Labor & Employment Law Newsletter

Gender equality

GARRIGUES

March 2021

Gender equality
and employers' obligations

The workplace equality legislation (Organic Law 3/2007 and Royal Decree-Law 6/2019) was recently implemented in Decree 901 and Decree 902 passed in 2020. Both decrees attempt to finalize the legislative measures adopted to advance towards greater gender equality in employer-employee relations. And that advance is sought to be achieved through profuse, complex legislation not without ambiguities and interpretation difficulties.

Federico Durán López

The regulator's regulatory incontinence is displayed in several passages. See, for example, article 9.4 of RD 901/20: the equality plan's measures may be reviewed to *add, redirect, improve, correct, intensify, soften or even stop applying a measure*. Or article 7.1 of the same decree: the status diagnosis shall identify *the inequalities, differences, disadvantages, difficulties and obstacles that exist or may exist*. Besides exhaustivity being required in relation to the present, we also have to anticipate and see into the future ("that exist or may exist").

This incontinence with words is moreover accompanied with detailed regulations on a range of matters and with both documentation and procedural requirements: besides containing detailed regulations on the contents of the equality plan and the status diagnosis along with their negotiation procedures, a set of regulations is also contemplated on the negotiating committee, another set for the plan's monitoring committee, a pay register must be put in place, a pay audit must be performed, good practice guidelines and procedures, technical guidelines for collective bargaining along with technical guidelines for audits are specified, and a ministerial order is announced with the job valuation rules.

On top of all this there is increased government supervision, present in the preparation of those guidelines and directions, to the point of attempting to impose a classification model on employers, which brings back to life the "professional category" concept or job valuations, and present also in the specified actions of the labor inspectors. A review of the equality plan is imposed where evidence of its "insufficiency" is reported by the Social Security General Treasury (ITSS). Can the ITSS determine the insufficiency of an equality plan, including one that has been negotiated and agreed, and impose a review of it? What grounds can there be for determining its insufficiency or the principles for finding it to exist? It is more serious to entrust the inspectors with the power to find "failure to meet statutory and regulatory requirements" by the equality plan, which should fall within the jurisdiction of the courts, as acknowledged in the decree itself when the same article 9 later mentions a court judgment which "determines failure by the equality plan to meet the statutory or regulatory requirements" (subarticle 2.e). Moreover, the mandatory requirement to register equality plans (on the register for collective agreements; article 11 RD 901/20) throws up a doubt as to whether the authorities can carry out a verification of lawfulness of the plan before it is registered, and even request modifications to it before carrying out its registration.

This collection of employers' obligations is brought to the point of paroxysm when private and family life matters are added to the mix. References to the distribution of roles, to family responsibilities, to personal data, to personal and family circumstances, reveal an inappropriate inclusion of personal privacy and private life issues in company matters. Take article 7, 1, f) of RD 901, which states that the status diagnosis must include "*shared responsibility for exercising the right to reconcile work, private and family life*". Can the employer "collect data", because that is what the diagnosis involves, on how workers exercise their rights to reconcile private and family

life? Who can determine, and based on what principles, whether they are exercising their rights with "shared responsibility"? What measures can employers adopt to prevent private and family obligations not being performed with shared responsibility? Or to achieve shared responsibility for exercising rights? How can employers, without invading the sphere of private life, "promote shared responsibility for those rights"? (Annex, point 5.a). In addition to which, this, purely speaking, is not a matter of exercising rights, as article 7 says, but rather of performing the obligations that family life imposes. We see here how it has been enshrined for the government to enter every sphere of private and family life.

All this profuse legislation, this misplaced government interventionism, has or may have the perverse effect of encouraging the performance of obligations purely at a procedural or documentation level, without bringing about any real changes in the business and employment world. Concise and clear legislation containing reasonable and balanced duties and obligations is a much more effective way of achieving changes. And that trend of performing obligations at a documentation level will be more pronounced at smaller companies: employers with fewer than fifty workers (bearing in mind that every temporary and part-time worker has to be counted as one more employee, regardless of length of contract or working hours, as well as the workers supplied by a temporary employment agency) will find it very hard to meet the cost in procedural and financial terms that implementing the rules will involve. And aside from the temptation to perform the obligations only at a procedural level, employers will at times need an effort of the imagination (the regulatory regulator seems to have their suspicions, because with a dash of humor, they specify that employers must produce "data broken down by gender *true to reality*", in other words making things up will not be tolerated: Annex to RD 901, point 3.b). Think about the companies that do not have a classification system based on professional categories (because, as allowed by article 22.1 of the Workers' Statute, they have implemented a professional classification system that uses professional groups) or that do not apply the "valuation of jobs" technique, which the rule in the regulations appears to impose (where does that leave free enterprise yet again?), and it is even provided that a ministerial order will be approved in this respect (beyond the existing instructions). This is a technique belonging to human resources management, used for classification and pay purposes, which the more advanced companies dropped decades ago. Human resources consultants now talk about "roles" fulfilled by workers, rather than jobs. At many companies the concept of job does not even exist, and workers are assigned to projects.

Lastly, it remains to be seen how the parity and equality requirements that also apply, although timidly, to the workers' representative bodies at companies are met. Will those requirements allow positive action measures to be put in place to encourage women to take on representative functions? Employers obviously do not appear to be able impose anything in this respect, although they are allowed to agree on specific measures in the equality plans.

There remains much to do in this terrain which is in need, among other things, of greater conceptual clarity. The constitutional and statutory mandate is basically to prevent discrimination. The fight for greater equality (which can never be complete because inequality is innate to the human condition, the reason for Alexis de Tocqueville predicting that the passion for equality would become a "delirium") requires different tools to those able to be used to prevent discrimination. Not every inequality is discriminatory or able to classed as unlawful. It would be a great leap forward if we could achieve an employment and business world free from discrimination in which all inequalities with a discriminatory meaning are removed.

What do I need to know about the new legislation on equality?

María José Ramo, partner of the Labor and Employment Department of Garrigues, explains what is new in relation to equality plans and the recent obligations concerning pay equality at companies. In order to do that, María José Ramo uses her extensive experience in advising on the preparation of numerous equality plans and her first-hand knowledge of the difficulties that often arise in these negotiations.

What is the number of employees above which employers have to have an equality plan?

Currently, every employer that has 100 or more workers. In March 2022, those that have 50 or more workers. There is also an obligation for employers with fewer workers if their applicable collective labor agreement requires them to have an equality plan or if the labor authority so decides in a penalty proceeding, in lieu of the ancillary penalties.

What is the maximum term for an equality plan?

The maximum term is 4 years.

Can an employer stop applying the equality plan if the number of workers falls below the threshold at which an equality plan is required?

No. The employer must continue to apply the equality plan until the end of the valid term of the agreed plan.

When do union representatives have to be involved in negotiating equality plans?

If there are no workers' statutory representative at the employer, or at any of the employer's workplaces, and also if the equality plan is for a group.

Have the rights to information of the negotiating committee for the equality plan been increased?

Yes they have. The negotiating committee may access all documents and information that will be needed to prepare the equality diagnosis, and the employer has to provide access to them. In return, the negotiating committee has a "duty of secrecy" and cannot use those documents for any other purpose than to negotiate the equality plan.

An obligation has been imposed to register all equality plans. Can an equality plan be registered if it has not been negotiated, or if it has been negotiated but an agreement could not be achieved for its approval by the negotiating committee?

All equality plans must be registered within fifteen days following their approval, and only equality plans that have been negotiated may be registered, no matter whether the negotiation ended with an agreement or not.

Is there going to be a verification of lawfulness before its publication on the register in the same way as for collective labor agreements?

Yes, that's right. If the plan does not meet the legal requirements, the authorities will make a request to the company to correct the identified defect, within a specified period. It is therefore important to check whether the plan is lawful before it is filed for registration.

Are groups of companies always able to draw up a single plan?

Employers belonging to a group of companies can prepare a single plan for all or some of the companies in the group (by having a diagnosis made for every employer), but they will need the negotiating committee's approval to do so, and the committee must substantiate the arguments for having a single equality plan.

What do employers that currently have an equality plan in force need to do to fulfill their obligations under Royal Decree 901/2020?

Carry out an adaptation process in the period laid down for reviewing plans, and in all cases, before January 14, 2022, following a negotiating process.

Royal Decree 902/2020 imposes an obligation to have a pay register. Is this obligation identical for all employers, whatever their size?

All employers have had to have a pay register since March 2019, but from April 14, 2021 a greater amount of information will have to appear on that register for employers under obligation to have an equality plan. These employers, besides providing pay information distributed by professional groups or categories, also have to show that information broken down for groups of jobs that are of equal value at the company, according to the results of the valuation of jobs. They also have to include a reason where the arithmetic mean or median of the aggregate pay amounts at the company for workers belonging to one gender is at least 25% higher than for the other gender.

What contents should a pay audit have?

In a pay audit every job at the company must be evaluated, to be able to allocate a score or numerical value to each. It must also contain a plan of action for correcting pay inequalities and a follow-up system.

How can Garrigues assist its clients in the process of preparing and negotiating the equality plan?

At the Labor and Employment Department of Garrigues we prepare, based on all the quantitative and qualitative information we request from the employer, an equality diagnosis that will serve as a working document for the negotiating committee to prepare their report with the conclusions of the diagnosis, a document that will be part of the equality plan. We also take care of ensuring that the negotiating committee is set up correctly, either with the workers' statutory representatives or with union representatives, or both, as required.

We advise our clients during negotiation of the diagnosis and of the equality plan, either by sitting on the negotiating panel, or not sitting on the panel but providing technical and legal support to the employer's representatives during the negotiation.

We draft the equality plan produced by the negotiations, taking care to ensure that all the legal requirements are satisfied to prevent issues arising for its subsequent registration. And lastly, we carry out the register's procedures for the equality plan until it has been entered.

At Garrigues we also have specialized professional practitioners who can advise on pay audits and on pay gap analyses.

What are the risks for employers if they fail to fulfill their obligation to have a registered equality plan?

Besides possibly having a penalty imposed by the labor inspectors, they could be excluded from public tenders by being legally barred from entering into contracts with the public sector.

Why Garrigues for equality matters?

The recent legislation has greatly added to the difficulty of fulfilling equality obligations. Employers need to be aware that complications can arise in the negotiation of an equality plan, the negotiators may take issues to court concerning bad faith or defects in the negotiation or even to apply for the equality plan to be voided if an agreement could not be achieved in the negotiation.

The impact that the measures in the equality plan will have is also a key factor to consider, as well as the difficulty for implementing it, bearing in mind that failure to fulfill any of the measures may give rise to legal action by the workers or by their statutory or union representatives.

News

Deadlines to comply with the obligation to draw up an equality plan depending on the size of the workforce

Royal Decree-Law 6/2019 established a system of gradual application of the company's obligation to draw up an equality plan, as shown in the following table:

Obligation to draw up and implement an equality plan	Number of employees in the company according to the calendar of gradual application of articles 45 and 46 LOI, in the wording provided by Royal Decree-Law 6/2019, of 1 March (D.T. 12ª LOI)
Until 06/03/2020	Companies with more than 250 workers.
From 07/03/2020	Companies between 151 and 250 workers.
From 07/03/2021	Companies between 101 to 150 employees.
From 07/03/2022	Companies with 50 or more employees.

Accordingly, from 7 March 2021, companies with 101 to 150 employees are obliged to draw up and implement an equality plan. It should also be borne in mind that the aforementioned obligation can be established by collective agreement regardless of the number of employees rendering services in the company.

Companies with 50 or more employees must comply with this obligation from 7 March 2022.

The regulation on equality plans came into force on 14 January 2021

The Royal Decree 901/2020 came into force on 14 January 2021 As reported in the alert published on 21 January.

As of this date, companies will have to adapt the equality plans in force at the time of the entry into force of the regulation within the review period foreseen therein and, in any case, within a maximum period of 12 months from the entry into force (14 January 2022).

The royal decree on equal pay will enter into force on 14 April 2021

Royal Decree 902/2020 of 13 October on equal pay for women and men will enter into force 6 months after its publication in the Official State Gazette (on 14 April 2021).

Since March 2019, companies are obliged to have a salary register (regardless of the number of employees), although additional obligations are established in the event that the company is obliged to have an equality plan. This regulation establishes the obligation to include in the equality plan the results of the pay audit, which will have the same duration as the equality plan unless a shorter duration is expressly provided for.

Finally, in accordance with the first final provision of Royal Decree 902/2020, the procedure for the assessment of jobs is pending publication and must be approved by means of an order issued at the joint proposal of the Ministry of Labour and Social Economy and the Ministry of Equality.

Publication of the guide for the preparation of equality plans in companies

On January 21, as indicated in the third additional provision of Royal Decree 901/2020, a guide to drawing up equality plans has been published by the Women's Institute of the Ministry of Equality.

According to the Ministry, the aim is to provide a practical and simple methodological guide for the negotiation and drafting of equality plans, including two blocks: (i) theoretical, which explains the procedure for negotiating and drawing up the plan; and (ii) practical, which offers tools and models that companies can download and adapt to their organizations.

The PSOE (socialist party) submits to the Congress of Deputies the proposal of a new law for the comprehensive equal treatment and non-discrimination

On 21 January 2021, the PSOE submitted a proposal of a new law for the comprehensive equal treatment and non-discrimination to the Spanish Congress.

The proposal includes references to equal treatment in employment and self-employment and the guarantee of such equality in collective bargaining. Among other issues, it states that the Labour Inspectorate should particularly ensure respect for the right to equal treatment and non-discrimination in access to employment and working conditions. Moreover, it establishes that collective bargaining may establish positive action measures to prevent, eliminate and correct all forms of discrimination in the field of employment.

On the other hand, it provides for the creation of a commissioner for equal treatment and non-discrimination as an independent authority responsible for protecting and promoting equality under the terms set out in the text.

Finally, with regard to the possibility of imposing sanctions, the proposal refers to the Law on Infringements and Sanctions in the Social Order (LISOS).

Case Law

The Supreme Court rules on the equality plan negotiating committee

In a recent ruling, applying the regulations prior to the entry into force of Royal Decree 901/2020, the Supreme Court has indicated that the negotiation of equality plans must be carried out by those entitled to negotiate collective bargaining agreements.

By virtue of the above, the legal representatives or trade union representatives cannot be replaced by a workers' committee specifically created for such negotiation. The High Court emphasizes the special relevance that the legislator has given to equality plans, as well as the fact that the company is not authorised to impose an equality plan except in "limited" cases and when there are "exceptional circumstances". This pronouncement, prohibiting ad hoc commissions, is in line with the new regulations.

The negotiation of the equality plan is part of the essential content of trade union freedom

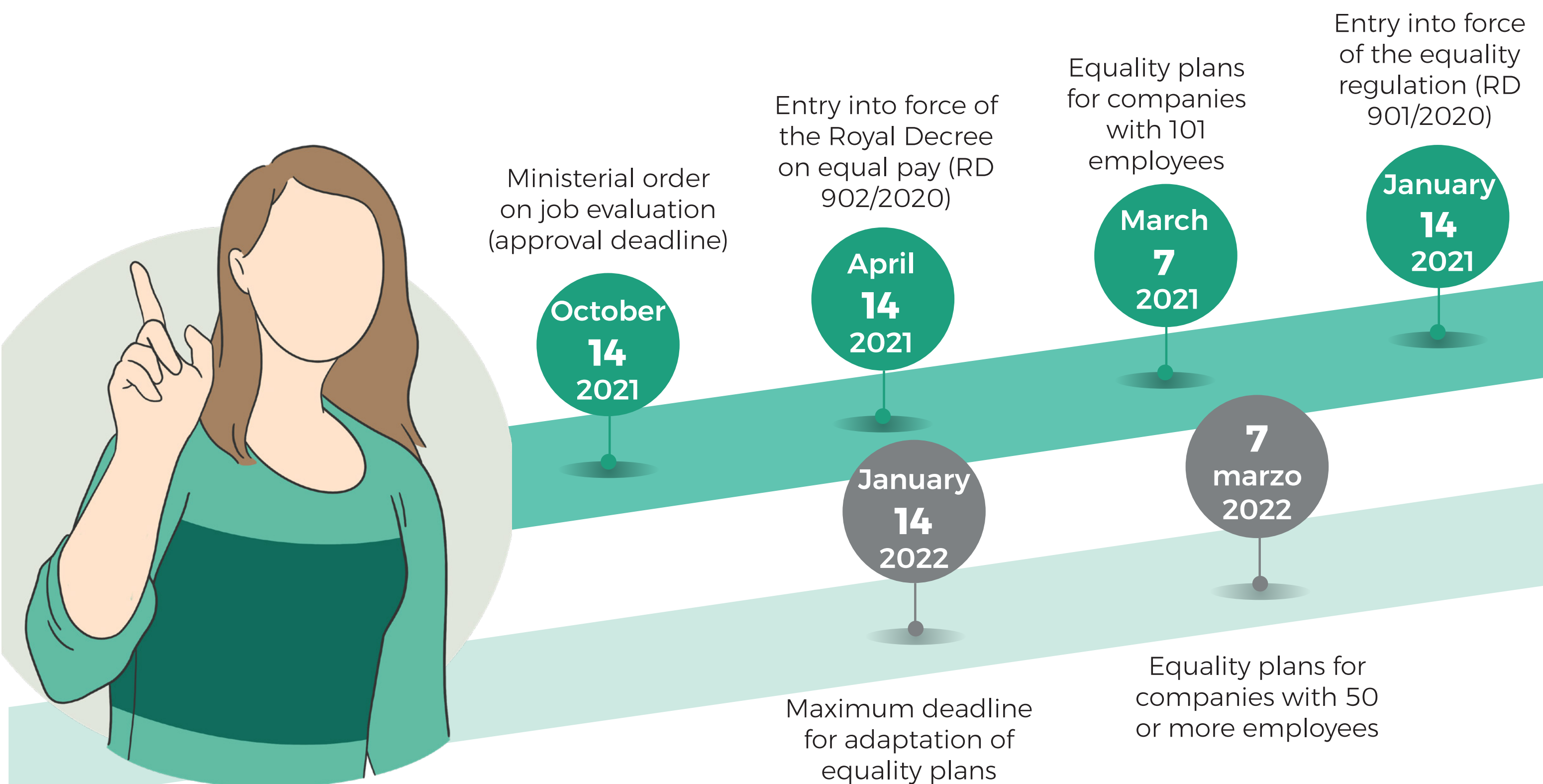
The High Court, in its judgment of 13 September 2018, declared that the negotiation of an equality plan forms part of the essential content of trade union freedom in its aspect of the right to collective bargaining.

In the case analysed, the Court concluded that the company must assume the negotiating momentum and cannot slow down or delay the negotiation or impose the plan without extraordinary circumstances justifying it.

The existence of a business succession cannot justify wage differences between men and women

The employee render services for a foundation that had been absorbed by another foundation and received a lower productivity bonus than her male colleagues. The foundation justified the difference by stating that it had merely respected the working conditions that the worker had at her previous employer, without any discrimination.

In this case, the High Court of Justice of the Canary Islands, confirming in its ruling that handed down by the Social Court No. 4 of Tenerife, has considered that the existence of a business succession cannot justify the maintenance of a discriminatory remuneration system, declaring that the successor company cannot limit itself to respecting the remuneration system of the previous company, but must correct any existing discrimination.



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