

# Spain

## Introduction

Labor law in Spain can be considered the group of rules that protect an employee in his or her employment relationship and that determine the conditions applicable to life in the workplace.

The basic sources of Spanish labor law include the following:

- Spanish Constitution: The Constitution of 1978, which recognizes the main labor, social and union rights, as commonly understood in Western European countries;
- Treaties: Certain treaties and conventions, including the many EU regulations. Spain is a signatory country to ILO Agreements N° 87 (Agreement on Trade Union Freedom and Protection of the Right to Form Trade Unions of 1948) and N° 98 (Agreement on the Right to Form Trade Unions and Right to Collective Bargaining of 1949);
- Parliament Acts, Royal Decrees and the government regulations that implement them: The 1995 Labor Act is the main piece of labor legislation applicable nationwide, the 1994 General Law on Social Security is the main social security legislation, and the 2000 Law on Foreigners is the main piece of immigration legislation;
- Case law: Formally, case law in Spain is only created when two consistent Supreme Court cases decide the same issue in the same way. Single Supreme Court cases and appellate level court decisions are of course extremely persuasive to lower courts, but they are not technically binding.
- Collective bargaining agreements: Collective bargaining agreements or “CBAs” are detailed, binding agreements negotiated between unions (and/or other employee representatives) and employers organizations (and/or employers). Many collective bargaining agreements have been negotiated for a specific industry in the entire country, such that all companies in Spain that belong to that specific industry will automatically be bound by the rules established in the nationwide collective bargaining agreement. Other collective bargaining agreements apply only to a specific province or limited geographical area, or, if the collective bargaining agreement is negotiated at a company level, to a

specific company or part thereof. Almost all companies in Spain are subject to a collective bargaining agreement and should be aware of and comply with the applicable collective bargaining agreement's rules.

- Employment contracts: The law regulates whether contracts (either oral or written) can be entered into for a fixed term or must be with an indefinite term, as is the general rule. Also, the law regulates a number of special types of employment relationships (e.g., top executives, commercial agents, house-workers and others), which are not subject to certain rules established under the Labor Act for the so-called "ordinary" employment relationship.

## The Labor Courts

The Labor Courts are responsible for passing and enforcing judgments on labor issues. They constitute a special branch of the judicial system. There are three levels of labor courts: the Social Courts at a provincial level, the Social Chamber of The High Courts at a regional level, and the Social Chamber of the Supreme Court located in Madrid. The Supreme Court of Justice is the highest jurisdictional body of the State, except in matters relating to constitutional guarantees, where the Constitutional Court has the final decision making power.

## Labor Disputes

- Individual Disputes And Collective Disputes

In general, individual disputes are those that arise between an employee and an employer over the individual's subjective rights. Collective disputes arise only when collective interests are at stake, but not where the interest is exclusively an individual interest that happens to affect more than one employee individually.

- Mediation, Arbitration And Conciliation

Conciliation is a procedure that aims at encouraging a transaction between the parties with the ultimate goal of avoiding judicial proceedings. In both individual and collective disputes, Spanish law imposes the obligation to attempt conciliation with the Labor authorities before filing any claim in Labor Courts. Mediation proceedings may be initiated at the request of the parties in dispute for the appointment of an impartial mediator. If the settlement proposed by the mediator is accepted, it has the same binding effect as a collective agreement. Arbitration is a procedure for settlement

of labor disputes characterized by the intervention of a third party, the arbitrator. The arbitration provided for under Spanish law is private and voluntary. Mediation and arbitration procedures are typically initiated for collective disputes.

## **Terminations**

The Labor Act lists the various reasons justifying the termination of an employment relationship. Such reasons include, but are not limited to, mutual agreement of the parties; reasons validly established in the contract to the extent permitted by the law; resignation, retirement, death or disability of the employee or employer; “force majeure;” and dismissal, constructive dismissals, etc. The various types of terminations have different applicable rules and consequences, and the comments below are limited to (i) a brief reference to the termination of fixed-term contracts due to the expiration of their term, and (ii) a more thorough introduction to the rules on dismissals of employees under ordinary, indefinite term contracts.

### **Termination Of Definite-Term Or Fixed-Term Contracts**

Unless otherwise terminated earlier, definite or fixed-term employment contracts automatically come to an end at the expiration of their fixed term. If the employment relationship continues *de facto* for any reason at the expiration of such term, the agreement may be deemed to have been tacitly extended for an indefinite period of time.

When the duration of a fixed-term contract exceeds one year, the party who wishes to terminate the contract must give a minimum 15 days’ notice. In some cases, depending on the type of contract, an employee may be entitled to a severance compensation of eight days of salary per year of service.

Fixed-term contracts can only be concluded in very specific circumstances and are subject to various regulations, including maximum durations.

### **Termination Of Ordinary, Indefinite-Term Contracts**

Ordinary employees under the Labor Act may only be dismissed with cause after any trial period has expired (during the trial period, the contract may be terminated by either party freely). The basic causes for termination can be grouped into disciplinary

causes and what are known as “objective” causes, which most commonly are economic, technical, productive or organizational causes. Each of the two basic types of dismissals has its own required procedure.

## **Disciplinary Dismissals**

Disciplinary dismissals may be based on the following grounds:

- Repeated and unjustified lack of punctuality or attendance at work;
- Lack of discipline or disobedience at work;
- Verbal or physical aggression to the employer, other staff or their families;
- Breach of good faith and abuse of confidence in performing the job;
- Intentional and continuous reduction of regular or agreed work performance;
- Drunkenness or drug addiction, if it adversely affects the employee’s work; and
- Harassment of the employer or of any person who works at the company by reason of racial or ethnic origin, religion or convictions, disability, age, or sexual orientation and sexual harassment or harassment by reason of sex of the employer or people who work in the company.

These grounds are often regulated in further detail by the applicable collective bargaining agreement, which can specify the conduct that can be sanctioned and the degree of the applicable sanction.

Disciplinary dismissals must be given to the employee in writing stating the facts giving rise to the dismissal and specifying the effective date of termination. The employee then has 20 days as from the effective date of termination to contest the dismissal. Before the employee can file a complaint for dismissal with the Labor Courts, however, the parties are required to attempt to settle the matter at the Mediation, Arbitration and Conciliation Office, an Agency of the Labor Department. If no settlement is reached, the employee may then file a court claim. After trial, the Labor Court may declare the dismissal justified, unjustified, or null and void.

If a Labor Court finds those legal causes for the dismissal exist and the correct procedure has been followed, the dismissal is declared justified and no severance compensation needs to be paid to the employee.

If the alleged cause for dismissal is not satisfactorily proven or, if it is proven, but is insufficient to justify a dismissal, the dismissal may be declared unjustified. In this event, the employer has five days as of the Court decision notification date to choose between reinstating the employee or paying severance compensation. If the dismissed employee is an employee representative, the employee representative chooses, not the employer.

Severance compensation for unjustified dismissals is computed on the basis of 45 days' gross salary per year of employment with a maximum of 42 months' salary. The employee's salary for these purposes includes fixed and variable salary, as well as benefits in kind, but does not include certain benefits that are considered "social" in nature such as complementary health care schemes, pension schemes and insurance coverage. In addition to the severance compensation, the court in cases of unjustified dismissals will order the payment of interim salary, which is the salary from the date of dismissal through the date the court's judgment is notified, which is normally in the range of three to four months of salary.

The need to pay interim salary may be eliminated or limited, however, if the company ab initio acknowledges that the dismissal is unjustified and deposits the amount of the severance compensation required with the Labor Court, so that the employee can directly receive the payment from the court. Given the costs of litigation and the potential costs of interim salary, companies in practice often simply acknowledge that the dismissal is unjustified and pay the severance compensation at the time of the dismissal or within 48 hours following the dismissal.

In addition to the possible finding of justified or unjustified dismissal, the Labor Court can alternatively find that the dismissal is null and void. The Labor Court will declare the dismissal null and void in a number of specific cases, which primarily include the following:

- The dismissal is based on discrimination prohibited by the Constitution or by law, or the dismissal violates the employee's fundamental rights or public freedoms. These cases can include cases of retaliation against the employee for legitimately exercising his or her rights.
- Automatically in cases where the employee is pregnant, has requested or is enjoying maternity or paternity related rights, unless the court finds that the dismissal was justified.

- Where the dismissal is in retaliation for having exercised rights that exist to protect employees who are victims of gender related violence.
- When the dismissal occurs within nine months of having returned to work after maternity- or paternity-related leave of absence.
- When the collective dismissal should have been used but was not used.

Should the Labor Court declare the dismissal null and void, the company is required to immediately reinstate the employee with back pay. Given the costs of having to reinstate and the increased difficulties of dismissing the employee afterwards, prior to any dismissal, the company should carefully consider surrounding circumstances to ensure that no cause for a finding of a null and void dismissal exists.

### **Objective Dismissals**

“Objective” dismissals are dismissals that do not have to do with the employee’s (“subjective”) misconduct and that are instead based on one or more of the following objective reasons:

- An employee’s incompetence that has come to light or arisen after the trial period has elapsed;
- An employee’s failure to adapt to reasonable technological developments affecting his or her position, so long as two months have passed from the date the new conditions were implemented;
- An employee’s absence from work, even if justified, which exceeds 20% of the work days in two consecutive months, or which exceeds 25% of the work days in any four months in a twelve month period, where the workforce suffers from chronic absenteeism;
- When the company needs to phase out job positions based on organizational, productive, economic or technical grounds. If the grounds are economic, the measure should contribute to overcoming the company’s negative economic situation. If the grounds are productive, organizational or technical, the measures should have the purpose of overcoming the difficulties that prevent the company from functioning well, due to its competitive position in the market or the market demand, through a better organization of its resources.

This last type of objective dismissal may only be used when the number of employees to be dismissed does not exceed a particular number established by the Labor Act; if the employees to be dismissed for these reasons exceed the maximum number, the procedure for collective dismissals will need to be followed (see the section below on collective dismissals).

With regard to the objective (individual) dismissal's procedure, the employee must be given a letter of dismissal and provided a 30-day prior notice or salary in lieu thereof. The company at the time the letter is provided must simultaneously pay the severance compensation of 20 days of salary per year of service, any period of less than one year of service being prorated by months, up to a maximum of 12 months of salary.

If the procedural requirements for objective dismissals are not strictly followed, the dismissal will be null and void, and the company may be required to reinstate the employee with back pay. In addition, if the dismissal is based on discrimination, if it interferes with maternity- or paternity-related rights or if it infringes the rules on collective dismissals, it will also be null and void as in cases of disciplinary dismissal.

If an objective dismissal is declared by a court to be unjustified, as in disciplinary dismissals, the employer is given the option to either immediately reinstate the employee with back pay or to terminate the relationship, paying a severance compensation of 45 days per year of service up to a maximum 42 months' salary (if the employment contract at issue was a special indefinite term contract pursuant to Royal Decree 8/1997, Additional Disposition One, the amount of indemnity for an unjustified objective dismissal will be 33 days of salary per year of service, up to a maximum of 24 months of salary, instead of the 45 days' salary per year of service, up to 42 months of salary). As in disciplinary dismissals, if the person dismissed is an employee representative, the employee exercises the option instead of the employer.

As in disciplinary dismissals, the court will in cases of unjustified dismissal also award interim salary, which is the salary from the date of dismissal through the date the court's judgment is notified (normally three to four months' salary). As explained above, the need to pay interim salary may be eliminated if the company acknowledges at the time of the dismissal or within the following 48 hours that the dismissal is unfair and deposits the severance compensation for the employee with the labor courts, and may only be limited if the company proceeds in the same way any time between the dismissal and the court judgment.

If the court finds the dismissal to have been justified, the contract will be declared to have terminated, and no compensation will need to be paid other than the 20 days' salary per year of service (up to 12 months' salary) that was originally provided to the employee along with the notification letter of dismissal.

## **Collective Dismissals**

The collective dismissal procedure must be used when, in any 90-day period, the number of employees to be dismissed for economic, technical, productive or organization reasons equals or exceeds the following:

- 10 employees in companies with fewer than 100 employees;
- 10% of the workforce in companies with 100 to 300 employees;
- 30 employees in companies with 300 employees or more; or
- All employees in companies with over five employees.

If the number of dismissals does not meet these thresholds, the dismissals are subject to the objective (individual) dismissal procedure described above.

It is worth noting that spreading out the dismissals over consecutive 90-day periods to avoid the collective procedure and instead qualify for the above simpler objective procedure could lead a court to declare the dismissals fraudulent and consequently null and void. Significant case law exists on (i) which types of dismissals compute for purposes of the threshold and (ii) how the 90 day periods and/or consecutive 90 day periods should be counted. These rules are extremely important and should be considered carefully prior to any dismissal to avoid having the dismissal(s) declared null and void and having to reinstate employee(s) with back pay. In addition, special rules may apply as to which employees should be dismissed first (e.g., employee representatives have "last to go" rights).

The collective dismissal procedure can be divided into the following stages:

### **Notice of the Commencement of the Procedure**

The collective dismissal procedure requires that the employer file a petition for authorization with the labor authorities and simultaneously initiate a consultation period with employee representatives. The petition must be accompanied by a number of supporting documents explaining the grounds for the dismissals and justifying

the measures to be adopted. The documents should include economic and legal documentation of the causes of the dismissals and, in companies with 50 employees or more, a social plan adequately to prove and support the measures proposed.

The employee representatives must, in addition, be given written notice of the proceedings and be provided a copy of the economic and legal documentation and a copy of the social plan. If the dismissal affects more than 50% of the workforce, the employer must also notify the employees and the labor authorities of any sale of company assets.

### Consultation Period

Under the Labor Act the consultation period must last at least 15 days in companies with fewer than 50 employees and at least 30 days in companies with 50 employees or more. The applicable collective bargaining agreement, however, may require a longer consultation period.

During the consultation period, the company and employees discuss the reasons for the dismissals and the possibility of avoiding or reducing their negative effects on the employees in an attempt to negotiate a possible agreement.

### Administrative Authorization

Once the consultation period ends, the employer must notify the labor authorities whether or not an agreement has been reached with the employee representatives.

If an agreement has been reached during the consultation, the labor authorities will issue a resolution within 15 days authorizing the termination of the labor relationships.

If no agreement is reached during the consultation period, within 15 days the labor authorities will, depending on whether the documents submitted reasonable evidence of the need for the proposed measures according to the legal causes, issue a resolution approving or rejecting, wholly or partially, the employer's petition.

If the dismissals are authorized, the employee will be entitled to 20 days of salary per year of service, up to a maximum of 12 months of salary, unless the company has agreed to provide a greater severance compensation. If the dismissals are not authorized, the employer will not be allowed to dismiss the employees. In any case, the labor authorities' decision can be appealed before the courts of the contentious-administrative jurisdiction.

The advantages of reaching an agreement with employee representatives during the consultation period are substantial since the labor authorities will normally not authorize collective dismissals unless the legal requirements have been strictly met or unless an agreement has been reached with the employees. If the authorization is not granted, unlike objective dismissals, the employer will not be able to dismiss the employees by simply paying them the severance compensation of 45 days of salary per year of service. Thus, oftentimes agreements reached during the consultation period entail costs for such dismissals well in excess of 45 days of salary per year of service.

## **Discrimination**

### **Laws On Employment Discrimination**

The basic source of law in Spain is the Spanish Constitution of 1978. In this respect, Articles 13 and 14 of the Spanish Constitution read as follows:

- “Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other condition or personal or social circumstance” (Article 14);
- “Aliens shall enjoy in Spain the public freedoms guaranteed by this Title, under the terms established by treaties in the law” (Article 13.1).

Moreover, Article 9.2 of the Constitution imposes a duty on authorities to promote the appropriate conditions, which will ensure equal treatment to men and women, and to remove any barriers that inhibit equal treatment.

In implementation of the Spanish Constitution, Spanish labor law has established specific rules that implement the Spanish Constitution in the field of employment and, in some cases, extends the protection against discrimination to additional groups. In general terms, the relevant provisions are somewhat varied but may be grouped as follows:

### **General Prohibition Against Discrimination**

Article 4.2 (c) of the Labor Act states that employees have the right not to be discriminated against, directly or indirectly, in seeking work or once employed, for reasons of sex, civil status, age (within the legal provisions), racial or ethnic origin,

social condition, religious or political beliefs or convictions, sexual orientation, affiliation with a union (or lack thereof) or language. Discrimination due to disability is also prohibited, so long as the individual is apt to perform the relevant work.

Discriminatory employment measures are considered null and void. Indeed, Article 17 of the Labor Act provides as follows:

“The statutory orders, clauses established by collective bargaining agreements, individual agreements and employer’s unilateral decisions which contain direct or indirect unfavorable discrimination on grounds of age or disability or when they show favorable or unfavorable discrimination in the employment, as well as with respect to pay, working hours and other work conditions on grounds of sex, origin, including racial or ethnic, marital or social status, religion or convictions, political beliefs, sexual orientation, trade union membership and adherence to union agreements (or lack thereof), family links with other employees within the company and language “within Spain,” shall be considered null and void.”

“Any decisions of the employer that constitute an unfavorable treatment of employees in reaction to a claim made within the company or in reaction to a court claim that aims to require compliance with the principle of equal treatment and no discrimination shall likewise be null and void.”

The provision reiterates the general consequence of a violation of the prohibition against discrimination or employer retaliation; specifically, the law cannot acknowledge the discriminatory or retaliatory act as valid and consequently the act is considered null and void and thus legally ineffective.

### Principle Of No Offences Or Harassment

Article 4.2 (e) of the Labor Act states that employees have a right to privacy and to protection of their dignity, including protection against harassment based on racial or ethnic origin, religion or beliefs, disability, age or sexual orientation, and against sexual harassment and harassment by reason of sex.

### Equal Pay

Article 28 of the Labor Act reinforces the principle of equal pay by requiring employers to provide “equal pay for equal work” with no possible grounds for sex discrimination. Pay is widely defined as including not only base salary, but also all bonuses, commissions and other benefits.

## **Employee Remedy For Employment Discrimination**

With respect to the remedies available for employment discrimination, procedurally, the Constitution provides for the protection of fundamental rights by the ordinary courts of justice. Appeals may be lodged before the Constitutional Court once ordinary proceedings have been exhausted. Courts are constitutionally bound to interpret these fundamental rights in accordance with international law and principles.

In addition, where the equal treatment principle is infringed, the employee concerned can file a claim with the Labor Courts following the appropriate procedures first. The court has power to award compensation, and there is no statutory maximum on the amount of damages that can be awarded.

In connection with dismissals, if an employer dismisses an employee for discriminatory reasons, the dismissal will be considered null and void. Particularly protected in dismissal cases are employees enjoying or who have requested the enjoyment of maternity- or paternity-related rights; if their dismissal is not considered fair, it will automatically be considered null and void. In the field of maternity/paternity-related rights, closely related to sex discrimination issues, the law establishes rights in an attempt to reconcile professional and personal aspects of the employee (e.g., leaves of absence). These rights were significantly developed and extended with a new law in early 2007, the Organic Law 3/2007 of March 22, 2007 on Equality between Men and Women.

## **Potential Employer Liability For Employment Discrimination**

The potential employer's liability for employment discrimination can be summarized as follows:

### **(i) Labor Consequences**

Should the company allow or not take the necessary measures to stop harassment at the work place, the employer could be considered to be failing to comply with its labor obligations; the employee can in such cases claim a type of constructive dismissal and request that his or her labor relationship be terminated with a severance compensation equal to 45 days of salary per year of service, up to a maximum of 42 months. Additionally, the employee could claim an additional compensation for damages caused by the harassment (although no statutory maximum exists on the amount of damages that can be awarded, compensation amounts that courts have awarded to date do not tend to be significant by U.S. standards).

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(ii) Administrative Sanctions

The Labour Offences and Fines Act classifies the following acts or omissions as very serious employment offences and authorizes the imposition of fines ranging from 6,251 euros to 187,515 euros. The offences which may be sanctioned include the following:

- Unilateral decisions of employers involving direct or indirect discrimination based on age or disability or involving any sort of discrimination in the matter of compensation, hours, training, promotion and other labor conditions with respect to sex, ethnic or racial origin, civil status, social status, religion or beliefs, political ideas, sexual orientation, trade union membership and support, kinship with other employees within the same company and language;
- Any decision of the employer that constitutes an unfavorable treatment of employees in response to a claim made within the company or in reaction to a court claim that aims to require compliance with the principle of equal treatment and no discrimination;
- Sexual harassment when it takes place in the framework of the employment relationship, regardless of who the agent may be.
- Harassment based on racial or ethnic origin, religion or beliefs, disability, age and sexual orientation and by reason of sex, when it takes place in the framework of the employment relationship, regardless of who the agent may be, if and when the employer knows of the harassment and fails to take the necessary measures to prevent it;
- Failure to establish an equality plan when the equality plan is required, failure to apply the equality plan or clear breach of the equality plan.
- Establishing conditions through advertised job offers or through any other means that constitute discrimination of any sort, with respect to access to employment for reasons of sex, ethnic or racial origin, civil status, social status, religion or beliefs, political ideas, sexual orientation, trade union membership and support, kinship with other employees within the same company, social condition and language.

Moreover, where the equal treatment principle is infringed, the law provides for the loss of subsidies and discounts the employer may have been enjoying under public employment programs and disqualification from receiving any such subsidies and discounts for a period of six months. Courts may award the employee a compensation for damages caused.

(iii) Criminal Sanctions

Articles 22.4, 314 and 510 of the Spanish Criminal Code prohibit discrimination as follows:

- Article 314 punishes whoever causes “serious discrimination” in public or private employment against a person, based on grounds of ideology, religion or beliefs, or due to the person’s race or ethnicity. The corresponding sanction may be imprisonment in the most serious cases, although a punishment of imprisonment is highly unusual in practice;
- The Spanish Criminal Code includes racist motives as an aggravating circumstance (Article 22.4) in any offence, and punishes, among other acts, incitement to discriminate, dissemination of abusive material, discrimination in public services and professional corporate discrimination, and the promotion of discrimination by associations;
- Section 510 punishes incitement to “discrimination,” “hatred” and “violence,” and the use of offensive expressions against groups or associations based on certain prohibited grounds (i.e., racism, anti-Semitism, religion, ideology, race, sex, illness, etc.) as follows:

“Anyone who incites others to discrimination, hatred or violence against groups or associations for reasons of racism, anti-Semitism or other reasons relating to ideology, religion or beliefs, or on the grounds of the fact that its members belong to a particular ethnic group or race or on the grounds of their national origin, gender, sexual orientation, illness or disability shall be liable to one to three years’ imprisonment and to a six to 12 month fine.”

“The same penalty shall apply to anyone who knowingly or with reckless disregard disseminates false information that is offensive to groups or associations for reasons relating to their ideology, religion or beliefs, or to the fact that their members belong to a particular ethnic group or race or to their national origin, gender, sexual orientation, illness or disability.”

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# Sexual Harassment

## Laws On Sexual Harassment

Section 14 of the Spanish Constitution sets forth the prohibition of sexual discrimination, and section 18.1 guarantees the rights to personal and family privacy and honor. Moreover, the Spanish Labor Act provides certain guarantees against sexual harassment, considering that privacy and dignity are basic employee rights. Those rights include the protection against physical or verbal conduct that may constitute sexual harassment (Section 4.2.e.).

In addition, under recent legislative amendments, section 54.2.g of the Labor Act considers sexual harassment at the work place as a breach of the employment contract and, hence, as a valid cause to dismiss the harasser. In this respect, certain collective bargaining agreements are including sexual harassment expressly as a valid cause for dismissal.

## Employee Remedies And Potential Employer Liability For Sexual Harassment

The employee remedies and the employer's potential liability for sexual harassment can be summarized as follows:

(i) Labor Consequences

As mentioned above for discrimination grounds, should the company allow or not take the necessary measures to stop harassment at the work place, the employer could be considered to have breached its labor obligations, and the employee could claim a form of constructive dismissal and request that his or her labor relationship be terminated with a severance compensation equal to 45 days of salary per year of service, up to a maximum of 42 months of salary. Additionally, the employee could claim an additional compensation for damages caused by the harassment.

(ii) Administrative Sanctions

Sexual harassment when it takes place in the framework of the employment relationship, regardless of who the agent of the harassment may be, can be deemed as a very serious employment offence and therefore may be sanctioned with a fine ranging from 6,251 euros to 187,515 euros.

(iii) Criminal Sanctions

Section 184 of the Criminal Code states that sexual harassment is a criminal offence. Depending on certain circumstances, the corresponding sanction may consist either of a fine or, in particularly serious cases, an imprisonment ranging from six months to one year. Imprisonment is highly unusual in practice.