

Are Employers Obligated to Maintain a Daily Register of Working Hours in Spain?

IN SHORT

The Situation: Recent debate in Spain relating to the responsibilities of employers focused on whether companies had a legal obligation to maintain a daily record of an employee's working hours.

The Resolution: Two recent decisions by Spain's Supreme Court Employment Chamber confirm that hours-worked logs are mandatory only when employees perform overtime hours.

Looking Ahead: Both decisions point to the belief that a legislative gap exists, perhaps creating an opening for the Spanish government to respond with reform measures.

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In March and April 2017, the Supreme Court's Employment Chamber resolved (through Judgments 246/2017 and 338/2017) that, as a general rule, there is no legal obligation for companies to maintain a daily record of the employee's working hours. The relevance of these resolutions is palpable since they cause changes in the criteria that both the Spanish courts (in particular, the Spain National Court, "*Audiencia Nacional*") and the Labour and Social Security Inspection ("ITSS") have sustained in recent years.

The Supreme Court determined that the daily record of working hours must be maintained only when employees perform overtime hours. Furthermore, it supports this decision with a systematic argument. Specifically, it states that the obligation to log daily working hours is established in Article 35 of the Spanish Workers' Statute, under the heading of overtime regulation. The Supreme Court alleges that, if the legislator had intended the institution of maintaining daily working hours records as a general mandate (not only in case of overtime performance), it would have recourse to its regulation within the provisions concerning the employees' ordinary working hours, as it happens in the case of part-time work. Finally, it adds that the absence of such record is not even stipulated as a punishable conduct in the legislation which regulates the infringements and sanctions of the social order. Therefore, it is impossible to make a broader interpretation of said sanctioning regime.

It is important to emphasize that Judgment 246/2017 of the Supreme Court contains three dissenting votes that differ from the majority view of the chamber. It should be highlighted that the second dissenting vote states that the legal debate was erroneously raised since the issue was not approached from a broader perspective and solely focused on the analysis of the overtime provisions. In this sense, it states that the obligation to record the daily working hours cannot be based on the legal regime of overtime (where, in fact, a working hours record is required only in the case of performing overtime hours), but in those provisions linked to the employer's obligations on health and safety, proportionate remuneration and effective control of the daily working hours. According to such dissenting vote, these matters are sufficient grounds to force companies to keep a record of the daily working hours. This position is relevant because it could serve as a basis for future resolutions of the Supreme Court.

The criteria used by these judgments have had an important impact in the ITSS, which declared in its Instruction 3/2016 that the working hours' daily register was mandatory for all companies



regardless of the performance of overtime hours. However, on May 18, 2017, the ITSS issued a new instruction that is in line with the conclusions of the analyzed judgments, including some significant nuances. In particular, the Instruction 1/2017 states that the content of Instruction 3/2016 remains in force except for the company's obligation to register the employee's daily working hours, whose omission cannot be considered as a punishable action according to the latest judgment of the Supreme Court. In any case, it is important to note that, by virtue of Instruction 1/2017, within the inspection activities of the ITSS, the latter could ask the companies for a working hours' control system with a view to assessing those facts that could lead to an infringement of the working hours' regulations.

It will be interesting to see the criteria the Labour Authorities uses in resolving those sanctioning procedures that were initiated by the ITSS as a result of the absence of a daily working hours record in the company. That is to say, those cases in which the ITSS, based on Instruction 3/2016 and before the analyzed judgments of the Supreme Court were issued, have initiated a sanctioning procedure against a company for the nonimplementation of a daily working hours recording system. In this regard, it cannot be ignored that the criteria of the Supreme Court is a significant jurisprudential basis for companies to leverage to avoid the corresponding sanction.

Finally, it should be taken into account that although Spanish labour legislation does not expressly establish the daily working hours record as a general mandate, attention should be given to future judicial resolutions and ITSS inspections that could introduce practical nuances in the commented judgments. Regardless of the above, these judgments are opening the way to a legislative reform that addresses the general obligation for companies—not only in cases of performing overtime hours—to record the daily working hours of their employees.

Jones Day will continue following up on this issue and any important practical implications for companies.

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THREE KEY TAKEAWAYS

1. The Supreme Court dictated that a daily record of working hours must be carried out only when employees perform overtime hours.
2. Still, a dissenting opinion, against the majority opinion of the Supreme Court, argued that the responsibility to record daily working hours cannot be based on the legal regime of overtime, but rather on provisions tied to a company's obligations relating to health and safety, proportionate compensation, and effective control of daily working hours.
3. The Supreme Court decisions that are analyzed in this *Commentary* could lead to legislative action requiring that companies keep broader records of employee work hours.

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