CLIFFORD
CHANCE

Client Briefing

April 2017

# The Spanish Supreme Court determines that keeping a record of working hours is not enforceable by law

The Plenary Sitting of the Labour Division of the Spanish Supreme Court has recently issued a judgment which ends the discussion as to whether or not employers must obligatorily keep a record of the daily working hours of their workforce. Specifically, the Supreme Court has reviewed and annulled a judgment by the Spanish National Court which had confirmed such obligation, concluding on the contrary that Article 35.5. of the Workers' Statute does not establish any obligation whatsoever to keep a record of employees' daily working hours, but instead only to record overtime worked.

Therefore, the failure to keep this record will no longer be considered a sanctionable breach of labour regulations, as has been the case to date as a result of a specific labour inspection awareness campaign designed to ensure compliance with that obligation.

## Key issues



## 1. Background

The legislation on which the subject of this discussion is based is Article 35 of the Spanish Workers' Statute ("WS"), governing the specificities of overtime worked, which states as follows in section 5 thereof:

*"For the purpose of calculating overtime, the number of hours each employee has worked shall be recorded each day and shall be added up for each payment period, with employees receiving a copy of such total on the corresponding payslip."*

The issue at stake in the case brought before the Labour Division of the Supreme Court in its Judgment handed down on 23 March 2017 (the "Judgment") consists of determining if the obligation to record the number of hours worked contained in Article 35.5 above is only enforceable when additional hours are worked or if, on the contrary, it should be construed that the recording of overtime is the prerequisite for monitoring potential excess hours worked per day, making it necessary that the hours be recorded in any event and for the entire workforce.

Historically, the Supreme Court has determined the scope of the employer's obligation contained in Article 35.5 WS, concluding that it is not necessary to keep a record of overtime worked when these hours are neither accrued nor remunerated.

However, such doctrine was disputed by the Labour Division of the Spanish National Court, in its Judgment of 4 December 2015, in which it maintained that the obligation to keep a record of daily working hours set out in Art. 35.5 WS actually serves as a tool or means of proof to confirm the overtime worked and to ensure that these extra hours are effectively recorded, this being the prerequisite for monitoring any overtime worked. In particular, the Labour Division of the National Court upheld the collective claim and ordered the employer (a bank) to *"establish a system for keeping a record of the number of hours effectively worked each day by its workforce, which would enable compliance with the set working hours to be checked".*

That judgment was appealed by the bank's representative, invoking the infringement of Article 35.5 WS in relation to Article 20.3 thereof.

## 2. Judgment of the Labour Division of the Supreme Court of 23 March 2017

The Plenary Sitting of the Labour Division of the Supreme Court (the "Plenary") has determined that Article 35.5 WS does not establish the requirement to record the number of hours effectively worked each day by the workforce, so as to be able to check compliance with the number of hours set by the employer.

The interpretation made by the Plenary in the Judgment thus rectifies the conclusion reached by the Labour Division of the National Court in its Judgment of 4 December 2015, which stated that all employers must mandatorily keep a record of the daily number of hours worked by each individual employee, so as to thus be able to determine if any overtime was accrued.

The conclusion reached by the majority of the judges of the Plenary in the Judgment is based on the following grounds:

i. According to a literal interpretation of Article 35 WS, it can only be construed that employers are obliged to record the overtime worked, which is in line with the historic and legislative antecedents on this issue.

ii. According to a logical-systematic interpretation of the WS on the whole, it can be seen how *"the duty to keep a record of daily working hours is established, whereas the legislator regulates overtime (the title of Article 35 in question) worked and not the regular hours worked or the usual working hours, which is relevant since the different heading of each article indicates that the legislator limits the employer's duty, of concern to us here, to keeping a daily record of overtime…".* Furthermore, the Plenary maintains that this interpretation is supported by the provisions of Article 12.4 c) WS, governing the obligation to record, daily, and total, monthly, all hours worked by part-time employees, an *"unnecessary mandate if the legislator had established the need to record all hours worked each day, using a system which enables compliance with set working hours to be checked".*

iii. The spirit and intention of Article 35 WS must be to monitor the number of overtime hours worked, so as to avoid exceeding the limits established by law, but not to impose an exhaustive control of the regular workday, which is *"not required under Article 34 WS"*

iv. This solution is in line with the provisions of EU law on the workday and the regulation of working hours, which establishes the need to keep a record of the hours worked and the rest periods only in certain special cases, but not a record of regular hours worked when the maximum number of hours is not exceeded.

v. Creating these types of records could entail *"undue interference by the employer in the employees' privacy and freedom"*, and we must not forget the rules on the protection of personal data, since keeping records of regular workdays would require storing and processing the data collected, so as to determine compliance with the annual number of hours set by the employer.

The Plenary states, in short, that the above grounds *"prevent one from making an extensive interpretation of Art. 35.5 WS, imposing obligations which limit a right such as the one established in Article 28.3 of said law and the principle of freedom of enterprise deriving from Article 38 of the Spanish Constitution"*

and states, in other respects, that the law does not consider it a breach to fail to keep the records being discussed here.

The Judgment states that failing to record the number of hours an employee has worked each day does not enable an assumption to be made that overtime has been worked. However, if the employee proves that he or she has worked additional hours, the fact that the employer has not kept such a record will not work in its favour, as it will have a harder time refuting the proof provided by the employee.

In any case, it is worthy of note that the Judgment itself states the need to carry out a legislative reform to clarify if, in fact, Article 35.3 of the WS requires a record of the effective working hours of the workforce to be kept and, moreover, the controversial nature of the matter can be clearly inferred from the Judgment, given that there are five dissenting voices in the Plenary.

## 3. Conclusion

This Judgment brings to an end a long discussion on the need to keep a daily record of hours worked. Although previous judgments exist which had established that Article 35.5 of the WS does not impose such an obligation, the truth of the matter is that the labour inspectorate has been sanctioning companies for not keeping such records, with various judgments - firstly from the contentious-administrative courts and secondly from the labour courts - upholding such sanctions..

Following the judgment issued by the Labour Division of the Spanish National Court on 4 December 2015, the obligation to keep a record of daily working hours seemed even clearer, to the point where the labour inspectorate issued guideline 3/2016 on increased supervision of working hours and overtime, which established that *"particular emphasis must be placed on keeping records of working hours"*, launching a campaign to check compliance with such obligation

The Judgment brings this discussion to an end **by clarifying that keeping such records is not enforceable by law.** It should be noted that the Judgment was issued by the Plenary Sitting of the Labour Division, and therefore a change in criteria of the Supreme Court is not possible, given that this is not the criteria of a specific division. Even so, it is important to stress the existence of three dissenting opinions seconded by five judges, all of whom are of the opinion that keeping such records is indeed enforceable by law.

## Contacts


**Clifford Chance**

Paseo de la Castellana, 110
28046 Madrid
Tel: +34 91 590 75 00

**Juan Calvente**

*Head of employment in Clifford Chance in Spain*

E. Juan.Calvente@CliffordChance.com

**Efraina Fernández**

*Senior Associate Lawyer of employment*

E. Efraina.Fernandez@CliffordChance.com

**Jorge Martín-Fernández**

*Senior Associate Lawyer of employment*

E. Jorge.Martin-Fernandez@CliffordChance.com

**Isabel Palacios**

*Junior Lawyer of employment*

E. *Isabel.Palacios@CliffordChance.com*

**Clifford Chance**

Av. Diagonal 682
08034 Barcelona
Tel: +34 93 344 22 00

**Cristina González**

*Senior Associate Lawyer of employment*

E. Cristina.Gonzalez@CliffordChance.com