

REPORT
on the Free Movement of Workers
in Spain in 2009-2010

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Introduction

We will only refer to the main legal aspects related with transposition of Directive 2004/38 in Spain during 2009.

Chapter I

The Worker: Entry, Residence, Departure and Remedies

The Spanish legal framework is the *Royal Decree 240/2007, of February 16*, on the entry, free movement and residence in Spain of citizens of the Member States of the European Union and other states parties to the agreement of the European Economic Area, in force, since April 2, 2007 (Hereinafter, RD240/2007).

1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS:

Art. 7(1a); Right of residence for more than three months

The Spanish legislator has not transposed the EU citizen's condition *to be workers or self-employed* established in article 7. (1,a) of Directive 2004/38 in any provision of RD 240/2007.

Thus, the Spanish RD 240/2007, under the provision on Right of residence for more than three months explains that “citizens of the EU or of the EEA have the right of residence in Spain for a period of longer than three months” without any mention to their condition of workers, self-employed or any other working condition.

Moreover, Article 3, 2 RD240/2007 explains that all persons to whom the RD is applicable have the right to access to any work activity, studies, in the same conditions as Spaniards.

Art. 7 (3 a-d); Retention of the status of worker:

Considering that the condition of worker or self-employed (established in article 7. (1a) of Directive 2004/38) has not been transposed in Spain, the Spanish legislator does not mention either the retention of the status of worker of the article 7 (3) of Directive 2004/38.

Art. 8(3a); Registration certificate (...).

The RD 240/2007, in coherence with what we have just explained, does not mentioned any administrative formality in order to obtain the Registration Certificate except that UE or EEA citizens are obliged to apply for the registration certificate before the end of the three months period time after their arrival. Once the citizen has made the application and paid the relevant fee¹, s/he will be given a registration certificate displaying his name, nationality, address, date of registration and Foreigner's Identity Number (NIE).

¹ Order PRE/3654/2007 of 14 December 2007 on taxes to be paid in order to obtain administrative authorisations, immigration documents and frontier visas (including the EU or EEA citizens Registration Certificate and Residence Cards as Family Member of EU or EEA citizens). Updated by Act 51/2007 on General Budget of the State 2008, Official Journal number 309 of 24 December. (See, http://extranjeros.mtin.es/es/NormativaJurisprudencia/Nacional/RegimenExtranjeria/RegimenGeneral/documentos/orden_pre3654_07_actualizada_2008.pdf). Application for Registration Certificate or Residence Cards as Family Member (which can be downloaded from www.extranjeros.mtas.es, www.mtas.es or www.mir.es).

Art.14 (4 a-b), Retention of right of residence.

In the RD 240/2007 there is no mention at all to any of the reasons mentioned in the article 14.(4 a-b) as circumstances limitative in relation with the adoption by Spanish authorities of an order of expulsion against UE citizens and their family members

Art. 17, Cases in which the right of permanent residence in the host MS shall be enjoyed before completion of a continuous period of five years of residence

The cases involving the acquisition of the right to permanent residence before having complied with the five years of continuous residence stipulated in articles 17.1 and 2 of Directive 2004/28 were transposed in sections 2, 3 and 4 of article 10 of RD 240/2007. However, the Spanish legislator has omitted the transposition of the second part stipulated in article 17.1.a) which states that *“If the law of the host Member State does not grant the right to an old age pension to certain categories of self-employed persons, the age condition shall be deemed to have been met once the person concerned has reached the age of 60”*. Finally, Sections 3 and 4 of article 17 of Directive 2004/38 are transposed in Spain in sections 3 and 5 of article 10 of Royal Decree 240/2007.

Art. 24 (2), Equal treatment

Article 24 (2) of Directive 2004/38 has not been transposed into Spanish legislation. Regarding equal treatment in general, article 3 (4) of RD 240/2007 establishes that *“All the Union citizens residing on the basis of this Royal Decree in Spain shall enjoy equal treatment with the Spanish people within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State, or other states parties to the agreement of the European Economic Area, and who have the right of residence or permanent residence”*.

2. SITUATION OF JOBSEEKERS:

The RD 240/2007 does not regulate jobseekers situation as a consequence of the lack of transposition of working conditions foreseen in the article 7.1 of Directive 2004/38. In practice, this lack of transposition implies that the jobseekers have the right to stay and look for work as Spaniards, without specific limitation for them. Moreover, as said *supra*, article 3, 2 RD240/2007 explains that all persons to whom the RD is applicable have the right to access to any work activity, studies, in the same conditions as Spaniards.

- a) Is it in line with case law – Do they have to register? They have to register just like other EU or EEA citizens (that means before the end of the three months period after entry).
- b) How long can they stay without formalities? If the EU or EEA citizen spends less than three months in Spain, s/he only needs his passport, or a valid identity card that shows his nationality. Family members who are not members of an EU or EEA State need to enter with a valid passport and in many cases (Regulation EC 539/2001) with a visa or to show the family residence of a citizen of the EU issued by another Member State. After three months they need to ask for a residence card. The RD 240/2007 is in accordance

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with the stipulations preview in article 6 and recital 9 but not with article 14.4 of Directive 2004/38 that as we have mentioned supra has not been transposed.

3. OTHER ISSUES OF CONCERN

No questions.

Chapter II

Members of the Worker's Family

1. THE DEFINITION OF FAMILY MEMBERS AND THE ISSUE OF REVERSE DISCRIMINATION

The Article 2 of RD 240/2007 defines family members of the EU or EEA.² The conclusion that one can see reading this disposition is that the Spanish legislator has chosen the widest definition of the family nucleus and equates married couples with common law partners legally registered in another Member State equating these to those recognised in Spain.

The question of reverse discrimination in Spain has been reduced with the modification of RD 2393/2004 on general alien's regulations by the Third Final Disposition introduced by the RD 240/2007.

2. ENTRY AND RESIDENCE RIGHTS

The right to enter, leave, move within and reside freely on Spanish territory is recognised in the article 3 of RD 240/2007 for all family members of the EU or EEA citizens as essential rights. However, a number of requirements or formalities must be complied by the family members of the EU or EEA citizen to enter and to life in Spain.

The Spanish legislator conditions for the entry of family members of EU or EEA citizens for a stay which is *less than three months* are foreseen in article 4,2 of RD 240/2007. The Family members who are not nationals of a Member State (*so-called third country family members*) can enter in Spain with a valid passport for a period of time that cannot exceed of three months.

On July 10, 2009 the Spanish Council of Ministers approved Royal Decree 1161/2009, of July 10 amending Royal Decree 240/2007, of February 16, on the entry, free movement and residence in Spain of citizens of the Member States of the European Union and other states parties to the agreement of the European Economic Area. As a result of Royal Decree 1161/2009, of July 10, 2009, has been amended the section 2 of article 4 of Royal Decree 240/2007 implementing into Spanish law the section 2 of article 5 Directive 2004/38. In consequence, the possession of the valid residence card issued by any Member State exempts

2 Art.2 "a) The spouse, on condition that the declaration or agreement of nullity of the matrimonial bond, divorce or legal separation has not taken place. b) The partner he has a union analogous to the matrimonial union with, which is registered in a public register established for this purpose in a Member State of the European Union or in a State which is a party to the European Economic Area, which prevents the possibility of two simultaneous registrations in this State, on condition that this registration has not been cancelled, which must be sufficiently accredited. Matrimony and registration as a registered couple will be considered to be incompatible with each other. c) The direct descendents and those of the spouse or registered partner on condition that the declaration or agreement of nullity of the matrimonial bond, divorce or legal separation has not taken place or the registration as a couple has not been cancelled, those under twenty-one years old, those over this age who live under his charge or are incapacitated. d) The direct grandparents, and those of the spouse or registered partner who live under his charge, on condition that the declaration or agreement of nullity of the matrimonial bond, divorce or legal separation has not taken place or the registration as a couple has not been cancelled."

the family members from the visa requirement. Spain shall grant third country family members every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.

In the cases of residence for the family members of EU or EEA citizens (or of Spanish citizens) in Spain for more than three months, the obligation is laid down to request and obtain a residence card of a family member of a citizen of the EU. This request will be made to the Office of Aliens and a receipt of request will be granted until the effective handover of the residence card (article 8 RD 240/2007)³.

3. ACCESS TO WORK

The access to work for family members of the EU or EEA Citizens is regulated by art.3 of RD 240/2007. These family members, with the exception of the descendants over twenty-one years old and the descendants under his charge, can access any type of employed or self-employed work in equal conditions with Spaniards.

4. THE SITUATION OF FAMILY MEMBERS OF JOBSEEKERS

RD 240/2007 does not regulate jobseekers situation as a consequence of the lack of transposition of working conditions in general. That needs to be understood as a right for these jobseekers and their families to stay and look for work in the same conditions that the Spaniards.

Nevertheless, article 3, 2 RD240/2007 explains that all persons to whom the RD is applicable with the exception of dependent descendants over the age of 21 and dependent direct relatives in the ascending line have the right to access to any work activity, studies, in the same conditions as Spaniards.

3 Art. 8. The documentation which must be submitted to this Office of Aliens are as follows: “a) The valid passport of the applicant in force. In the event that this document has expired, a copy must be submitted together with the application for renewal. b) Accrediting documentation of the family, matrimonial or registered union bond, when necessary, duly translated and with an apostille or legalised, which grants the right to the card, c) The certificate of the registration of the family member who is a citizen of a Member State of the European Union or of another State party to the Agreement on the European Economic Area who accompanies the applicant or whom the applicant is going to join. d) In the cases in which this is required by article 2 of the present Royal Decree, documentation accrediting that the applicant for the card lives under the charge of the citizen of a Member State of the European Union or of another State party to the Agreement on the European Economic Area, and is a family member. e) Three recent colour photos with a white background, ID card size.”

Chapter III

Access to Employment: a) Private sector and b) Public sector

A) ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

a.1. Equal treatment in access to employment (e.g. assistance of employment agencies)

In theory there is an apparent absence of direct or indirect discrimination in Spanish legislation and practice. The private work placement agencies have the same obligations as regards EU or EEA citizens and their families as does the National Employment Institute as the public authority by virtue of the Resolution of July 11, 1996.

a.2. Language requirement

The majority of private job offers request knowledge of English or another Community language.

B) ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR.

b.1. Nationality condition for access to position in the public sector.

Article 57 of the Spanish *ACT 7/2007, 12 April on The Basic Statute of the Public Employee* (in force since 13 May 2007) contains a provision which includes verbatim that:

“Nationals of Member States of the EU can access public employment in the same condition as Spanish citizens with the exception of those directly or indirectly participating in the exercise of public power or in the functions which are intended to safeguard the interest of the State or the Public Administrations. Therefore, different government of each territorial level (State, Autonomous Community and Town Halls) will determine the groups of public employments (...) which can not be accessed by the national of other EU States”

Therefore, all different Spanish administrations (State, different Autonomous Communities and Town Halls) prepare their own Acts to implement the Basic Statute of the Public Employee. Currently, there are different Draft Autonomous Acts on the Public Sector that we will follow in order to inform the OFMW properly and promptly on what exceptions those Acts approved regarding the access of EU citizens to Public Sector.

Meanwhile, current legislation continue to be applying (except in cases contrary to the new Basic Statute of the Public Employee). Thus, Royal Decree 543/2001 of 18 May listed the State public service post not open to EU citizens: Diplomatic corps, Arm forces, Judiciary, State economists, State tax authorities, prison civil servants, doctors, nurses... However, different Decrees of the Autonomous Communities (in force) added to their own list the post of firemen, policemen or forestall agents adopting a position not in line with EU case-law.

It is to be expected (and controlled) that the Acts implementing the Basic Statute on Public Employee will follow ECJ case-Law on the issue.

b.2 Language requirements

Since 1990, the Spanish Supreme Court and the Spanish Constitutional Court, in general, stated that the requirement to know the co-official language (in Galicia, Basque Country, Cataluña, Valencia)is compatible with the principle of equality, merits and capacity established in the Spanish Constitution, as far as in some cases is a test of capacity. Nevertheless, the level of knowledge must be in proportion with the use of the language in the job in question.

However, regarding Navarra, the Spanish Supreme Court (in two different sentences of May 2009 and July 2009) has withdrawal articles 21.1 and 23,1 of the Foral Decree on use of Euskera in Navarra (Decree 29/2003). Following those articles, already withdrawal, on the evaluation of Euskera as a merit in the tenders to the Administration; the Euskera was evaluated 10% plus than English, French or German at the Navarra's Basque zone and 5 % plus that those other European languages in the Navarra's mixed zone.

b.3 Recognition of professional experience for access to public sector.

Royal Decree 1837/2008 of November 8 on transposition into Spanish law of Directive 2005/36/EC on recognition of professional qualification came after the resolution of ECJ of 27 October 2008 declaring that Spain has failed to fulfil its obligations under the Directive. RD follows the structure of the Directive and includes the list of all regulated professions

Galicia's High Court of Justice, 10 October 2009 (Resolution number: 817/2009, Appeal number : 595/2008) understood that a Tender for the domestic transfer of Primary Attention Paediatrician was not discriminatory regarding EU free movement of workers even the Portuguese professional experience of the applicant (D. Hilario) was not taking into account as a merit:

“we are in a domestic mobility process and it is not to be evaluated the professional experience of D. Hilario in Portugal neither the experience of Spaniards in the Public Health sector of other EU Members”.

b.4 Other aspects of access to employment.

An interesting issue is the case of troops and sailors in the Spanish Army and Navy (professional military service), under Art 3, 1 of Law 8/ 2006 of April 24 Spanish nationality is required to enter the Spanish navy or Army. However, it is possible “*to be a national of the countries which have special historical, cultural and linguistic links with Spain*” (listed as Argentina, Bolivia, Costa Rica, Colombia, Cuba, Chile, Ecuador, El Salvador, Equatorial Guinea, Guatemala, Honduras, México, Nicaragua, Panamá, Paraguay, Peru, Dominican Republic, Uruguay and Venezuela Royal Decree 1224/2002). No mention at all to any of

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the EU Member States. In any case, it is to be noted different functions carried out by officers as compared with soldiers and sailors.

Regarding, for example, civil protection and emergency attention, specifically regarding firemen, the Autonomous Communities have the competence. Thus, the law of the Balearic Islands 3/2006 of March 30 provides that “*They are agents of the authority given that condition it is understood that the Spanish nationality is required*”. Idem in Andalucía, Navarra and others.

Chapter IV

Equality of Treatment on the Basis of Nationality

1. WORKING CONDITIONS (DIRECT, INDIRECT DISCRIMINATION)

The section 4 of article 3 of RD 240/2007 established that all the citizens of the Union who reside in Spain will have equality of treatment with Spanish citizens in the area of application of the Treaty of the European Community. The effects of this right will extend to the family members who do not have the nationality of the Member State of the EU or the EEA beneficiaries of the right of residence or the right of permanent residence.

This principle of equality of treatment is complemented by the stipulations in the recitals of RD 240/2007 which states, “In any case, the approval of the aforementioned Directive 2004/38/CE, of April 29, 2004, has made it necessary to incorporate its content to Spanish legislation, in accordance with what is stipulated in *articles 17 and 18* of the Treaty Constituting the European Community *as regards citizenship of the Union*, as well as the rights and principles inherent to these and to the principle of non-discrimination due to reasons of gender, race, colour, ethnic or social origin, genetic characteristics, language, religion or convictions, political opinions or of another type, belonging to a national minority, assets, birth, incapacity, age or sexual orientation”.

2. SOCIAL AND TAX ADVANTAGES.

The main issue related with tax and free movement of workers in 2009 has been the ECJ judgment of 6 October 2009 against Spanish Tax Law regime for violation of article 56 EC and article 40 of EEA. We mention this case because initially the Commission also considered the infringement of article 39 EC.

The Spanish Tax Law regimen implied that, until 31 December 2006, the taxation of non-residents' income was governed by the consolidated law on the tax on the income of non-residents (Texto Refundido de la Ley del Impuesto sobre la Renta de no Residentes), adopted by Royal Legislative Decree No 5/2004 of 5 March 2004 (BOE No 62 of 12 March 2004, p. 11176, ‘the TRLIRNR’), Article 25(1)(f) of which subjected capital gains to a flat rate of tax of 35%. Under Article 46 of the TRLIRNR, non-residents at least 75% of whose total income came, in a single tax year, from employment or economic activities in Spain were able to choose to be taxed as persons liable to the tax on the income of natural persons. Article 46(3) provided that the personal and family circumstances of those workers were to be taken into consideration.

That system was repealed as from 1 January 2007 (the repealed was the reason invoke by the Commission to end the procedure of infringement of article 39 of EC but not the procedure for violation of article 56 EC and 40 EEA) with the entry into force of Law No 35/2006 on the taxation of income of natural persons and partially amending the laws on corporation tax, taxation on the income of non-residents and taxation on wealth (Ley 35/2006 del Impuesto sobre la Renta de las Personas Físicas y de modificación parcial de las leyes de los Impuestos sobre Sociedades, sobre la Renta de no Residentes y sobre el Patrimonio, BOE

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No 285 of 29 November 2006, p. 41734, and corrigendum, BOE No 57 of 7 March 2007, p. 9634).

Precisely, as consequence of this judgment the Spanish government has approved a new Tax Law regimen with a rate of tax of 19% for the taxation of non-residents' income obtained in Spain. This new Tax Law regimen will be in force as from 1 January 2010.

Chapter V
Other Obstacles to Free Movement

No obstacles of another nature have been found in relation to the free movement of workers.

Chapter VI Specific Issues

1. FRONTIER WORKERS

There is not controversial issue neither did case law relate with C-212/05 *Hartmann* in Spain.

The only reference to frontier workers in the RD 240/2007 concerns the recognition as beneficiaries of the right to permanent residence before the period of five years finalises. Specifically, in the article 10, section 2, letter c) of the RD 240/2007.

2 SPORTSMEN/ SPORTSWOMEN

Basketball:

In the Agreement subscribed to on March 18, 2008 up to the 2011-2012 season by the Spanish Basketball Federation, the Association of Basketball Clubs and the Association of Professional Basketball Players, clearly established the following rule with contracting quotas. Specifically, it was established that there must be a minimum quota of 4 or 5 players who might be selected for the Spanish national team, depending on whether the squad is made up of 11 or 12 players, a maximum of 2 extra-Community players, which is not obligatory, and there must be 5 players from the European FIBA area, without including countries belonging to the Cotonou Agreement.

Volleyball:

The Volleyball competition norms for the season 2009/10 establishes in the point 4 referred to federal licenses and permits that

“4.1.1 .- All equipment must necessarily deal *in the Super League* team before the start of the competition a minimum of ten licenses, they will at least 5 players whose origin is the Federation RFEVB. This minimum number will be maintained throughout the competition.... 4.1.5 .- Each team may have with federal approval in force up to 7 players which Federation of origin is not the RFEVB . In each party the teams only may align a maximum of 5 players which Federation of origin is not the RFEVB”.

And the General competition Norms for volleyball season 2009/2010:

“9.3 .- In *Division Honor Men and Women* cannot be processed at the same time more than seven players whose licenses Federation of origin is not the RFEVB. Each party the teams may align a maximum of five players whose Federation of origin is not the RFEVB.

9.4 .- In *Super League-2 Men and Women* cannot be processed at the same time more than four licenses of players whose Federation of origin is not the RFEVB. In each match can align up to four players whose Federation of origin is not the RFEVB.”

Handball:

In the General provisions of the Official competitions organized by ASOBAL (Asobal League - Super Cup - Asobal CUP – King Cup) for the SEASON 2009-2010, the point 1.13.a) Establishes that

“Pursuant to the agreement with the RFEBM. and endorsed in ASOBAL Assembly of July 15, 2008, for the seasons 2008/09, 2009/2010, 2010/2011 and 2011/2012, in competitions organized by ASOBAL the teams *can play with nine (9) foreign players, independent of their EU citizenships or not.*”

3. THE MARITIME SECTOR

The main issue for the 2009 report is that *Law 25/2009* of 22 December 2009 (Article 23) amending various laws to adapt the Spanish legal framework to the freedom of services, introduces a reform of article (Article 77 (2)) and a new paragraph (P. six, letter a)) in the Fifteenth Additional provision of the Law 27/1992 of 24 November, regarding the State Ports and Merchant Marine.

Article 77 (2) is amended as follows:

(2). The captain and first mate of national ships must be nationals of a Member State of the European Economic Area, except in cases where it is provided by the Maritime Administration that these jobs are to be filled by Spanish nationals, because a great part of their activities involves public powers competences. In the case of merchant vessels, at least 50 percent of the crew must be from Spain or from another Member State of the European Economic Area.

The new Paragraph Six, letter a) of the Fifteenth Additional Provision reads as follows:

Nationality: The Captain and first mate of the vessel must have, in any case, the nationality of a Member State of the European Union or European Economic Area, except in cases in which it is established by the Maritime Administration, that these jobs must be filled by citizens of Spanish nationality because a great part of their activities involves public powers competences.

At least 50 percent of the crew must be from Spain or from another Member State of the European Economic Area.

Notwithstanding the foregoing, when there is not availability of Spanish nationality crew or any other member of the European Union or European Economic Area, for compelling reasons of economic viability of transport service, or any other cause that could have a fundamental influence on the existence of the service, the Ministry of Public Transport may authorize the hiring of nationals from third countries, in higher proportion than previously stated, always ensuring the safety of ships and navigation and taking into account the formalities laid down by Spanish legislation on foreigners and immigration.

4. RESEARCHERS /ARTISTS

There are no specific provisions under RD 240/2007 regarding artists, so general aliens' regulations could be mentioned.

5. ACCESS TO STUDY GRANTS

Order EDU/1901/2009, of 9 July, on university study grants for academic year 2009-2010, Official Journal, 15 July 2009. As other years and following Spanish and EU legislation, study grants are open to Spaniards and to other EU citizens (in this last case the students or their parents must have a work in Spain)

Chapter VII

Application of Transitional Measures

1. TRANSITIONAL MEASURES IMPOSED ON EU-8 MEMBER STATES BY EU-15 MEMBER STATES AND SITUATION IN MALTA AND CYPRUS

Spain is not concerned with these transitional measures.

2. TRANSITIONAL MEASURES IMPOSED ON WORKERS FROM BULGARIA AND ROMANIA.

From 1 January 2009 the Instruction DGI/ SGRJ/2009, of February 5, 2009 recognises to any Bulgarian and Romanian nationals and their family members under the scope of the Instruction, the right to enter, stay and reside under conditions contained in RD 240/2007. In consequence, nationals from Bulgaria and Romania and their family members have the same free movement as any EU citizen.

Chapter VIII

Miscellaneous

All the issues of this chapter will be dealt with in the thematic report on enforcement of regulation 1612/68.

5. SEMINARS, REPORTS AND ARTICLES

Reports

ALLUÉ BUIZA, A. and MARTÍNEZ PÉREZ, E.J. (Dir), *Relaciones laborales y acción sindical transfronteriza*, editorial Comares, Granada, 2009.

Articles

Rodríguez Crespo, M. J., “Contenido y limitaciones de la libre circulación de trabajadores”, *Iuris: Actualidad y práctica del derecho*, N° 126, 2008, p. 40-50.

Arnáiz, A., “La libre circulación de trabajadores, la ampliación a Bulgaria y Rumanía y el Tratado de Lisboa sobre la Unión Europea”, *Información laboral. Legislación y convenios colectivos*, N° 37, 2008, p. 2-14.

Martín Dégano, I., STJCE 15.9.2005, ‘Comisión/Reino de Dinamarca’, As. C-464/02, *Crónica tributaria*, N° 129, 2008, p. 224-232.

Rodríguez-Piñero Royo, M. C., “La libre circulación de los trabajadores en el espacio europeo: del Tratado de Roma a la Directiva ‘Bolkenstein’”, *Relaciones laborales: Revista crítica de teoría y práctica*, N° 15-16, 2009, p. 45-68.

Rodríguez-Piñero Royo, M. C., “Libertad sindical, derecho a la negociación colectiva y derecho de huelga en la jurisprudencia reciente del Tribunal Europeo de Derechos Humanos”, *Relaciones laborales: Revista crítica de teoría y práctica*, N° 23-24, 2009, p. 13-37.

Ramos Moragues, F., “El principio de libre circulación de trabajadores en el ámbito público”, *Aranzadi social: Revista Doctrinal*, Vol. 2, N° 12, 2009, p. 83-99.