decreed by the health authority, which are duly accredited, shall be considered as arising from a situation of force majeure*".

The company may decide to suspend the contract or reduce the working day due to economic, technical, organizational and production causes related to COVID-19, applying different exceptionalities with respect to the regulatory procedure for these cases (Article 23 RDL 8/2020).

These regulations are the development of application to the pandemic situation of Article 47 of the Workers' Statute. It indicated that:

- The economic causes will be given "when from the results of the company a negative economic situation emerges, in cases such as the existence of current or expected losses, or the persistent decrease in its level of ordinary income or sales. In any case, it will be understood that the decrease is persistent if during two consecutive quarters the level of ordinary income or sales of each quarter is lower than that recorded in the same quarter of the previous year".
- Technical causes shall be given in the event of changes in the scope of the means or instruments of production.
- Organizational causes, when changes occur in the scope of the systems and methods of work of the personnel or in the way of organizing production.
- Productive causes, when there are changes in the demand for the goods or services marketed by the company.

On the other hand, Article 51.7 Worker's Statute provides for the labor authority to determine in cases of termination of contracts due to force majeure, and following the procedure indicated in the Statute itself.

The temporary suspension of the contract or reduction of working hours was not only provided for employees but also for self-employed workers (who were protected because they had to give up their activity due to the Decree regulating confinement or because of the reduction of income due to limitations in the mobility of persons and clients in the State of Alarm).

For both groups, the government established both special unemployment protection (called extraordinary cessation of activity for the self-employed) during the pandemic and a total or partial exemption from social security contributions during such periods.

Insofar as the pandemic has been prolonged in time due to the different waves caused by different variants or mutations of the coronavirus, the Government and the social agents (employers and trade unions) have signed, on a four-monthly basis and up to a total of 6, the so-called "Social Agreements for the maintenance of employment", extending the temporary measures of suspension of contracts or reduction of working hours of workers and total or partial exemptions from contributions according to different variables, which has occurred until the month of March 2022.

C) Special measures in workplaces

In addition to the measures established directly in the framework of the occupational risk prevention regulations, which will be mentioned below, it is worth mentioning Article 7 of Law 2/2021, of 29 March, on urgent prevention, containment and coordination measures to deal with the health crisis caused by COVID-19, which regulates measures in workplaces.

Thus, in addition to complying with the occupational risk prevention regulations and the rest of the applicable labor regulations, the owner of the economic activity or, where appropriate, the manager of the centers and entities, shall:

- Adopt ventilation, cleaning and disinfection measures appropriate to the characteristics and intensity of use of the work centers.

- Provide workers with soap and water, or hydroalcoholic gels or disinfectants with virucidal activity, authorized and registered by the Ministry of Health for hand cleaning.

- Adapt working conditions, including the arrangement of workstations and the organization of shifts, as well as the use of common areas in such a way as to ensure the maintenance of a minimum interpersonal safety distance of 1.5 meters between workers. When this is not possible, workers should be provided with protective equipment appropriate to the level of risk.

- Adopt measures to avoid the massive coincidence of people, both workers and clients or users, in the work centers during the time slots of foreseeable greater affluence.

- Adopt measures for the progressive reincorporation of workers in the workplace and the promotion of the use of teleworking when this is possible due to the nature of the work activity.

Also, persons who present symptoms compatible with COVID-19 or who are in home isolation due to a diagnosis of COVID-19 or who are in a home quarantine period due to having had close contact with a person with COVID-19 should not go to their workplace.

If a worker begins to have symptoms compatible with the disease, the appropriate telephone number will be contacted immediately and, if necessary, the corresponding occupational risk prevention services will be contacted. Immediately, the worker will put on a mask and will follow the recommendations indicated, until his medical situation is assessed by a health professional.

*2.1 Preventive measures and recommendations*

2.1.1 Organizational measures

a) Avoid the massive coincidence of people, both workers and clients or users, in the work centers during the time slots of foreseeable greater affluence, whenever possible, as well as during rest periods.

b) Promote teleworking for the development of those activities whose nature allows it. Evaluate the adoption of mixed work options for those activities that do not require continuous presence in the workplace.

c) When traveling in shared vehicles, use a respirator and guarantee the entry of outside air.

c) Implement the necessary measures to minimize contact between workers and between workers and potential customers or the public who may come to their workplace. In this sense, the layout of workstations, the organization of the circulation of people and the distribution of spaces (furniture, shelves, aisles, etc.) in the workplace should be modified, as far as possible, with the aim of ensuring that the 2-meter safety distance is maintained.

d) Establish business continuity plans in the event of an increase in staff absences or in a scenario of increased risk of transmission in the workplace, with a process of participation and agreement with the workers' legal representatives. Contemplate possibilities of redistribution of tasks and/or teleworking if necessary.

d) In those establishments open to the public, the following considerations shall be taken into account:

- The maximum capacity shall allow compliance with the extraordinary measures dictated by the health authorities, specifically with the requirement of safety distances.

- Whenever possible, the implementation of access control mechanisms at the entrances to the premises shall be encouraged. This access control should ensure strict compliance with the maximum capacity calculated for this extraordinary situation.

- When applicable, measures shall be established to organize the customers who remain outside the establishment waiting to access it when the capacity permits. All members of the public, including those waiting outside the establishment, must keep a strict safety distance.

- Customers shall be clearly informed of the organizational measures and of their obligation to cooperate in complying with them.

2.1.2 Collective protection

a) To adopt ventilation, cleaning and disinfection measures appropriate to the characteristics and intensity of use of the work centers.

b) To provide workers with soap and water, or hydroalcoholic gels or disinfectants with virucidal activity, authorized and registered by the Ministry of Health for hand cleaning.

c) To implement physical separation barriers: use of intercoms, windows, methacrylate screens, transparent curtains, etc.

d) About delimitation and maintenance of distance at counters, customer service counters, etc.

2.1.3 Personal protection

The optimal way to prevent transmission is to use a combination of all preventive measures, not only Personal Protective Equipment (PPE). The application of a combination of control measures can provide an additional degree of protection.

The occupational risk prevention services will advise the employer and the opinion of managers, middle management and workers' representatives should be sought. The following elements should be taken into account in the risk assessment:

a) Adequate ventilation

b) Occupancy level

c) Maintenance of an interpersonal distance of 1.5 meters.

d) Time of permanence

e) Activity

f) Temperature and relative humidity conditions

g) Use of common areas (locker rooms, canteens, etc.)

h) Shared means of private transport

i) Existence of vulnerable people in the workplace

Any protective measures must ensure that they adequately protect working personnel from risks to their health or safety that cannot be avoided or sufficiently limited through the adoption of organizational measures, technical measures and, lastly, individual protection measures. All of the above measures may be adopted simultaneously if the working conditions so require.

*The Spanish Ministry of Health has defined vulnerable groups for COVID-19 as people with cardiovascular disease, including hypertension, chronic pulmonary disease, diabetes, chronic renal failure, immunosuppression, cancer under active treatment, severe chronic liver disease, morbid obesity (BMI>40), pregnancy, and those over 60 years of age.*

As can be seen, numerous standards have been enacted since the declaration of the state of alarm, succeeding one another or complementing each other, so that we can find an amalgam of legal texts in relation to the measures that sought to mitigate the effects of the pandemic.

*2.2 Recoverable Paid Leave*

Established in Law 4/2021, of April 12, regulating a recoverable paid leave for employees who do not provide essential services in order to reduce the mobility of the population in the context of the fight against COVID-19. It was intended for employed persons providing services in public or private companies or entities and whose activity was not paralyzed as a result of COVID-19.

This leave was mandatory between March 30 and April 9, 2020. The right of retirement that would have corresponded to them if they had been providing services on a regular basis was retained.

The companies that had to apply this leave could establish the minimum number of staff or work shifts required to maintain the activity.

### 3. Specific requirements on the Individual worker's cooperation to the fulfillment of OHS in the pandemic

The Workers' Statute establishes the labor duties (Article 5) of workers, among which should be highlighted the compliance with the specific obligations of their job, and observance of the occupational risk prevention measures adopted. In the latter we must focus more on in order to elucidate what would be the specific requirements to be carried out by workers to comply with occupational health and safety. Article 29 of Law 31/1995, of November 8, 1995, on the prevention of occupational hazards (hereinafter, LPRL), develops this duty in depth, when it indicates that the worker must ensure his own safety and health at work and that of those who may be affected by his activity, in accordance with his training and the instructions of the employer. The worker has the obligation to:

a) Properly use the means with which the workers carries out their activity.

b) Properly use the protective equipment provided by the employer, and in accordance with the instructions provided.

c) Not to put out of operation the existing safety devices and to use them correctly.

d) Report any situation that may pose a risk to the safety and health of workers. Workers who, after having had contact with a case of coronavirus, are subjected to the corresponding preventive isolation to avoid the risks of contagion arising from this situation until the corresponding diagnosis is available, must inform their employer and the prevention service or, where appropriate, the prevention delegates. The worker on sick leave is not obliged to inform the company of the reason for the sick leave; however, this individual right may give way to the defense of other rights such as the right to the protection of the health of the group of workers in pandemic situations and, more generally, the defense of the health of the entire population.

e) Cooperation in the fulfillment of the obligations established by the authorities for the protection of workers.

f) Cooperation with the employer to ensure safe working conditions.

Failure to comply with the obligations of workers in terms of prevention is considered a breach of labor law, and may be punished by the company management in accordance with the penalties established by law.

These are the requirements for the cooperation of workers who carry out their activity in person, but the legislation also provides for the requirements of remote workers. These were established

in Royal Decree Law 28/2020, nowadays in the Law 10/2021, which we have already analyzed above. In special, some aspects:

- Remote workers have the right to adequate protection in terms of health and safety at work, in accordance with the provisions of Law 31/1995, of 8 November, on the Prevention of Occupational Risks, and its implementing regulations.

- The company should obtain full information about the risks to which the teleworker is exposed by means of a methodology that provides confidence in its results, and provide for the most appropriate protective measures in each case.

- The protection of the psychosocial risks of the worker is very important. In particular, the distribution of the working day, the times of availability and the guarantee of breaks and disconnections during the working day must be taken into account. For thar reason, teleworkers have the right to digital disconnection outside working hours.

- Finally, the employer will be able to adopt measures of surveillance and control to verify the fulfillment of the obligations and labor duties of the worker, including the use of telematic means, keeping in its adoption and application the due consideration to its dignity and taking into account, in its case, the real capacity of the workers with disability.

*3.1 Quarantine*

It should be noted that some of these rules have changed during the pandemic because of mass vaccination in Spain and because later variants of coronaviruses have had less harmful effects on the population.

3.1.1 We follow the classification of cases:

a) Suspected case: case that meets clinical criteria for a suspected case (acute respiratory infection of sudden onset of any severity presenting, among others, with fever, cough or shortness of breath) until a PCR result is obtained.

b) Confirmed case with active infection:

- Case with or without clinical and PCR (or other molecular diagnostic technique considered appropriate), positive.
- Case that meets clinical criteria, with negative PCR (or other molecular diagnostic technique considered appropriate) and positive result by serology (not by rapid test).

All suspected cases will be kept in isolation pending the result of the PCR and the search for their contacts will be initiated. In cases that do not require hospital admission, home isolation will be indicated. Isolation will be maintained until three days after the resolution of fever and clinical picture with a minimum of 14 days from the onset of symptoms. In asymptomatic cases, isolation should be maintained until 14 days from the date of diagnosis.

3.1.2 It is classified as close contact:

a) Any person who has provided care to an infected: healthcare or socio-healthcare personnel who have not used appropriate protective measures or persons who have other similar physical contact.

b) Any person who has been in the same place as an infected, at a distance of less than 2 meters (e.g. visitors, meeting) and for more than 15 minutes.

c) Any person who has traveled on an airplane, train or other long-haul ground transportation (provided access to identification of travelers is possible) within a two-seat radius of the infected, as well as crew who have had contact with the infected.

Any asymptomatic person who meets the definition of a close contact of a confirmed case should be informed and active or passive surveillance should be initiated, following the protocols established in each Autonomous Community. Close contacts of confirmed cases will be quarantined at home for 14 days from the date of last contact with the case. If during the 14 days of quarantine symptoms develop, it will be considered a suspect case, should make immediate self-isolation in the place of residence and urgently contact the responsible person who has been established for monitoring. If the contact remains asymptomatic at the end of the quarantine period, he/she will be able to return to his/her normal routine.

*3.2 Obligation to teleworking*

One of the implications of the pandemic on the way work is carried out is that of teleworking.

Article 5 Royal Decree-Law 8/2020 established the preference for teleworking as an alternative to the temporary temporary suspension of the contract or reduction of working hours. In this remote work, the legislator was also concerned with the prevention of occupational hazards, for that reason it also referred to risk assessment, understood as carried out when the worker himself carries out a voluntary self-assessment. This rule is anchored in four premises:

- Among all the possible variables, as a form of remote activity, outside the physical framework of the parent company, only one of them is welcomed, which is that of work at home. With it one tries to eliminate the risk of contagion in the contacts with the companions, clients and users or in the journeys especially if one has to use public transport.

- The telework is imposed on a mandatory basis for both parties to the employment relationship (workers and employers), provided that two very lax requirements are met: if it was "technically and reasonably possible" and "if the effort of adaptation was proportionate".

- Preference is given to the teleworking system against the secondary resource to the provisional employment restructuring procedure.

- An attempt is made to lighten formalities to speed up the step, so that, in those companies in which teleworking was not foreseen prior to the state of alarm, it is understood that the business obligation to carry out the evaluation of occupational risks through a simple self-assessment carried out voluntarily by the worker himself by answering a standard form has been fulfilled.

Several months later, the most important regulation on this was established by Royal Decree-Law 28/2020, of September 22, on teleworking, (currently replaced by the Act 10/2021 of 9 July).

This Royal Decree-Law was an urgent regulation, which intends, with the endorsement of the social dialogue, to correct the mistakes of the previous hasty regime and to establish some basic principles; specifically, the following fundamental ones:

a) The teleworking returns to be voluntary demanding the conformity of both parts of the contract.

b) It can be developed in the domicile of the worker or in any other place chosen by this one as it can be a telecentre.

c) It requires compliance with the "regularity" parameter, so that the non-face-to-face work "in a reference period of three months", reaches "a minimum of thirty percent of the working day".

d) Attributes to remote workers the right to adequate health and safety protection, with the provisions of the LPRL and its implementing regulations being fully applicable.

e) It recognizes the right to time registration (to note down the time of entry and greeting) and to digital disconnection.

f) It establishes an exhaustive protection of the worker's right to privacy and data protection.

g) It insists on the idea of avoiding, involving the equality plans, that teleworking is used as a refuge or, better, as a trap for women with family responsibilities.

h) It respects the previous conventional regulation (in the few cases where it existed).

i) It establishes a remuneration guarantee, since the expenses involved in the "development of the work at a distance" will be "defrayed or compensated by the company", both for the equipment and the tools and means assigned to the development of their work activity.

This Royal Decree-Law was applicable to workers who voluntarily render their paid services on behalf of others and within the scope of organization and management of another person, natural or legal, called employer or entrepreneur. That is, employees, not self-employed.

It established limitations on remote work, such as that at least half of the services rendered by minors and of internship and training and apprenticeship contracts had to be performed in person (Article 3). Likewise, equal opportunities and non-discrimination were also indicated, with no prejudice to their working conditions, whether in terms of remuneration, job stability, working time, training or professional promotion, without modifying the agreed conditions, and with the same rights as those who carry out the activity in person. Companies were obliged to avoid any discrimination against teleworkers (Article 4).

The entry into force of this Royal Decree-Law meant the return to the voluntary nature of teleworking, since until that time (September 22, 2020), teleworking was mandatory in all cases in which it could be applied, as a way to prevent transmission of the virus. The signing of the so-called teleworking agreement was required, and it established the impossibility of the

termination of the employment contract or the substantial modification thereof in case the worker refused to work remotely.

Some of the workers' rights that we can also observe in this Royal Decree-Law 28/2020 are the right to training, to professional promotion, to the sufficient provision and maintenance of means, equipment and tools, and to the payment and compensation of expenses (articles 9 to 12, respectively), the right to privacy and data protection, and to digital disconnection (by limiting the use of technological means of business communication and work during rest periods) (articles 17 and 18).

Referring to working time, we find the right to flexible working hours, in terms that respect the terms of the teleworking agreement, provided that it complies with the requirements of mandatory availability times and working and rest time. We also note the right to proper time registration, regulated in the Workers' Statute and which must correctly reflect the time that the teleworker devotes to the work activity, indicating the time of commencement and termination of the working day.

Another of the issues to be considered and regulated by this Royal Decree-Law on teleworking is the risk assessment, carried out in the area of the home established for the development of telecommuting, by means of an agreement between the company and the worker. It establishes that the risks inherent to teleworking must be taken into account, especially psychosocial, ergonomic and organizational factors, as well as paying special attention to the distribution of the working day, availability time and the guarantee of breaks and disconnections during the working day.

*3.3 Vaccination requirements*

Companies cannot impose on their employees the obligation to state whether they have been vaccinated. There is no obligation to answer if they have been vaccinated against the coronavirus, as this could affect their right to privacy, as stated in Article 18 of the Spanish Constitution. Vaccination is personal health information that is not obligatory to disclose.

Although the powers of management and control of the company and the workers' right to privacy may conflict, preference must be given to the latter.

In addition, as established in art.9.1 EU regulation 2016/679 of the European Parliament and of the Council of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and the free movement of such data, the processing of data relating to health is prohibited, except for the exceptions provided for in the regulation itself. In our country there is also no obligation to state whether one has been vaccinated as a condition for being hired, in selection processes, because vaccination against COVID-19 is part of the candidate's privacy and should never be included in a job interview. This would also be a very serious infringement.

Specifically, and according to Article 16.1.c of Royal Legislative Decree 5/2000, of August 4, which approves the revised text of the Law on Infractions and Penalties in the Social Order, the following is punishable: requesting personal data in selection processes or establishing conditions, through advertising, dissemination or by any other means, that constitute discrimination for access to employment.

## 4. The role of workers' representation in the workplace and collective agreement with a perspective of guaranteeing rights and duties in the field of health and safety at work during the pandemic

There is no doubt that workers are the most interested ones in the effective protection and prevention of occupational risks, as their health depends on it. For this reason, any policy carried out in the area of occupational risk prevention, by virtue of article 5.1 LPRL, will be aimed to promote the improvement of working conditions in order to raise the level of health and safety protection of workers at work and will be carried out with the participation of employers and workers through their most representative organisations.

Employers are, because of their duty of safety, obliged to adequately control health and safety risks by preventing risks during work activities. As the worker is the subject whose health must be protected against possible risks during their work activity, social regulations provide them with various channels for exercising this basic right, both individually and collectively. Not only do they have the duty to collaborate in prevention, but they must also be informed, consulted and trained in this area (both workers and their representatives). And the participation of workers in the preventive system is fundamental, as both they and their representatives have real knowledge of the risk in the specific workplace and experience of the best way to carry out the work, as they know the risk and know, on many occasions, how to avoid it. In fact, it has been indicated that workplaces where workers actively contribute to prevention tend to have lower levels of risk and accidents at work.

By virtue of article 12 LPRL, the participation of employers and workers will take place in the planning, programming, organisation and control of management related to the improvement of working conditions and the protection of the health and safety of workers at work. It is a basic principle of occupational risk prevention policy, to be developed by the competent public administrations at the different territorial levels. Participation is a clear commitment of our model of occupational risk prevention, especially on the part of workers, who are the necessary protagonists as they are the ones whose health is affected by occupational risks. From the collective point of view, which is the one that concerns us, Chapter V LPRL regulates workers' rights to consultation and participation in relation to issues affecting health and safety at work. It connects, so to speak, the legal representation of workers with a specific figure in matters of risk prevention, the prevention delegate, who in the exercise of his functions can reach agreements with the employer to adopt preventive measures (informal negotiation), just as in companies of a certain size the health and safety committee, a joint body and meeting point between the prevention delegates and the employer, can also reach agreements for the establishment or improvement of preventive measures (which would be another informal collective negotiation channel).

Participation or cooperation which is framed within the ideas of antagonism and conflict that are present in the labour relationship and which entails a double channel of protection of the interests at stake, in this case workers' health, since cooperation through participation in prevention and overcoming conflict through collective negotiation to improve health and safety conditions are perfectly compatible, as well as complementary, situations. Moreover, it has

been a symbiotic relationship, since, on the one hand, collective negotiation has served to improve the channels of participation and, on the other, where the collective agreement has not been able to regulate, workers' participation in the company has helped to reach agreements or pacts on occupational health that have served to improve the preventive conditions of workers.

*4.1 Workers' representation in the company*

In Spain, workers are represented in the company through a double channel of representation: trade union and legal (non-union) workers' representation.

Both spheres come together to represent workers in the widest possible way.

The prevention of occupational risks in Spain has been characterised by an enormous regulatory activity and by a large number of agents involved in a labour market and a production system in constant evolution.

a) The legal representation of the workers (staff delegates and company committees, depending on the size of the employing entity) have the right to be informed and consulted by the employer on all matters that may affect the workers and on the situation of the company, which has occurred in an important way during the health crisis, since the employers had to inform the legal representatives of the workers of any relevant change in the organisation of work due to SARS COVID-19, not only with regard to occupational risk prevention measures to avoid mass contagion, but also the measures that may have been established in cases of suspension of employment contracts and reduction of working hours caused by the suspension, limitation or restriction of business activity in order to avoid the spread of infection with the virus. In addition, these representatives are responsible for monitoring the fulfilment of labour regulations and health and safety conditions at work. For all these reasons, they have a credit of remunerated hours per month for the exercise of their representative functions, depending on the size of the company.

b) Article 7 of Spanish Constitution understands workers' trade unions as organisations that "contribute to the defence and promotion of their own economic and social interests". The exercise of trade union activity in companies includes not only collective negotiation and other fundamental rights such as the right to strike, but also participation as interlocutors in the determination of working conditions in any sphere (including public administrations).

In addition to acting as social partners with the government of the nation or of the autonomous communities, they can also have specific representation within companies through trade union sections (groups of workers affiliated to the same trade union in the same company). These trade union sections have the right to carry out trade union activity within the company, which means proposing, attending to, controlling or demanding any measure that may affect the working conditions of the workers, including the measures for the prevention of occupational risks adopted during the COVID and also the way to organise production in the case of suspension or reduction of working hours due to impediments or limitations established by the governmental authority to avoid the spread of COVID contagions.

When, due to COVID-19, companies have been allowed to enter into employment regulation mechanisms, i.e. to suspend or reduce the working hours of their employees due to the limitations to carry out their activity because of the State of Alarm (temporary force majeure) or, where appropriate, due to economic, technical, organisational or production problems because of the difficulties to carry out business activities normally due to the pandemic, this type of mechanism has been used and has led to company agreements in which workers' representatives have participated in order to look after the interests of their colleagues in the application of the adopted measure.

*4.2 The specific representation of workers in matters of prevention: the prevention delegates*

However, there is specific representation in the area of occupational risk prevention.

The Law on the Prevention of Occupational Risks created a participative prevention system. Therefore, workers have the right to information, consultation and participation in matters of prevention and must be actively involved in prevention, since it is the workers who are most interested in enjoying the right to effective protection in matters of health and safety at work.

Not only is the right to information important for workers, but also the right to training, which will be dealt with in more detail below. The employer has the obligation to give the workers the necessary instructions on prevention and the workers have the right to information. This is a necessary right in order to be aware of the risks that may occur in the execution of work (both in the company and with regard to the corresponding jobs), as it will help the worker to adopt a cautious behaviour in the development of the work activity, avoiding risks. But they must also be informed of the protective and preventive measures and activities established to avoid or combat risks and to be aware of the measures to be adopted in the event of an emergency or serious and imminent risk. However, the Law on the Prevention of Occupational Risks has prioritised the collective over the individual, recognising the centrality of the participation of workers and their representatives in the preventive management system as necessary for its effectiveness.

Companies that have workers' representatives must provide all this information to the workers, except for that referring to the specific risks affecting the jobs, which must be reported directly to each worker (and the specific measures adopted for the protection and prevention of risks in those jobs).

On the other hand, Article 18.2 and Chapter V LPRL are dedicated to the consultation and participation of workers in matters of prevention and it is necessary for this to be the case since, as we have said, they are the ones directly affected by occupational risks. Therefore, the employer must consult the workers, and allow their participation, in the framework of all issues affecting health and safety at work[1]. They have the right to make proposals to the employer

[1] Before taking a decision on risk prevention or occupational health, the employer must consult the employees (in the persons of their representatives) on a number of matters: the planning and organisation of work in the company and the introduction of new technologies (where these could give rise to risks), the choice of equipment, the determination and suitability of working conditions and the impact of environmental factors on work; the organisation and development of health protection and occupational risk prevention activities in the company,

and to the participation and representation bodies, aimed at improving the levels of protection and prevention of occupational risks.

Pursuant to Article 34 et seq. LPRL, and with the particularities of its exercise in the Public Administrations, workers' participation will be channelled, in companies with more than 6 workers, through their representatives and specialised representatives. This means that, on the one hand, the unitary representation has been entrusted with the exercise of powers in terms of information, consultation and negotiation, surveillance and control and the exercise of actions before companies and the competent bodies and courts in relation to the prevention of occupational risks. On the other hand, the creation of a specific figure is contemplated, also within the unitary representation, the prevention delegate as a representative of the workers with specific functions in the area of occupational risk prevention (the number of which depends on the size of the company). In short, as described in Article 35 LPRL, workers' representatives with specific functions in the area of occupational risk prevention are designated by and from among the staff representatives, within the sphere of the representative bodies provided for in the regulations referred to in the previous article, and the number of these will depend on the number of workers in the company. Some of the most relevant competences of the occupational risk prevention delegates are: to collaborate with the company management in the improvement of preventive action or to monitor and control the compliance of occupational risk prevention regulations, which is why during the pandemic they have had to check whether the protocols to avoid contagion established specifically by the Government in response to the proposals of the World Health Organisation and in application of the technical notes of the National Institute for Safety and Health at Work were being complied with in companies[2].

Having outlined this panorama of worker participation in occupational risk prevention, we must focus on a fundamental issue for the improvement of risk prevention: the existence of prevention delegates in companies. As is well known, these delegates, among other powers, can collaborate with technicians in risk assessments (including with the Labour and Social Security Inspection to verify compliance with regulations), they must be informed by the employer both of accidents and of protection and prevention activities and, finally, they can ask the employer to adopt measures of a preventive nature and to improve the levels of protection of the safety and health of workers.

After many years of the Law on the Prevention of Occupational Risks, several imbalances can be observed, two of which are important. The first of these is that the prevention delegate is a unitary representative with specialised functions, which requires that he or she has sufficient

including the designation of the workers responsible for these activities or the use of an external prevention service; the designation of workers in charge of emergency measures; the information and documentation procedures provided by law; the design and organisation of preventive training; or, finally, any other action likely to have a substantial effect on the safety and health of workers.

[2] The competences of which, as is well known, involve: collaborating with the company's management in improving preventive action; promoting and encouraging the cooperation of workers in the implementation of the regulations on occupational risk prevention; being consulted by the employer, prior to their implementation, on the decisions that may be adopted in terms of risk prevention in the company; and monitoring and controlling the compliance of the regulations on occupational risk prevention.

training to be able to carry out his or her activity for the benefit of colleagues and the company, and this is not always the case. This will be dealt with in the following section.

The second is more serious. It has been said that where there is worker representation, health and safety at work has better indicators. This is because the action of workers' representatives is associated with higher levels of prevention management, greater compliance with regulations and higher levels of health and safety information and awareness among workers.

There is no doubt that participation through the prevention delegates is a way of contributing to the knowledge of the technicians with the experience of the workers in the company or sector, which is why their functions and competencies are promotion, encouragement, collaboration, consultation, etc. For this reason, they have to participate throughout the whole process of preventive intervention, as their participation is expected to improve or raise occupational health and safety in the planning and adoption of preventive measures. Therefore, in order to be able to carry out their functions correctly, in addition to being trained, they must be informed (they are obliged to secrecy, so they should receive all relevant information regarding health and safety in the company, which in many cases does not occur) and even advised (the prevention services must advise them and not only the employer, as in the vast majority of cases occurs[3]; perhaps it would be appropriate to establish a system of public advice for these workers' representatives, as mentioned above[4]).

It is true that participation helps to activate dynamism in preventive matters and the exercise of workers' rights, but the structured and permanent framework of participation established by the Law on the Prevention of Occupational Risks does not work in a country like ours, where a very high percentage of companies are small or micro-companies which, having fewer than 6 workers, do not have unitary representatives (and therefore no prevention delegates) and even in companies which have the possibility of electing representatives, this election has not been carried out by the workers themselves. And perhaps, where they do exist, the precariousness of employment and what this entails may mean that occupational risk prevention becomes a formalistic compliance with legal requirements.

For this reason, the majority class unions have proposed in various documents the creation of "ad hoc" figures such as the creation of territorial prevention delegates to carry out preventive functions in companies where there are no prevention delegates. There are already some experiences, in Asturias and Navarra, for example, and in some other sectors,

[3] Article 31.2 LPRL establishes that the prevention services must advise and assist the employer, the workers and their representatives and the specialised representative bodies. In many cases, the lack of assistance or advice to workers affects their capacity to participate, as they lack the necessary information to exercise their functions and competences.

[4] It is true that they can appeal, *ex* Article 40 LPRL, to the Labour and Social Security Inspection if they consider that the measures adopted and the means used by the employer are not sufficient to guarantee health and safety at work or accompany the Inspector or Sub-Inspector acting during the visit, but a more agile channel or procedure would be necessary and with more celerity than what is currently observed, since the work overload of the Labour and Social Security Inspection prevents this task which, in itself, is not an advisory task either.

based on art. 35 LPRL, which allows, through collective negotiation or by means of agreements on specific matters referred to in art. 83.3 ET.

*4.3 Other forms of worker participation: Health and Safety Committees*

In addition, in companies or centres with 50 or more workers, Health and Safety Committees must be set up as joint and collegiate participation bodies for the regular and periodic consultation of the company's actions in risk prevention matters. Some of the competences of the Health and Safety Committee are: to participate in the preparation, implementation and evaluation of the company's risk prevention plans and programmes or to promote initiatives on methods and procedures for effective risk prevention, proposing to the company the improvement of conditions or the correction of existing deficiencies.

*4.4 COVID prevention in collective negotiation.*

4.4.1 The lack of attention to COVID in collective agreements

It is true that the pandemic has impeded the development of collective negotiation because of the difficulties encountered by the sides in coming together and adopting a new collective agreement. It is also true that, on the understanding that the pandemic would be a short-lived, transient phenomenon, the general rules laid down in collective agreements on the prevention of occupational risks could also serve to protect workers against the COVID virus.

Clearly, *ex* Articles 37.1 Spanish Constitution, 82.2, 84.4 and 85.1 Workers' Statute, the prevention of occupational risks and health and safety at work as a matter or condition inherent to labour relations can, and should, form part of the content of collective agreements. However, the interaction of these rules with the regulation of occupational risk prevention means that the collective agreement plays both an enhancing and a complementary role.

And the fact is that, *ex* art. 3 Workers' Statute, collective agreements are one of the sources that can regulate the rights and obligations concerning the labour relationship, including those relating to the protection of workers' health in the working environment. This is confirmed by Article 2.2 LPRL, which states that this law and the regulations that develop it have the character of "unavailable minimum rights" which, however, can be improved and developed in collective agreements, despite the fact that, throughout the LPRL, there are few occasions in which collective negotiation is required. Thus, the authorisation given by Article 2.2 LPRL to collective negotiation is hindered by the concurrence of two factors: on the one hand, the aforementioned minimum necessary right, certainly based on the importance of the legal assets protected, and, on the other hand, the extensive and detailed regulatory development of the LPRL, which has meant that the "vital space for negotiation in substance" is not excessive, or, to put it another way, which "has considerably reduced the scope of collective autonomy". Nevertheless, these impediments can be overcome, as there is considerable opportunity to establish rules for the application, development and adaptation of many aspects of the LPRL, as will be seen below, which is what has actually happened. Collective negotiation, as a support for legal regulations, can help to put an end to (or at least reduce) the scourge of workplace accidents.

On the one hand, because collective negotiation is a useful and possibly the most effective means for the development of a preventive culture in the company, since through an agreement between the two sides it allows the acceptance of the contents, which facilitates its implementation, compliance and development. This is why it has been described as the "best instrument for raising awareness, knowledge of obligations and rights in terms of prevention".

On the other hand, because the collective agreement, as an instrument regulating working conditions in a given area, sector or company, is an important formula for regulating the specific health and safety conditions in a given company or sector, since the negotiating subjects are those who know "first hand" or more closely the occupational risks that may affect the workers in that company or sector. Moreover, as has rightly been said, the temporary duration of the collective agreement favours up-to-date occupational health and safety protection as it allows the measures initially adopted to be adapted "to changes in the production system, to technological innovations and even to the appearance of new risks arising as a result of changes in the traditional production system...". In any case, collective negotiation is the most appropriate institution (due to its flexibility and dynamism) for the regulation of these matters, both because of its real knowledge of the risks associated with the productive sector or the forms of work organisation, and because of its permanent adaptation to changes that would allow the adoption of prevention rules adapted to new situations.

*4.4.2 Teleworking as a way of preventing the spread of the virus*

The third transitional provision of Law 10/2021, of 9 July, on telework established that "telework implemented exceptionally in application of Article 5 of RD-Law 8/2020, of 17 March, or as a consequence of the health containment measures derived from COVID-19, and for as long as these are maintained, the ordinary labour regulations will continue to apply".

This mention of the consequences of the health containment measures derived from COVID has made it possible, until now, for many companies to have established a system of total or mixed (face-to-face and remote) remote working ("teleworking") without the need for Law 10/2021 on remote working to apply.

However, this transitional situation seems to have come to an end with the publication of Royal Decree 286/2022 of 19 April, which modifies the obligatory use of masks during the health crisis caused by COVID-19. From now on, the mandatory use of masks is limited to a number of places (transport, hospitals, pharmacies...) and does not include companies unless their occupational risk prevention service so decides.

We have seen in our country how, over the last few months with the omicron variety of the coronavirus, the health containment measures have been reduced and with this Royal Decree 286/2022, it could be concluded that they have been eliminated almost in their entirety.

In other words, if a company, after this Royal Decree, teleworks more than 30% of the working day in a reference period of three months (art. 1 Law 10/2021), this law will apply with all its consequences.

On the other hand, it should be remembered that the experience of teleworking imposed by the pandemic is gaining ground in some sectors, as the savings in space and costs, the reduction of commuting, thus contributing to sustainability, the advantages for the conciliation of work and family life, etc., make it attractive for some companies. According to the Adecco Group Institute, almost three million workers have teleworked in Spain in 2021. The regulations governing teleworking in Spain after the pandemic (initially RD-Law 28/2020 and currently Law 10/2021) refer to collective negotiation for its development, especially to determine how to compensate or pay for the expenses that this type of work entails for the worker. For this reason, a number of collective agreements, both company and sectoral, have already regulated teleworking in their area[5].

## 5. OHS (Occupational Health and Safety) Authorities, grievance procedures, practitioners.

### *5.1 National Institute for Safety and Health at Work*

In Spain, the authority in the field of occupational health and safety is the National Institute for Safety and Health at Work.

The National Institute for Safety and Health at Work has the mission to promote and support the improvement of safety and health conditions at work, thus fulfilling the functions entrusted to us by the Law on Occupational Risk Prevention and the Spanish Strategy for Safety and Health at Work.

Both the reduction of accidents at work and occupational diseases and the improvement of health and safety conditions at work require the implementation of a true preventive culture. To this end, the institute focuses its efforts on improving the resources and sources of information available and the existing communication mechanisms.

The National Institute for Health and Safety at Work (INSST) is the specialised technical scientific body of the General State Administration whose mission is to analyse and study health and safety conditions at work, as well as to promote and support their improvement. To this end, it shall establish the necessary cooperation with the bodies of the Autonomous Communities with powers in this area.

The Institute shall encourage and support the implementation of occupational health and safety promotion activities by the Autonomous Communities and the General State Administration, with which it shall establish the necessary cooperation actions, as well as encourage and support the implementation of the aforementioned activities promoted by employers' and workers' organisations considered to be the most representative at state level and, in general,

[5] XXIV Collective Agreement for the banking sector 2021, Collective Agreement for savings banks and financial institutions 2020; Collective Agreement for the department store sector; Collective Agreement for the financial company El Corte Inglés, EFC, SA; IV Collective Agreement for the company Nokia Transformación Engineering and Consulting Services Spain, SLU; X National Collective Agreement for the pasta industries (2021); XX General Collective Agreement for the chemical industry for the years 2021-2023; III Collective Agreement for the company Corporación de Radio Televisión Española, S.M.E, SA (2020).

by entities whose actions may contribute to the improvement of occupational health and safety conditions.

Some of the functions are:

-To elaborate guides and other technical documents, as well as to elaborate or compile methodologies and tools to facilitate compliance with OHS regulations.

- To develop international, bilateral or multilateral cooperation programmes on occupational safety and health, within the framework defined by the competent administrations.

- To act as a national reference centre before European institutions, ensuring the coordination and transmission of information to be provided at national level, in particular with regard to the European Agency for Safety and Health at Work and its network.

- To collaborate with international organisations and other relevant public or private institutions that act in the field of occupational health and safety, for which purpose it may sign agreements under the terms established by law.

- If possible, avoid the mass coincidence of people, both workers and clients or users, in workplaces during the time slots when there is likely to be the greatest influx of people. This measure should also be considered during rest periods.

- Promote teleworking for the development of those activities whose nature allows it. Consider the adoption of mixed working options for those activities that do not require continuous presence at the workplace.

- When travelling in shared vehicles, use face masks and guarantee the entry of outside air.

5.2.2 Collective protection measures

- Adopt ventilation 1,2, cleaning and disinfection measures appropriate to the characteristics and intensity of use of the workplaces.

- Provide workers with soap and water, or hydroalcoholic gels or disinfectants with virucidal activity, authorised and registered by the Ministry of Health for hand cleaning.

5.2.3 Personal protective measures

The optimal way to prevent transmission is to use a combination of all preventive measures, not only Personal Protective Equipment (PPE). The application of a combination of control measures can provide an additional degree of protection.

For most occupational exposures, strict application of hand, surface and equipment hygiene measures, together with respiratory protection measures (respiratory etiquette and continuous and correct mask use) and ventilation, minimises transmission of infection.

Mask use reduces the emission of aerosols generated by breathing, talking, shouting, coughing or sneezing and is effective in reducing the emission of any respiratory virus, including SARS-

CoV-2. In addition, the use of a facemask reduces exposure to the virus by filtering the inhaled air through the mask.

However, in the work environment, the use of a respirator is generally not mandatory. The risk assessment of the workplace will be the activity that will allow a decision to be taken on the appropriate preventive measures to be put in place, including the possible use of masks if this results from the assessment.

In the current epidemiological and immunity context, the mandatory use of masks is indicated for:

a) Workers in health centres, services and establishments as established in Royal Decree 1277/2003.

b) Workers in socio-sanitary centres.

c) Workers in means of passenger transport.

And the responsible use of the mask in:

d) People working in vulnerable groups in any situation in which they have prolonged contact with people at a distance of less than 1.5 metres.

e) Workers related to vulnerable areas, institutionalised or at home.

The occupational risk prevention services shall advise the employer, and the opinion of managers, middle management and workers' representatives must be sought. The following elements are to be taken into account in the risk assessment. As it was mentioned before:

- Adequate ventilation

- Occupancy level

- Maintenance of interpersonal distance of 1.5 metres

- Time spent in the room

- Activity

- Temperature and relative humidity conditions

- Use of common areas (changing rooms, canteens, etc.)

- Shared means of private transport

- Existence of vulnerable people in the workplace.

For further information on the above elements, it is recommended to consult the scientific-technical information on the effectiveness of preventive measures for transmission control and the documents published by the Ministry of Health on SARS-CoV-2 transmission by aerosols

and recommendations for the operation and maintenance of air-conditioning systems in buildings and premises for the prevention of the spread of SARS-CoV-2, cited above.

### 5.2.4 Detection, notification, investigation and management of cases and contacts

Companies, through the prevention services, are called upon to collaborate with the health authorities in the early detection of COVID-19 compatible cases and their contacts in vulnerable settings and groups. The participation of health workers from the prevention services in the National Network of Epidemiological Surveillance with the collection of information and notification of COVID-19 cases is an obligation, but also a fundamental action in the control and follow-up of cases and contacts in these settings.

The health service professionals of the occupational risk prevention service will be responsible for establishing the mechanisms for the detection, investigation and follow-up of cases and close contacts within the scope of their competences, in coordination with the public health authorities, following the provisions of the Covid-19 Surveillance and Control Strategy after the acute phase of the pandemic.

In general, mild and asymptomatic confirmed cases and close contacts will not be isolated or quarantined, respectively. They will maximise protective measures such as the use of masks, proper hand hygiene and avoid unmasked interaction with vulnerable people for 10 days after the onset of symptoms.

As we said, it should be noted that some of these rules have changed during the pandemic because of mass vaccination in Spain and because later variants of coronaviruses have had less harmful effects on the population.

## 5.3 Labour and Social Security Inspectorate

As indicated in article 9 of Law 31/1995, of 8 November 1995, on the prevention of occupational hazards, the Labour and Social Security Inspectorate is responsible for monitoring and controlling the regulations on the prevention of occupational hazards, including the following functions:

a) To monitor compliance with the regulations on the prevention of occupational risks, as well as with the legal-technical regulations that affect working conditions in matters of prevention, even if they do not have the direct qualification of labour regulations, proposing to the competent labour authority the corresponding sanction, when it verifies an infringement of the regulations on the prevention of occupational risks, in accordance with the provisions of Chapter VII of this Law.

b) To advise and inform companies and workers on the most effective way of complying with the provisions that it is responsible for monitoring.

c) To draw up the reports requested by the Social Courts in claims brought before them in proceedings for accidents at work and occupational illnesses.

d) To report to the labour authority on fatal, very serious or serious occupational accidents, and on those others in which, due to their characteristics or the parties involved, such a report is considered necessary, as well as on occupational illnesses in which these qualifications are met and, in general, in those cases in which the authority so requests regarding compliance with the legal regulations on occupational risk prevention.

e) To verify and encourage compliance with the obligations assumed by the prevention services established in this Act.

f) To order the immediate stoppage of work when, in the inspector's opinion, there is a serious and imminent risk to the safety or health of workers.

But also, and most importantly, they have the function of proposing sanctions in the event of non-compliance with the measures for the protection of workers' occupational risks, as will be seen below.

**5.4 Organisation of resources for preventive activities: in particular, Occupational Risk Prevention Services**.

The right of workers to effective occupational health and safety protection is immediately connected with the employer's duty to protect them against occupational hazards.

Employers must therefore guarantee the health and safety of the workers in their service, carrying out occupational risk prevention that integrates preventive activity in the company and adopting all necessary measures to protect the health and safety of workers.

The difficulty lies in the fact that the way work is carried out is changing, which requires a permanent review of preventive activity in order to identify, evaluate and control new risks in productive activity and, in coherence with this, to adapt preventive measures to new situations and circumstances with the idea that this "dynamic" preventive activity will protect the health of the workers in its service.

The organisation of the resources necessary for the development of preventive activities will be carried out by the employer in one of the following ways:

a) Personally undertaking the preventive activity.

b) Appointing one or more workers to carry out the activity.

d) By setting up its own prevention service.

e) By setting up a joint prevention service.

f) By using an external prevention service.

In small and medium-sized companies, remember that more than 90% of companies in Spain have fewer than 50 workers, it is not easy for employers to guarantee the health and safety of the workers in their service, carrying out occupational risk prevention that integrates preventive activity in the company, due to the complexity of the preventive regulations and the lower

availability of human and material resources, and in these companies it is complicated to manage the avoidance of certain risks, for example, emerging risks or those that may affect particularly sensitive workers. All of this places a burden on the management that prevents them (at least this is what the employers claim), their growth and the maintenance of employment in their service. Therefore, in order to avoid costs, it is allowed that the employers themselves take on the preventive activity or that, where appropriate, under the ultimate responsibility of the employer, he/she designates one or more workers to do so (as long as they are not companies with special risks due to their type of activity). Of course, this would require specific and in-depth training in occupational risk prevention for these people.

As is well known, in Spain, the organisation of risk prevention in the company, with the support of "preventive resources", has two systems: one internal (the company's own prevention service) and the other external (external prevention service) of occupational risk prevention activity. Article 30 of the LPRL states that, in compliance with the duty of prevention, the employer shall designate workers to carry out this activity, set up a prevention service or, more usually, "contract this service with a specialised entity outside the company". The prevention culture in our country means that companies prefer to outsource the prevention of occupational risks, i.e. they prefer to resort to the market to subcontract these services.

During the pandemic, the prevention services (in most companies outsourced, as we have said, own prevention services only have to be set up in large companies, more than 250 workers or 500 depending on the type of activity) have fulfilled their function of providing the company with the advice and support they need depending on the types of risk in the company, in accordance with how scientific knowledge and study of the behaviour of the coronavirus was advancing. And in particular with regard to:

- Design, implementation and application of an occupational risk prevention plan against the virus.

- The assessment of the special risk factors that may affect the safety and health of workers in the pandemic expansion of SARS COVID.

- The planning of preventive activity and the determination of priorities in the adoption of preventive measures and the monitoring of their effectiveness.

- Information and training of workers on COVID.

- The surveillance of workers' health in relation to the risks derived from work and, at this time, the avoidance of contagion in the working environment.

As we have said, Spanish employers prefer to subcontract these prevention services. It is easier to contract the service than to take it on personally, to appoint a worker or to create their own service; in addition to the fact that the employer understands that they are transferring their own responsibilities to a specialised entity that can do it "better" than they can, and they also understand that this frees them from their responsibilities in terms of prevention by transferring them to third parties. Thus, the dominant model in the organisation of preventive resources is

the "outsourced" model, since outsourcing, in addition to reducing costs, makes the employer more relaxed with regard to the fulfilment of his obligations.

The contracting of external prevention services has become just another "formality" to be fulfilled, but also their activity to comply with the necessary requirements so that the employer who hires them is not sanctioned for non-compliance with his duties in terms of occupational health and safety. But, in short, formal compliance with the regulations does not necessarily lead to real and effective compliance with the measures that must be established to prevent occupational risks for workers. This is reflected in the high levels of occupational accidents in Spain.

## 6. Sanctions and responsibilities for the violation of the safety obligation

### *6.1 The obligation of workers to carry out their activity as a content of the employment contract and the employer's power of management*

Among the powers that the law confers on the employer, as the pre-eminent party in the performance of the employment contract, there are three groups of powers:

a) The power of management, as the capacity to organise the work activity within the company, giving orders and instructions to its employees in the execution of the contract, which carries the counterpart that the worker has a duty of obedience.

b) The power of control, as a set of powers that allow the employer to monitor and control compliance with the orders given, as well as the correct execution of its labour obligations.

c) Disciplinary power, which is the capacity to impose sanctions on workers in the event that they fail to comply with their obligations.

As a consequence of the execution of the employment contract and the exercise of the employer's powers and faculties, workers are obliged to perform the agreed work under the direction of the employer or the person delegated by the employer (art. 20 ET). The performance of the work is carried out by obeying the orders and instructions of the employer, which constitute the "regular exercise" of management powers, with "obedience" being a basic duty of the worker.

But the power of management is not an unlimited power, because in accordance with Art. 20.1 ET, the worker is only obliged to submit to the power of management "with regard to the agreed work", which implies a duty of obedience in the "regular" exercise of management powers.

The power of management is neither absolute nor arbitrary, it is limited to what is contained in the employment contract and must respect other rights, but the principle of "solve et repete" applies, meaning that the worker must comply with the orders and instructions received from the employer and then claim their illegality in the courts.

However, the principle of "solve et repete" has been qualified by jurisprudence, as there are exceptions, the so-called "ius resistientiae", which allows the worker to lawfully disobey the employer's orders without the risk of being sanctioned, and one such case is when the order

places the worker at risk to his physical integrity. It should be recalled that art. 21.2 of the LPRL establishes the right of workers to interrupt their activity and leave the workplace, if necessary, when they consider that such activity involves a serious and imminent risk to their life or health (this is a consequence of the fact that art. 14 of the LPRL establishes that workers have the right to effective protection in terms of health and safety at work, with the employer having the correlative duty to protect them from occupational hazards). It is a different matter if, as has happened in some cases, when the government understood that the activity had to be resumed (and the employer offered the corresponding risk prevention measures), the worker refused to return to work due to "fear" of COVID, which, after the employer's sanction of dismissal, has been understood by the courts as "fair dismissal".

On the other hand, the dismissal of a worker for not being vaccinated has been considered null and void (Sentence of Social Judge n 6 Bilbao, 8 October 2021) and in a similar case it has been declared unfair (Sentence of Social Judge of Oviedo of 5 May 2021). However, the dismissal of a worker who repeatedly fails to comply with the measures established by the companies with regard to COVID-19 (Sentence of Regional Court of Aragón of 27 July 2021) is justified, because art. 5 b) ET establishes that it is the worker's duty to "observe the measures" of occupational health and safety established in the company.

*6.2 COVID and disabled people or "high risk" workers*

Obviously, no one is exempt from contracting COVID, but there are some people who are at greater risk of becoming seriously ill because of their personal conditions.

In Spain, they have been classified into two types: the vulnerable (highest risk) and the extremely vulnerable (very high risk).

a) Vulnerable:

- workers of mature age (60 or more);

- pregnant workers

- workers who have a significant health condition (Asthma, COPD, emphysema, bronchitis; chronic heart disease; chronic kidney disease; neurological conditions; diabetes; obesity, weak immune system; spleen problems.)

If vulnerable, social distancing is advised, but strictly: limit contact with third parties, do not interact with people with symptoms of coronavirus; do not use public transport; telework, etc.

b) Extremely vulnerable

Those who are at "very high risk of severe illness" from the virus because they have a very serious health condition.

- People who have received an organ transplant

- People with cancer

- Cystic fibrosis, severe asthma and COPD

- Recipients of immunosuppression therapies

- Pregnant women with heart disease

For them, total isolation has been recommended as far as possible.

In this respect, Articles 25 and 26 of the LPRL should be remembered.

6.2.1 Particularly sensitive workers

The first of these refers to the protection of particularly sensitive workers.

Thus, the employer shall specifically guarantee protection for those who, due to their own personal characteristics or known biological condition, including those who are recognised as having a physical, mental or sensory disability, are particularly sensitive to the risks arising from work (in this case, the risk of coronavirus).

To this end, it must take these aspects into account in the risk assessments and, on the basis of these assessments, take the necessary preventive and protective measures. Not only personal protective equipment, but also, where feasible, the possibility of teleworking.

Furthermore, these "particularly sensitive" workers shall not be employed in those jobs in which, due to their personal characteristics, biological condition or duly recognised physical, mental or sensory disability, they, other workers or other persons related to the company may put themselves in a situation of danger or, in general, when they are manifestly in states or transitory situations that do not meet the psychophysical requirements of the respective jobs.

6.2.2 Pregnant workers and COVID protection

Article 26 of the LPRL makes specific reference to pregnant workers.

In this case, when the corresponding risk assessment is carried out in the company, the condition of pregnant workers and their exposure to agents, procedures or working conditions that could have a negative influence on the health of the workers or the foetus must be specifically taken into account, in any activity likely to present a specific risk, for example, contact with possible clients or colleagues who could be carriers of the coronavirus.

Of course, if the results of the assessment reveal a risk to the safety and health or a possible impact on the pregnancy of the workers concerned, the employer shall take the necessary measures to avoid exposure to that risk by adapting the working conditions or working time of the worker concerned.

When the adaptation of working conditions or working time is not possible or, despite such an adaptation, the conditions of a job could have a negative influence on the health of the pregnant worker or the foetus, and this is certified by the Medical Services of the National Institute of Social Security or the Mutual Insurance Companies, depending on the Entity with which the company has agreed to cover occupational risks, with the report of the doctor of the National

Health Service who provides medical assistance to the worker, the worker must carry out a different job or function that is compatible with her condition. The employer shall determine, after consultation with the workers' representatives, the list of jobs exempt from risk for this purpose.

The change of post or function shall be carried out in accordance with the rules and criteria applied in cases of functional mobility and shall be effective until such time as the worker's state of health allows her to return to her previous post. In the event that there is no compatible post or function, the worker may be assigned to a post not corresponding to her equivalent group or category, although she shall retain the right to all the remuneration of her original post.

If such a change of post is not technically or objectively possible, or cannot reasonably be required for justified reasons, the worker concerned may be placed on suspension of her contract for risk during pregnancy, as provided for in Article 45.1.d) of the Workers' Statute, for the period necessary to protect her safety or health and for as long as it is impossible for her to return to her previous post or to another post compatible with her condition. In this case, the worker will receive a social security benefit called "risk during pregnancy".

*6.3 Infringements and penalties for non-compliance with safety requirements*

6.3.1 The intervention of the ITSS in the control of preventive measures

Law 2/2021, of 29 March, on urgent prevention, containment and coordination measures to deal with the health crisis caused by COVID-19, includes in Article 31. 4, the empowerment of civil servants belonging to the Senior Corps of Labour and Social Security Inspectors and the Corps of Labour Sub-Inspectors, Occupational Health and Safety scale, to monitor and require compliance by the employer with the public health measures established in paragraphs a), b), c) of article 7.1, and in paragraph d) of the same, when they affect workers.

This authorisation extends to the officials authorised by the Autonomous Communities to carry out technical verification functions, as referred to in article 9.2 of Law 31/1995, of 8 November, on the prevention of occupational hazards, in accordance with the powers attributed to them.

Failure on the part of the employer to comply with these obligations shall constitute a serious infringement, in accordance with the provisions of Article 31.5 of Royal Decree-Law 21/2020.

Considering that the Labour and Social Security Inspectorate can be a good ally in controlling the pandemic in the workplace, any non-compliance with regard to those issues for which its staff have been empowered, related to COVID-19 in workplaces, can be transferred to them for the exercise of their functions of surveillance and control of the measures provided for in Article 7.1 a), b), c) and d of Royal Decree-Law 21/2020.

6.3.2 The LISOS catalogue of infringements and penalties

The Law on Infringements and Penalties in the Social Order divides infringements into minor, serious and very serious infringements.

A) Minor infringements.

Within the minor infringements, the ones related to COVID-19 is:

- The lack of cleanliness of the workplace that does not pose a risk to the physical integrity or health of the workers.

- Those involving non-compliance with occupational risk prevention regulations, provided that they do not seriously affect the physical integrity or health of the workers.

Although both infringements do not result in a serious risk, they must be taken into account because if they are prolonged over time they may result in a serious offence and entail a greater risk of contagion.

B) Serious infringements

The serious infringements related to COVID-19 are as follows:

a) Failure to comply with the obligation to integrate occupational risk prevention in the company through the implementation and application of a prevention plan, with the scope and content established in the occupational risk prevention regulations.

b) Failure to carry out risk assessments and, where appropriate, their updates and reviews, as well as periodic controls of working conditions and the activity of workers as appropriate, or failure to carry out those prevention activities made necessary by the results of the assessments, with the scope and content established in the regulations on the prevention of occupational risks.

Taking into account that during the pandemic, changes have been introduced in the prevention of occupational risks and companies have had to implement and apply all these changes to adapt them to COVID-19.

c) Failure to carry out the medical examinations and periodic monitoring tests of the state of health of workers that are required by the regulations on occupational risk prevention, or failure to communicate the results to the workers affected.

In the case of a pandemic, this would include routine PCR tests or antigen tests that could be carried out on workers to control contagion.

d) Those involving non-compliance with occupational risk prevention regulations, provided that such non-compliance creates a serious risk to the physical integrity or health of the workers affected and especially as regards:

e) Collective or individual protection measures.

f) Personal hygiene services or measures.

Including in this section protection measures against COVID-19 such as masks, hydroalcoholic gel, plastic screens, etc. to avoid contagion.

g) The lack of cleanliness of the centre or workplace, when it is habitual or when this results in risks to the physical integrity and health of the workers.

With emphasis on ventilation and disinfection as specific measures.

C) Penalties or sanctions

According to article 40.2 of the same law:

Infringements in matters of occupational risk prevention shall be sanctioned:

a) Minor ones, in their minimum degree, with a fine of 45 to 485 euros; in their medium degree, from 486 to 975 euros; and in their maximum degree, from 976 to 2,450 euros.

b) Serious infringements, with a fine of between 2,451 and 9,830 euros at the minimum level; between 9,831 and 24,585 euros at the medium level; and between 24,586 and 49,180 euros at the maximum level.

c) Very serious infringements, with a fine of between 49,181 and 196,745 euros in the minimum range; between 196,746 and 491,865 euros in the medium range; and between 491,866 and 983,736 euros in the maximum range.

It should be noted that the law on risk prevention mentions that the labour inspectorate can stop work, as can employers or the workers themselves.