Negotiation and content of plans guaranteeing LGBTI rights within companies

Following the adoption of the Royal Decree implementing measures for real equality and non-discrimination of LGTBI people within companies, collective bargaining must, as a general rule, adapt these measures to each undertaking or sector, as appropriate, within a time limit of three months. If no agreement is reached after three months from commencement of said bargaining, the content of the Royal Decree will apply.

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When Act 4/2023, of 28 February, for the real and effective equality of trans people and to guarantee the rights of LGTBI people ("Act 4/2023" or the "Act") was passed, Article 15 thereof made it obligatory for companies with more than fifty employees to have a planned set of measures and resources to achieve the Act's purpose, including a protocol to address harassment or violence against LGTBI people. This obligation was to become effective twelve months after the entry into force of the Act, raising many doubts as to its application given that the law itself referred it to collective bargaining and delegated the regulation of the content and scope of the measures to regulatory implementation. The latter has come with the adoption of Royal Decree 1026/2024, of 8 October, implementing the planned set of measures for equality and non-discrimination of LGTBI people within companies (the "Royal Decree").

Among the matters covered by the Royal Decree, the following should be highlighted:

1. **Employee-counting rules: all contracts, including those valid during the previous six months**

   For the purposes of negotiating the aforementioned "planned measures" (plan), employee counts shall take into account the total workforce of the company (regardless of the number of its workplaces and the form of employment contract), including persons on seasonal contracts, fixed-term contracts and contracts to provide temporary staffing. In any case, each person with a part-time contract shall be counted, irrespective of the number of working hours, as an additional employee.

   In addition, fixed-term contracts, whatever their modality, which, having been valid in the company during the previous six months, have been terminated at the time of the count, must be added. In this case, every 100 days worked or fraction thereof shall be counted as one additional employee. This count shall be carried out on the last day of June and December of each year.

   The count shall be done on the day the ad hoc joint consultative committee is set up and shall remain unchanged until the end of the plan's period of validity, even if the number of employees in the company falls below fifty-one at any given time.

   In companies with fewer than 50 employees, bargaining is voluntary.

2. **Content of the plan**

   In companies that do not have a collective agreement with a scope wider than that of the company, the agreement shall identify, at the very least, the bargaining parties, the personal (*ratione personae*), geographical (*ratione loci*) and temporal (*ratione temporis*) scope of application and the procedure for resolving any possible discrepancies that may arise in the application and interpretation of the agreed planned measures. In the case of a company with a collective agreement the scope of which is greater than that of the company, the personal, geographical and temporal scope shall be that established in the collective agreement itself.

   In all cases, and without prejudice to party autonomy in determining the content of the plan, multi- or single-employer collective agreements must include, at the very least, the measures described in Schedule I to the Royal Decree. Thus, the plan must include or implement the following:

   a) *Equal treatment and non-discrimination clauses* that contribute to create a favourable context for diversity and to advance in the eradication of discrimination against LGTBI persons, with express reference not only to sexual orientation and identity, but also to gender expression or sexual characteristics.

   b) The eradication of stereotypes in the *access to employment* of LGTBI people, especially through the adequate training of the participants in the selection processes. To this end, clear and specific criteria must be established to guarantee an adequate selection and recruitment process that prioritises the training or suitability of the person for the job regardless of their sexual orientation and identity or gender

expression, paying special attention to trans people as a particularly vulnerable group.

c) Criteria for *classification, professional promotion and advancement*, regulating these in such a way that they do not entail direct or indirect discrimination against LGTBI persons and basing them on objective elements, including qualification and capacity, that ensure professional career development under equal conditions.

Companies with more than fifty employees must implement measures that guarantee the rights of LGBTI persons therein

d) *Training, awareness-raising and language:* companies will integrate specific modules on the rights of LGTBI people in the workplace into their training plans, with special emphasis on equal treatment and opportunities and non-discrimination. The training will be aimed at the entire workforce, including middle management, executive positions and those responsible for personnel and human resources management.

In this regard, the training should contain general knowledge and dissemination of the set of planned LGTBI measures, as well as their scope and content; knowledge of sexual, family and gender diversity definitions and concepts contained in Act 4/2023; knowledge and dissemination of the protocol for accompanying trans people in employment, if it exists; and, finally, knowledge and dissemination of the protocol for the prevention, detection and action against discriminatory harassment or violence on the grounds of sexual orientation and identity, gender expression and sexual characteristics. This section includes the promotion of measures that ensure the use of language that respects diversity.

e) Promotion of heterogeneity of workforces to achieve *diverse, inclusive and safe working environments*. To this end, protection against LGTBI-phobic behaviour will be ensured, especially through protocols against harassment and violence at work.

f) The reality of LGTBI diverse families, spouses and unmarried partners, ensuring access to *leave, job benefits and rights without discrimination* based on sexual orientation and identity and gender expression. In this regard, all employees will be guaranteed equal enjoyment of the leave that, where applicable, is established in multi- or single-employer collective agreements to attend medical consultations or legal procedures, with special attention to transgender people.

g) Penalties for behaviour that violates the sexual freedom, sexual orientation

and identity and gender expression of employees shall be integrated, where appropriate, into the *disciplinary regime* of the applicable collective agreement.

3. Rules for negotiating the plan

a) *Procedure and standing*

The negotiation of the plan will follow the same procedure as that established for the collective agreement. Thus, at the company level and at the level above the company, these collective agreements may establish the terms and conditions under which such measures will be adapted within the companies. If the agreements have been signed previously, the ad hoc joint consultative committee will meet to deal exclusively with the negotiation of this LGTBI plan within the period established by the Royal Decree. For the negotiation, the rules on standing for collective agreements under Article 87 of the Workers' Statute Act will be applied. In companies with several workplaces, the joint works council will negotiate, if it exists and has powers for negotiation.

In the absence of an applicable multi-employer collective agreement, companies with a statutory body of worker representatives shall negotiate these plans by means of single-employer collective agreements.

In companies that do not have an applicable multi-employer collective agreement and do not have a statutory body of worker representatives, an ad hoc joint consultative committee will be set up, made up, on the one hand, of the company's representatives and, on the other hand, of workers' representatives composed of the most representative trade unions and of the trade unions that are representative in the sector to which the company belongs. The ad hoc joint consultative committee shall have a maximum of six members for each of the parties, and trade union representation shall be in proportion to the representativeness of each organisation in the sector. Without prejudice to the foregoing, the employee part of this ad hoc joint consultative committee shall be validly composed of the trade union organisation or organisations that respond to the company's call within ten working days, extendable to another ten working days if none respond within the first period. If no response is received within this new period, the company may proceed unilaterally to determine the planned measures in accordance with the contents of the Royal Decree. If there are workplaces with a statutory body of worker representatives and workplaces without it, the employee part of the ad hoc joint consultative committee will be made up of the statutory body of worker representatives of the workplaces that have it, on the one hand, and, on the other, of the members of the employee part, formed in accordance with the above, in representation of the employees at the workplaces that do not have it. In this case, the ad hoc joint consultative committee shall be made up of a maximum of thirteen members from each of the employee and employer parties.

Planning should be carried out through collective bargaining and, if no agreement is reached, the measures contained in the Royal Decree will be imposed

In all these cases, the ad hoc joint consultative committees may rely on external support and advice from people specialised in LGTBI equality in the workplace; these specialists will be entitled to speak but not to vote.

The members of the ad hoc joint consultative committee, as well as any experts who assist it, must at all times observe the duty of confidentiality with regard to the information that has been expressly communicated to them in a confidential manner. In any case, no type of document provided by the company to the ad hoc joint consultative committee may be used outside the strict scope of the committee or for purposes other than those for which it was provided.

In the negotiation of planned measures, respect for the privacy of employees must be ensured.

b) *Deadline for the establishment of the ad hoc joint consultative committee*

Both companies with a collective agreement and those without an applicable multi-employer collective agreement but with a statutory body of worker representatives must initiate the procedure for negotiating the planned measures by setting up the ad hoc joint consultative committee within a maximum period of three months following the entry into force of the Royal Decree - scheduled for the day after its publication in the *Official Journal of Spain*, i.e. before 10 January 2025.

For companies which, at the time of the entry into force of the Royal Decree, were not included in its scope of application, the period will start to run from the moment they reach the required number of fifty employees.

In companies that are obliged to negotiate this plan but do not have an applicable multi-employer collective agreement and lack a statutory body of worker representatives, the maximum period for setting up the ad hoc joint consultative committee will be six months from the entry into force of the Royal Decree (10 April 2025).

c) *Outcome of the negotiation*

Three months after the start of the procedure for negotiating the planned measures without an agreement having been reached on them or in the event that the multi-employer collective agreement in effect does not include the planned measures, the companies obliged to negotiate will apply all of the measures established in the Royal Decree. These measures will continue to be applied until the measures that

may subsequently be agreed by collective agreements come into effect.

d) *Validity of the plan and assessment deadlines*

The period of validity of the planned measures will be that agreed in the applicable multi-employer collective agreement when they have been negotiated within this framework. If they are negotiated within single-employer collective agreements, their period of validity will be determined by the negotiating parties.

Both multi- and single-employer collective agreements may establish appropriate deadlines for assessing compliance with the agreed planned measures, as well as the cases in which such assessments must be carried out. The planned measures agreed in the different areas of negotiation must be reviewed when the previous assessments so provide and, in any case, when it becomes clear that they do not comply with statutory and regulatory requirements or are insufficient, especially when this is detected as a result of action by the Labour and Social Security Inspectorate.

In any case, these are measures that must be respected under the terms of Article 44 of the Workers' Statute Act for transfers of undertaking.

4. On the protocol against harassment and violence against LGTBI persons

In all cases, the planned measures must include a *protocol against harassment and violence* that identifies preventive practices and mechanisms for detecting and acting against such harassment and violence. This obligation may be understood to be fulfilled when the company has a general protocol against harassment and violence that includes measures for LGTBI people, or extends it specifically to include them.

Its basic content, set out in Schedule II to the Royal Decree, requires the following sections:

a) A *statement of principles* stating an explicit and firm commitment not to tolerate within the company any discriminatory practice considered as harassment on grounds of sexual orientation and identity and gender expression, and expressly prohibiting any conduct of this nature.

b) *Scope of application:* the protocol shall be directly applicable to persons working in the company, regardless of the legal relationship between them and the company, provided that they carry out their activity within the organisational scope of the company. It shall also apply to job applicants, temporary staff, suppliers, customers and visitors, among others.

c) *Guiding principles and guarantees of the procedure*, among others, agility, diligence and speed in the investigation and resolution of the reported conduct, which must be carried out without undue delay and respecting the deadlines determined for each part of the procedure, which will be set out in the protocol; respect and protection of the privacy and dignity of the persons

affected, offering fair treatment to all those involved; confidentiality and sensitivity, neither conveying nor divulging information on the content of the reports submitted, under investigation or resolved; sufficient protection of the victim from possible reprisals, taking care of her/his safety and health, bearing in mind the possible physical and psychological consequences that may arise from this situation and especially considering the work circumstances surrounding the person assaulted; the right to contest, in order to ensure a fair hearing and fair treatment for all persons concerned; reparation for victims and, if it has led to a change in terms of employment, restitution to the previous conditions if so requested by the victim; prohibition of retaliations, whereby any act constituting a retaliation, including threats of and attempts at retaliation against persons who submitted a report through the channels provided for that purpose, appear as a witnesses or assist or participate in a harassment investigation, is expressly prohibited and void.

d) *Proceedings*, without prejudice to the application of Act 2/2023 of 20 February, specifying the steps for submitting a report or complaint and the maximum period for its resolution. In principle, the report may be submitted by the affected person or by whomever he/she authorises by means of the procedure agreed for this purpose and before the person to be determined from the committee in charge of the investigation process. In the event that the report is not submitted directly by the affected person, it must include their express and informed consent to initiate the proceedings of the protocol. After receiving the complaint or report and once the harassment situation has been confirmed, precautionary or preventive measures will be adopted to separate the victim from the harasser while the proceedings are conducted and until resolution.

The plan must include a protocol addressing harassment and violence against LGTBI people

Within a maximum period of the working days agreed and from the time the committee is convened, it must issue a binding report in one of two ways: either that there are indications of harassment covered by the protocol and, if appropriate, a proposal to open disciplinary proceedings, or that there are no indications of harassment covered by the protocol. The report must include, as a minimum, a description of the facts, the methodology used, the assessment of the case, the results of the investigation and the precautionary or preventive measures, if applicable.

e) *Resolution:* the necessary measures shall be adopted taking into account the evidence, recommendations and proposals for intervention in the report issued by the committee. If there is evidence of the existence of a situation of harassment on grounds of sexual orientation and identity or gender expression, the initiation of disciplinary proceedings shall be requested for a proven situation of harassment, the adoption of corrective measures shall be requested and, if appropriate, the measures for the protection of the victim shall continue to be applied. If there is no evidence of harassment, the report will be shelved.

Many companies have already anticipated the planning of these measures in the absence of regulatory regulation and statutory obligation. There are now only three important issues to consider: first, the reliance on collective bargaining, whether in the form of a multi-employer collective agreement, an annex to a multi-employer collective agreement, a single-employer collective agreement or any mechanism within collective bargaining that allows for the incorporation of this plan together with the protocol described; second, the deadlines established, considering that, as a general rule, three months will apply from the entry into force and the following three months for negotiation, after which, if no result is obtained, the Royal Decree will be applied; and, third, the content of both the plan and the protocol, the minimums of which are described in the Royal Decree and whose implementation will depend on the interest shown by each company or each sector in this new development.