CODES OF CONDUCT: AN ESSENTIAL PREVENTATIVE RESOURCE IN EMPLOYMENT RELATIONS - NICEA ABOGADOS

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The first corporate codes of conduct (Codes) came into being in the 1970s but it was not until the 1990s that, as a result of globalisation, they became commonplace. Large companies started to publish Codes as a way of protecting their image while committing to adjust their working conditions and activities to bring them into line with the principles they contained. Nevertheless, it is worth noting that such codes can never replace national and international employment legislation.

Although traditionally considered a feature of Anglo-Saxon countries (and known as Employment Handbooks), Codes are now becoming an essential means of establishing the "rules of the game" governing employment relations within Spain, for the following practical reasons:

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First, the rules contained in collective bargaining agreements are not always clear leading on occasions to errors of interpretation. In addition, sectoral collective bargaining agreements are often overly general and do not provide practical solutions for specific companies' needs. However, recourse to a company's collective bargaining agreement is sometimes a means of improving the minimum conditions of the sector as a whole.

In this context it can be useful if a company has its own internal action criteria and that this is reflected in a Code, as a means of guaranteeing communication with employees.

Secondly, in an increasing number of cases the courts have ruled that although a company is not in principle allowed to engage in certain managerial conduct and/or control activities (since these do not come within the express scope of employment legislation and/or applicable collective bargaining agreement), such conduct may be allowed given the pre-existence of a procedural code or manual. Set out below are examples of the importance of codes of conduct and of trends in Spain and Europe with respect to their preparation and updating:

– In 2004, the European Commission published Partnership for change in an enlarged Europe – Enhancing the contribution of European social dialogue. This referred to "guidelines or codes of conduct" highlighting that these do not merely concern the transfer of information, or a will to ensure compliance at national level, but rather to attain specific European norms, even where these are de minimis and do not form part of the hierarchy of Community law sources.

Aunque tradicionalmente se han considerado característicos de los países anglosajones, los códigos de conducta son cada vez más una manera esencial de establecer las "reglas del juego" que gobiernan las relaciones laborales en España, especialmente en las negociaciones colectivas y a la hora de determinar las obligaciones tanto del empleador como del empleado, apuntan Jacobo Martínez Pérez de Espinosa y María Soutelo Charle, de Nicea Abogados.
– With respect to the legitimacy of employees' personal IT in the workplace, the Spanish Supreme Court of 26 September 2007 (unifying conflicting lower case law) considers, inter alia, that controlling the use of computing resources made available to employees comes within the company's management power (Article 20, Employees' Statute). Nevertheless, the Court also highlighted the existence of a general corporate tolerance of the moderate use of the computer resources, which creates an expectation of confidentiality. Accordingly, this expectation will be deemed not to have been breached where the company has established a prohibition on private use and has warned employees that controls may take place.

This demonstrates the vital role Codes have to play – if the internal rules of a company or Code contains specific prohibitions or limitations on the personal use of computer resources the breach may be sanctioned; otherwise, the margin of tolerance will be increased.

With respect to cases of sexual harassment, the obligation to prevent such behaviour is seen as a corporate obligation of a preventive nature (also forming part of corporate social responsibility).

A corporate obligation is also contained by Spain's Organic Law 3/2007 (the Equality Law). It is also worth highlighting the recent judgment of the High Court of Justice of Galicia (Tribunal Superior de Justicia de Galicia – 22 January 2010) by which a company was ordered to pay an employee

damages for its passivity and failure to implement a sexual harassment prevention plan. The Court held that Article 48 of the Equality Law, which states that "companies shall foster working conditions that prevent sexual harassment and harassment on the grounds of gender", was not merely a recommendation but an obligation.

In conclusion, as a result of the difficulties currently affecting collective bargaining in Spain, and the latest trends in legislation and case law across Europe, the use of codes of conduct is encouraged. They present good information channels so that, through the establishment of preventive measures, of a strategic, guiding and disciplinary nature, companies may avoid conflicts in the workplace ending in litigation.

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