

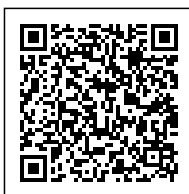
# IMPACT OF THE TEMPORARY REMOVAL OF EMPLOYEES' VACATION RIGHTS - SAGARDY ABOGADOS

*Posted on 28/06/2009*



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Category: [Employment](#)



**In Spain, Article 38.1 of the Workers' Statute establishes a period of paid annual leave of thirty days for employees, which is not susceptible to substitution by financial compensation, unless the employment contract is terminated.**

In such an instance, a financial compensation may be paid for the portion of annual vacation time not already taken.

Under the terms of the Statute, employees' vacation entitlement extends across a single calendar year and expires thereafter without the possibility of receiving a cash payment if not all of the entitlement is ultimately utilised.

A situation of temporary disability does not, in principle, affect this vacation period entitlement, as Article 5 of the ILO Convention 132 states that absences due to reasons beyond the control of the employee shall be counted as part of the period of service – it does also not count as vacation and the terms of the contract do also not alter.

Notwithstanding this, jurisprudence has consolidated the view that in cases where holidays are fixed in a collective manner and all of a business establishment is closed at the same time, the coincidence of absence because of sick leave or maternity leave does not confer on the employee a right to enjoy their vacation on different dates. Breach

Bernabé Echevarria, de Sagardoy Abogados, pone de manifiesto el contraste entre el criterio actual de interpretación utilizado en España, con una nueva sentencia del Tribunal de Justicia de la Unión Europea (del 29 de enero de 2009) que confirma que, el empleado podría hacer uso de sus días de vacaciones pendientes durante el siguiente año natural si hubiera estado en una situación de incapacidad temporal hasta el final del periodo marcado .

Concerning maternity leave, the Supreme Court has however opened a breach in this doctrine by declaring, on the basis of a Court of Justice (ECJ) decision (March 18, 2004), that in cases of coincidence between the rest period and collective vacation time, the worker may make use of their vacation entitlement at a different time but always within the same calendar year.

The Spanish Supreme Court in important judgments handed down by the General Chamber (October 3, 2007) has also consolidated the traditional criteria of interpretation regarding temporary disability situations, determining that motherhood is a unique event and as such may be treated differently.

However, four of the sitting judges took a contrary view to the majority decision, while making mention also that the right to utilise vacation time may only be possible while there is still time to do so within the same calendar year.

However, a more recent ECJ ruling (29 January 2009) on the matter has led to a more favourable shift towards the effective enjoyment of vacation periods despite the existence of situations of temporary disability, by stating the following:

"Article 7, paragraph 1 of Directive 2003/88, must be interpreted in the sense that it opposes provisions or practices which provide that the right to paid annual leave is exhausted at the end of the accrual and / or the extension period laid down in national law, even if the worker has been found to have incurred sick leave for all or part of the period of entitlement and that their inability to work lasted until the end of their working relationship, through which they have also been unable to exercise their right to paid annual leave."

Based on this interpretation, which is binding on European Union Member State national courts, the worker is entitled to take vacation leave even if they pass the full calendar year in a state of temporary incapacity, contradicting the doctrine of the Spanish Supreme Court which has applied the principle that entitlement lapses at the end of the calendar year.

This inevitably raises questions, including whether an employee in a position of temporary disability is entitled to leave despite the terms of their contract being suspended. If so, they may also be entitled to receive pay during the same period. This will however require a legislative amendment, both of the Workers and the General Law on Social Security.

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