

UNIT 5

CHANGES, SUSPENSION AND TERMINATION OF THE EMPLOYMENT CONTRACT

1

CHANGES IN CONTRACTS

Labour contracts can be changed and these changes can negatively affect the worker's working conditions. The law allows the employer to make these important changes in the worker's contract provided that the employer has economic reasons, technical, organisational and/or production problems. The worker may:

- ✓ Accept these changes.
- ✓ If the worker does not agree with the changes, the worker has to obey and comply with these changes, but the worker can also go and issue complaints to a judge if considered these changes were not necessary.
- ✓ It reasons are justified and the worker does not want to continue working in the company, in some cases the company will have to pay the worker a compensation (according to the law).

1.1 CHANGE OF DUTIES

A worker may be asked to perform duties of higher or lower categories than those which he/she was recruited.

This change may happen:

WITHIN THE PROFESSIONAL GROUP

In this case the employer does not have to justify any reason for the change, as long as the worker's rights are not violated. The worker will have to obey and comply with these changes.

OUT OF THE PROFESSIONAL GROUP

This is only justified by **technical or organisational** reasons and must be within a limited time.

- A** The employer may ask you to do a job that belongs **to a lower professional category**.

The law says that there must be an **urgent and unforeseeable** need to ask the worker for changing their duties, and that this change must be **for the minimum time required**. The workers' representatives must be notified of these changes. The worker **has the right to keep their previous salary**.

EXAMPLE 1

For example, you are a shop assistant and the employer needs the floor to be cleaned. The cleaner is on sick leave. The boss is worried because the shop needs to be ready on time and it is not ready yet.

In this case, the worker must obey and clean for the minimum time required and they will keep their previous salary.



B

The employer may ask you to do a job that belongs **to a higher professional category**.

In this case the worker has the right to earn the salary that corresponds to the higher professional category. When the period of time carrying out these duties is longer than 6 months within a year or 8 months within two years, the worker can ask for a change into that higher professional category.

EXAMPLE 2



For example, the manager of the bar in a hotel has been in a terrible accident and he will be on a leave for a long time. The boss has asked a waiter to take the position of the manager. The waiter will earn more money and he will get the same salary as a manager.

If the worker does not accept these changes they can leave the company, but **they will not get any compensation at all**.

1.2 TEMPORARY AND PERMANENT TRANSFERS

This happens when the worker is required to change the workplace within the company temporarily or for good. There must be **economic, technical, and organizational and/or production** reasons for the company to justify it.

There are different kinds of transfers:

TEMPORARY TRANSFERS OR DISPLACEMENTS

This consists of changing the usual workplace for the worker **no longer than 12 months within a period of 3 years**.

The worker has the right to:

- Keep their previous position and salary.
- Receive compensation for transportation expenses.
- Take four extra days off every 3 months of displacement.
- Be notified at least 5 days before the displacement takes place if it is going to last more than 3 months.

PERMANENT TRANSFERS

This type of transfer lasts **more than 12 months within a period of 3 years**.

According to the number of workers there are two different types of permanent transfers:



The worker should be notified about the transfer at least 30 days in advance. The company will cover transportation expenses. There are three different options for the worker:

- 1 To accept the transfer
- 2 To terminate the contract with a compensation for the worker of **20 days for every year worked** in the company, with a **maximum of 12 monthly payments**.
- 3 To accept and go to court. If the worker believes that there are not economic, technical, organisational and/or production reasons to justify the transfer, the company can be summoned to court.



In this case the transfer affects a group of workers or all the workers in the company when the company has more than 5 workers.

There will be a previous consultation period of a maximum of 15 days between the employer and the workers' representatives.

Workers affected by collective transfers will have the same options as the workers affected by individual transfers.

The conditions for a collective transfer are:

NUMBER OF WORKERS IN THE COMPANY	NUMBER OF WORKERS AFFECTED (WITHIN A 90 DAY PERIOD)
Fewer than 100	Minimum 10
Between 100 and 299	Minimum 10%
300 or more	Minimum 30

1.3 SUBSTANTIAL CHANGES IN THE WORK CONTRACT

Substantial changes in the labour contract are related to **working time, working schedule, shift work, remuneration schemes, work patterns, work efficiency, and work tasks when they exceed the limits of the “changes of duties”**.

The employer can modify these contractual conditions if there are **economic, technical, organisational and/or production** reasons.

According to the number of workers there are two different types of substantial changes in the labour contract:



The worker or the workers' representatives should be notified about the modification 15 days in advance. The worker has three different options:

- 1 To accept the new conditions
- 2 To terminate the contract with a compensation of **20 days for every year worked** with a **maximum of 9 monthly payments** (for modification of work patterns and work efficiency there is no compensation at all).
- 3 To accept and go to court (within a period of 20 days). If the modification is considered unlawful or unjustified, the worker will have the right to work under their previous conditions.



COLLECTIVE SUBSTANTIAL CHANGES

In this case the modifications affect a group of workers or all the workers in the company (the same number as for a collective transfer).

There must be a previous consultation period of a maximum of 15 days between the employer and the workers' representatives.

After this, the employer will communicate the final decision and the modifications shall enter into force within 7 days.

The parties can decide to reach to an agreement by submitting to mediation or arbitration.

1.4 EMPLOYER REPLACEMENT

This refers to the change in the ownership of the company or workplace.

In this case there is a modification or amendment of the employment contract because of the change of the employer, but it is not a termination of the work relationship. In fact, the new employer will maintain the same rights and duties laid down in the contract and also with the Social Security.

2

SUSPENSION OF THE EMPLOYMENT CONTRACT

This is the **temporary interruption of the work contract**; however the contractual binding is not terminated.

Suspension of the contract means that the obligations of both parties, working and remunerating the work, have no effect.

Workers are entitled to be reinstated in their job when the causes of the suspension cease.

2.1 SUSPENSION CAUSES

- Mutual agreement of the parties (licenses)
- Contract obligations, particularly those relating to good faith (prohibition on disloyal competition, professional secrecy, etc.).
- Leave of absence (excedencia).
- Temporary disability (illness or accident).
- Maternity, paternity, adoption or foster care of children under six years old.
- Risk during pregnancy (until child birth) and breastfeeding (until the child is 9 months old).
- Temporary extraordinary circumstances, and for economic, organisational, technical or production reasons (normal working hours can be reduced between 10% and 70%).
- Disciplinary suspension of work and salary.
- Strike and lock out of business.
- To do training activities.
- Deprivation of liberty, meanwhile the worker is not convicted.

2.2 EXTENDED LEAVE OR ABSENCE (EXCEDENCIA)

TYPES OF ABSENCES	CAUSE	DURATION	WORKER'S SITUATION
VOLUNTARY	Employee's request	From 4 months until 5 years	<ul style="list-style-type: none"> At least 1 year of seniority is needed. 4 years have to elapse between the end of the previous extended leave or absence. This period of seniority is not taken into account. The worker has no right to keep the job, but there is priority if there is a vacancy.
FORCED	To hold public office or to perform broader trade union duties	During the holding of the public position	<ul style="list-style-type: none"> This period of seniority is taking into account. The worker has right to keep their job.
PARENTAL LEAVE	Childbirth, adoption or fostering	3 years maximum	<ul style="list-style-type: none"> This period of seniority is taking into account. The worker has a right to keep the job only during the 1st year. For the 2nd and 3rd years there is priority if there is a vacancy.
CARE FOR MEMBERS OF THE FAMILY	Blood relation or relation by marriage up to second degree. These members cannot take care of themselves and do not perform paid work	2 years maximum	<ul style="list-style-type: none"> This period of seniority is taking into account. The worker has a right to keep the job only during the 1st year. For the 2nd year there is priority if there is a vacancy.

3

TERMINATION OF THE EMPLOYMENT CONTRACT

Termination of the contract means **that the labour relationship is finished**.

Contract termination is different from suspension of the contract because termination is for good and suspension is temporary.

CAUSES FOR CONTRACT TERMINATION	
MUTUAL TERMINATION OF THE CONTRACT	Termination by agreement (there is no compensation for the worker).
	Termination of the contract for reasons provided by the contract of employment.
	When the contract comes to an end (12 days of severance pay per year worked).
TERMINATION ON THE WORKER'S INITIATIVE	Worker's resignation, giving notice of the termination of the contract, according to the collective agreement or local custom (15 days' notice period). For instance, the worker does not want to be transferred.
	Abandonment of employment (with no previous notification). The employer can claim for damages.
	To solve fair cause (<i>causa justa</i>): Substantial changes of working conditions when this goes against the worker's dignity or there is a damage in the worker's vocational training, failure to pay wages, or not to pay them on the due date. The worker is entitled to receive a compensation.
	Any other infringement of the employers' duties, except for extraordinary circumstances. The worker is entitled to receive a compensation, e.g. mobbing.
TERMINATION ON THE EMPLOYER'S INITIATIVE ("Dismissals")	Disciplinary dismissal for serious infringement of the worker.
	Dismissal for "Objective Reasons". The worker is entitled to receive a compensation.
	Collective dismissal. The worker is entitled to receive a compensation.
OTHER REASONS	Worker's death (15 days' compensation for the inheritors), retirement or disability.
	Employer's death, retirement or disability (1 month compensation).
	Extinction of the company's legal entity (personalidad jurídica).

3.1 DISMISSALS

Dismissal is one of the causes for which the employment contract can be terminated. In this case it is the unilateral decision of the employer to terminate the contract.

Dismissals may be collective or individual.

TYPES OF DISMISSALS:

3.1.1 DISCIPLINARY DISMISSAL (Individual dismissal)

In this case, the employer, unilaterally, decides to terminate the contract of employment on account of the worker's **employee being guilty of serious misconduct**.

These breaches include the following:

- Recurrent and unjustified **non-attendance** to work or late arrival.
- Lack of discipline or **disobedience** at work.
- Verbal or physical **offence** to the employer, to other work colleagues or to their relatives.
- Transgression of contractual **good faith** and betrayal of trust in the performance at work.
- The continuous decreasing of **job efficiency and performance** voluntarily.
- Frequent **alcohol or drugs** intoxication whenever these affect the worker's job efficiency and performance.
- **Harassment** on grounds of sex, age, race, ethnic origin, religion, beliefs, disability, towards the employer or other workers in the company.

PROCEDURE:

- ✓ The dismissal must be notified in writing to the worker (**dismissal letter**).
- ✓ In case the worker does not agree with the employer's decision, the worker have to file a **demand for conciliation** in the Mediation, Arbitration and Conciliation Service of the autonomous region concerned, within 20 days upon receipt of the dismissal letter. In this way both parties may settle a reconciliation avoiding going to the labour court.
- ✓ If this fails, then the worker has the right to file a complaint before the labour court.

The judicial judgment can find the dismissal:

FAIR DISMISSAL

If the judge considers that the employer's decision is justified and proved, the employment contract is terminated without any compensation for the worker.

UNFAIR DISMISSAL	<p>If it is considered that the dismissal is unfair, the employer must pay the salaries that accrued during the proceeding, (the salaries that the employee ceases to receive from the date of dismissal until the sentence of the judge). Furthermore, the employer must either reemploy the worker or compensate them with 33 days of salary per year worked in the company, with a maximum of 24 monthly payments.</p>
VOID DISMISSAL	<p>If it is considered the dismissal as discriminatory or made in violation of fundamental rights, then the dismissal will be void and the employee holds the right to reinstatement.</p>
VOID DISMISSAL	<p>Dismissals of women who are victims of gender violence or women during breastfeeding or with diseases related to pregnancy, maternity or paternity will also be voided</p>
VOID DISMISSAL	<p>Dismissals to workers within 9 months after the application of reduced working day to take care of minor child or disabled family members or, in case of extended leave absence for taking care of members of the family, will be void.</p>

3.1.2 DISMISSAL FOR OBJECTIVE REASONS ACCORDING TO LAW

The main causes are as follows:

- The worker's **incompetence** to perform their tasks.
- Worker's **non-adaptation** to the work technical modifications.
- Recurrent **justified absence** from work. When the worker has been absent for more than the 20 % of working hours within a period of 2 months, or more than 25% of working hours within a discontinuous period of 4 months, taking into account a twelve-month period (absences due to strike, legal representative activities, work-related accidents, maternity leave, holidays and illness when the illness lasts longer than 20 consecutive days - are not included).
- To terminate some employment contracts (the number of them must be fewer than in a collective dismissal) based on **economic, technical, organisational or production** reasons.
- **Insufficient budget** of Governmental programs.

SPECIFIC REQUIREMENTS:

- ✓ The employer must notify the dismissal in writing to the employee including the reasons for the dismissal.
- ✓ A notice period of 15 days must be fulfilled.
- ✓ The worker has a 6 hour reduction within their working week for job-seeking.
- ✓ The employee can appeal against the employer's decision and the procedure is the same as in a disciplinary dismissal.
- ✓ This dismissal entitles the employee to receive severance equal to 20 days' salary per year worked, with a maximum of 12 monthly payments.

3.1.3 COLLECTIVE DISMISSAL

This is very common in recession periods.

Collective dismissal must be based on **economic, technical, organisational or production** reasons. The conditions related to the number of workers being made redundant for collective dismissal are the same as for the collective transfers. (Refer to pg. 203)

A PROCEDURE FOR THE REGULATION OF EMPLOYMENT MUST BE INSTITUTED MAKING A REQUEST TO THE LABOUR AUTHORITIES.

- ✓ The substitution of the consultation period for the mediation or arbitration shall be able to be agreed upon.
- ✓ There must be a consultation with the workers' representatives with a minimum duration of 30 days (15 in the case of companies with fewer than 50 workers).
- ✓ If the consultation period concludes with an agreement, this will be notified to the labour authority, by sending a copy of the agreement.
- ✓ If they do not reach an agreement the 2012 Labour Reform Law entitles the employer to give the final say, provided convincing evidence of goodwill by the employer during the consultation period.
- ✓ This dismissal entitles the employee to receive a redundancy payment equal to 20 days' salary per year worked, with a maximum of 12 monthly payments.

SUMMARY OF COMPENSATIONS DUE TO THE TERMINATION OF THE EMPLOYMENT CONTRACT

• TEMPORARY CONTRACTS (except training-apprenticeship contract and temporary replacement contract).	12 days' salary per year worked.
• UNFAIR DISCIPLINARY DISMISSAL	33 days of salary per year worked, with a maximum of 24 monthly payments.

SUMMARY OF COMPENSATIONS DUE TO THE TERMINATION OF THE EMPLOYMENT CONTRACT

<ul style="list-style-type: none"> • FAIR DISMISSAL FOR AN OBJECTIVE REASON • COLLECTIVE DISMISSAL 	20 days' salary per year worked, with a maximum of 12 monthly payments.
<ul style="list-style-type: none"> • UNFAIR DISMISSAL FOR AN OBJECTIVE REASON 	33 days of salary per year worked, with a maximum of 24 monthly payments
<ul style="list-style-type: none"> • EMPLOYER'S DEATH, RETIREMENT OR DISABILITY 	1 month of salary if no one takes charge of the company.
<ul style="list-style-type: none"> • WORKER'S DEATH 	15 days of salary

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SEVERANCE AGREEMENT (FINIQUITO)

This is the final severance of accounts that cancels the contract of employment.

Concepts to include in a settlement agreement

- Number of days worked during that month.
- Proportional part of the extra monthly payments (annual bonuses).
- Compensation for the annual holidays the employee should have taken.
- Other compensations / severance pay if applicable.
- The amount of money to compensate the notice period that has not been fulfilled.

If the worker does not agree with the calculation, they are not obliged to sign the severance agreement.

The worker can sign up to the severance agreement and write "not in accordance" or "non-compliant" near the signature, so that the worker will receive the money and can make a complaint afterwards.

The worker can ask for the attendance of a workers' representative.

IT IS IMPORTANT TO TAKE INTO ACCOUNT:

If the annual bonuses are not prorated:

$$\text{DAILY SALARY} = \frac{\text{Monthly salary} \times 14 \text{ months}}{365 \text{ days}}$$

(in case of 2 extra monthly payments)

IT IS IMPORTANT TO TAKE INTO ACCOUNT:

If the annual bonuses are prorated:

$$\text{DAILY SALARY} = \frac{\text{Monthly salary} \times 12 \text{ months}}{365 \text{ days}}$$

Annual
bonuses
(extra
monthly
payments)
can be:

Half-yearly
accrued

Yearly
accrued

Half-yearly accrued annual bonuses are taken into account every 6 months. This means the worker will be paid for the extra monthly payment of the semester he leaves the company (from the beginning of that semester to the day the worker leaves the company).

Yearly accrued annual bonuses are taken into account all year, so the calculation is from the moment the previous extra monthly payment was paid to the date the worker leaves the company

	SUMMER ANNUAL BONUS	CHRISTMAS ANNUAL BONUS
Half-yearly accrued	From the 1 st January to the 30 th June of the same year. (181 days)	From the 1 st July to the 31 st December of the year. (184 days)
Yearly accrued	From the 1 st July of the previous year to the 30 th June of the current year	From the 1 st January to the 31 st December of the current year.

SEVERANCE AGREEMENT TEMPLATE

PAYMENTS

SALARY PAYMENTS

- Basic salary
.....
- Additional payments
.....
- Proportional part of the extra monthly payments
.....
- Proportional part of annual holidays
.....

COMPENSATION FOR THE TERMINATION OF THE CONTRACT

- Daily salary x days of compensation fixed by law
Daily salary: (basic salary + additional payments + extra monthly payments pro rata) / 365

Days of compensation:

For 360.....days of compensation

For number the days worked.....X days

Daily salary x days

COMPENSATION FOR BREACHING THE NOTICE PERIOD

- Daily salary x days according to the collective agreement or law

TOTAL PAYMENTS

DEDUCTIONS

SOCIAL SECURITY (basic salary + additional payments + extra monthly payments prorate + proportional part of holidays)

- | | BASE | RATE |
|--|-------|-------|
| • Common contingencies | | |
| • Unemployment and occupational training | | |
| • Income tax withheld | | |

TOTAL DEDUCTIONS

NET PAY (TOTAL PAYMENTS - TOTAL DEDUCTIONS)

What is the legal process once the dismissal/termination letter has been issued?

Once a termination letter has been duly delivered to the affected employee, the employee may, within 20 days of receiving the termination letter, bring a claim against the employer for unfair dismissal or void dismissal.

Under Spanish Labor Law, it is mandatory for the parties to first engage in a **conciliation process**, and accordingly, the employee will have to file an administrative claim, in most cases, before the Servicios de Mediación, Arbitraje y Conciliación (SMAC). Certain actions are exempt from the mandatory conciliation requirement and may be directly submitted before a competent Court or Tribunal. These include but are not limited to actions that may pertain to social security, geographical mobility, substantial modification of working conditions, constructive dismissal by way of 'objective' actions, etc.

If the parties are unable to reach a settlement, the employee may submit a judicial claim before the competent Court or Tribunal (Social Court). The judge will declare a judgment after duly conducting the hearing pursuant to the Civil Code in Spain.

It must be noted that the courts and the Spanish Labor Law as drafted, encourage the parties to reach a settlement by way of mutual negotiation or conciliation. Even after judicial action has been initiated, the parties may reach a settlement agreement at any time before the judgement is issued.