

LaborNet No. 1397

"Innovative Court Ruling validating WhatsApp messaging between Employer and Employee. WhatsApp messages as a legally valid means of communication?

Dear All,

The Spanish Labor Court [Sala de lo Social] issued a ruling on September 2022, accepting service of notice through WhatsApp to an employee for a seasonal employment contract.

There are some validity requirements. For starters, notice should be given as soon as possible so that the employee may start working promptly.

Notice should be given at least 48 hours in advance. This is unless unexpected things come up and the Company has proof that it could not possibly comply with the minimum notice period.

- **Notice should be served in writing, through WhatsApp, SMS, paper document delivered in person, by email or any other form of communication so that instructions are properly given and there is** proof of notice containing adequate instructions for employment**.**

- Notice should be given to the contact information (telephone number, e-mail address) that the employee has provided to the Company at the start of employment or later on if there is any change in his/her personal data, which should also be informed in writing.
- Notice should contain information about workplace location, job position, professional category, applicable collective bargaining agreement and compensation during employment.
- The employee should be selected for this position based on his/her profile. As a result, from the company's roster of inactive permanent intermittent employees, those with the most suitable profile to fill the vacancy will be contacted first.
- Selection is made based on employee's profile, his/her skills, qualifications, experience, professional category, which make him/her a good fit for the role. Priority is given to those who have already worked for such company department.
- If there are several candidates with the same profile on the roster of inactive permanent intermittent employees, then seniority will be taken into account for selection.
- Flexibility is a key element; the goal is work-life balance. Due to this, the Company will allow the employee to set up the start of his/her workday or shift at the earliest convenience if they receive less than 48 hours' notice. This flexibility can be kept as long as the quality of services is not compromised.
- In this case, the Company agrees to give the employees' legal representatives the dates on which they are likely to be called to work, whether annually or every six months, well in advance, at the beginning of every calendar year. It will also inform them when they are registered as regular employees.
- If the employee does not show up to work after notice is given under the above-mentioned conditions, it means that he/she resigns from the position.

We will deal exclusively with these two issues to determine legal validity:

- Whether notice to permanent intermittent employees can be given via WhatsApp or SMS.

- Whether the deadlines for employees to show up to work are reasonable. Related effects in case of noncompliance.

The Spanish Labor Court ruled as follows:

“In our opinion, it is not illegal to give notice through these forms of communication. Section 16.3 ET (labor law) regulates permanent intermittent

employment contracts, expressly establishing that notice shall be made in writing, well in advance, containing the relevant instructions for employment."

(i) Notice is made in writing even via WhatsApp or other instant messaging apps on smartphones, or by email, so there is proof of notice and content.

(ii) The same applies to voicemails, even if they are not written means of communication.

(iii) Considering that the burden of proof falls on the Company, we can conclude that Section 22.1bis.3 2nd paragraph of the collective bargaining agreement is legally valid.

(iv) In addition, Section 22.1 bis states that notice should be given to the contact information (telephone number, e-mail address) that the employee has provided to the Company at the start of employment or later on if there is any change in his/her personal data, which should also be informed in writing.

(v) The Plaintiff does not claim the nullity of this paragraph even if it is discussed in the complaint. However, even if we admitted that this is a wording error that could be cured, the claim cannot be sustained either.

(vi) According to c**ustom and usage employees are not required to provide their cell phone number or email address to their employer because it is presumed that the employer already has them. As a result it is not illegal to** use them to give notice, especially when they are inactive intermittent permanent employees. Actually, for them these devices are the most commonly used tool for effective communication, and for the effective performance of the contract in place.

(vii) Consequently, the precedents claimed in paragraph 6.5 of the complaint do not apply in this specific case about the employee's duty to provide the employer with this information.

(viii) The collective bargaining agreement under analysis here refers to the law about fixed-term contracts currently in place under Section 15 ET and permanent intermittent contracts under Section 16 ET.

(ix) The collective bargaining agreement adds some provisions about permanent intermittent contracts, establishing deadlines for employees to show up after notice and the consequences for failure to do so.

(x) The new design of these hiring methods is dealt with under Royal Decree Act No. 32/2021 introducing significant changes to labor laws about fixed-term

contracts under Section 15, and permanent intermittent employment contracts under Section 16.

(xi) A Permanent Intermittent Employment Contract under Section 16 is defined as a contract intended to meet an ordinary business need for a definite or indefinite period of time but at irregular intervals, i.e. intermittently or seasonally.

(xii) This type of contract may be used for foreseeable business or administrative services that are part of the company core business.

Temporary employment contracts based on business needs under Section 15 ET refer to occasional or unexpected business needs or workload fluctuations, even if they are related to the company core business, that may disrupt its ordinary stable work volume temporarily, provided the terms under Section 16.1 are not met.

(xiii) Predictability/unpredictability. This is the key difference between these two types of contract and therefore Section 22.1bis of the collective bargaining agreement regulates permanent intermittent employment contracts (whereas temporary employment contracts due to business needs are regulated under Section 22.2). It sets deadlines for less than 48 hour notices, which are called unexpected services, when it is impossible to comply with minimum notice periods. Permanent intermittent employment contracts may be used to hire employees when there is an unexpected increase in workload where it is impossible to meet the statutory requirements under Sections 15 and 16 ET, in particular if we take into account that the lawmaker usually promotes employment contracts for indefinite periods of time (including permanent intermittent employment contracts) to the detriment of seasonal contracts.

(xiv) Consequently, the provisions under the collective bargaining agreement, whereby permanent intermittent employment contracts may be used for unexpected services, violate Sections 15 and 16 ET. Hence the nullity of the provisions of the collective bargaining agreement about the deadline to show up to work after less than 48 hour notices. Notice should be given at least 48 hours in advance.

(xv) However, the Plaintiff also claims the nullity of 48-hour notices.

(xvi) In any case, notice must be given in writing to have proof of the relevant instructions for employment and well in advance.

Here we see that the lawmaker has turned to collective bargaining to determine the minimum notice period for permanent intermittent employment contracts.

Section 10 of Directive 2019/1152, currently in force but not transposed, establishes that "the worker is informed by his or her employer of a work assignment within a reasonable notice period established in accordance with national law, collective agreements or practice as referred to in point (m)(iii) of Article 4(2).

“Giving notice well in advance” or “giving reasonable notice” are synonyms that European and national lawmakers have failed to define more accurately. Then it is up to collective bargaining parties to determine the exact meaning.

Please do not hesitate to contact us for further information.

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