ECIJA

20 / 03 / 2020

COVID-19:
Updated FAQs for business in Spain

Avenida Diagonal 458, Planta 8, 08006 Barcelona
+ 34 933 808 252
info@ecijalegal.com

www.ecija.com

ECIJA
Av. Diagonal, 458, planta 8ª
08006 Barcelona · Tel: +34 933 808 255
www.ecija.com

CONTENT

1 LABOUR AND EMPLOYMENT 1
2 CORPORATE 4
3 TAX 5
4 DATA PROTECTION 7
5 PUBLIC SECTOR CONTRACTING 10
6 PRIVATE AGREEMENTS 12

1 LABOUR AND EMPLOYMENT

Royal Decree-Law 8/2022, March 17th, on exceptional measures to deal with the economic and social impact of COVID-19 includes some specific updates on employment regulations. Herein a short summary of the changes to the main questions companies may be addressing in the current environment.

What is an ERTE and what is it used for?

An ERTE (Expediente de Regulación Temporal de Empleo) is a measure set up in Article 47 of the Workers Statute in its Article 47. It is a temporary legal measure allowing companies to: (i) temporarily suspend employment contracts or (ii) temporarily reduce the working hours of their employees; whenever there are duly justified economic, organizational, technical or productive reasons (ERTE due to objective reasons) or a situation of force majeure (ERTE due to force majeure) justifying it.

An ERTE intends to mitigate the negative situation of a company by exempting it from totally or partially paying wages of the workers affected by the measure.

What is new relating COVID-19?

- Expansion of the cases in which the ERTE due to force majeure can be called upon.
- Simplification and reduction of the terms to process an ERTE, both ordinary and force majeure.
- Social security exemptions for employers.
- Universalization of unemployment benefits.
- The unemployment benefit received by the workers will not consume their rights to future benefits they could otherwise be entitled in case of a hypothetical future dismissal.

After the approval of the Royal Decree, in which cases can I apply for an ERTE due to force majeure?

Force Majeure ERTES may be filed by companies in which the interruption of employment contracts or reduction of working hours is directly caused by the direct impact of COVID-19, including of the governmental measures implemented following the declaration of the State of Alarm and which may have entailed any of the following consequences:

- Suspension or cancellation of activities
- Temporary closure of public venues
- Restrictions on transport, whether public, private or of merchandise
- Lack of supplies that hinder the regular development of the activity

Force majeure shall also be deemed to occur in all those extraordinary cases in which the activity of the undertaking must be stopped following the infection of the workforce or the preventive isolation decreed by the competent health authority.

After the recent modifications, how is the processing of the ERTEs?

The processing of any kind of ERTE, ordinary or by force majeure, has been simplified by the Royal Decree.

With regard to force majeure ERTES, the need to negotiate with the workers' legal representatives are eliminated. The processing of this type of ERTEs is subject to the steps below, with the effective date being that of the causal event.

1) Application by the company, which in turn must notify the affected workers with the supporting documentation.

2) Resolution by the Labour Authority within 5 days, following a report, where appropriate, from the Labour and Social Security Inspectorate.

As for the processing of Ordinary ERTEs the RD has simplified the whole procedure, which is now as follows:

1) Application by the company. Simultaneously, the affected workers are informed and provided with the supporting documentation.

2) Constitution of the workers representative commission within 5 days.

3) Consultation period between the company and the workers representatives for a maximum period of 7 days.

4) If applicable, a report from the Labour and Social Security Inspectorate, within a period of 7 days.

What are the social security exemptions for employers who carry out an ERTE due to force majeure?

In all those ERTEs authorized on the basis of temporary force majeure linked to Covid-19, it is foreseen that employers will be exempted from the payment of Social Security contributions for all the affected workers. The exemption is for the whole of the Social Security contribution for companies with less than 50 workers, and of 75% in companies having more than 50 employees.

However, in order to benefit from this exemption, companies must maintain employment for at least 6 months, as of the date in which the activity is restarted.

What is the situation of the affected workers?

Workers affected by ERTE, of whatever kind, will be entitled to unemployment benefits. This right is recognised for all workers, even those who do not comply with the minimum contribution period (360 days in the last 6 years). Furthermore, the period during which the benefit is received will not be credited against their total unemployment rights benefits.

To calculate the benefits corresponding to each employee, the remuneration received during the last 180 days worked will be taken into account. Should the worked time be below that figure, the number of days worked before the suspension of the contract will be considered.

Further Questions

Is the implementation of teleworking mandatory?

Not really, however, companies are encouraged to implement teleworking mechanisms, whenever possible due to the features of each job position. In order to implement this measure, a risk assessment must be carried out as established in Article 16 of the Law on the Prevention of Occupational Risks.

The above obligation shall be understood to have been fulfilled through a self-evaluation carried out voluntarily by the affected employee f. The RD provides a document to enable such self-diagnose.

What can I do, in case I'm in charge of children or have dependent relatives, preventing me from working and taking care of them simultaneously?

Employees having people dependent on them for care or assistance, such as young children or grandparents, will have the right to have their working day adapted and/or reduced, provided that they can prove such circumstances.

- The flexibility may go as far as reducing/adapting the working day by 100%, with the corresponding reduction/adaptation of the salary.
- The reduction of the special working day does not require any prior notice.

CONTACT

Alfonso Maria Autuori

Labour and Employment Law

aautuori@ecijalegal.com

+ 34 933 808 255

2 CORPORATE

Royal Decree Law 8/2022 includes measures on corporate matters including, among others, the preparation and approval of the Annual Accounts, and the calculation of deadlines during the state of alarm.

Can meetings of the governing and management bodies of associations, civil and commercial companies, cooperatives and the trustees of foundations take place during the state of alarm?

Yes, it is possible. Article 40 of RD 8/2020 enables the possibility to hold these meetings either by videoconference, subject to certain requirements or in written form even when these alternatives are not expressly provided in the articles of association of the entity.

Has the term to prepare and approve the 2019 annual accounts been extended?

Yes, the current deadline has been suspended during the duration of the state of alarm. It will be resumed since the end of this for an additional three months.

Likewise, the term for the approval of the annual accounts by the general shareholders meeting has also been extended by an additional three months as from the date in which the accounts will have been prepared by the company directors.

These extensions are discretionary for the companies.

How about the auditing of the accounts?

Should the company be subject to auditing, the term for verification will be extended for two months from the end of the state of alarm.

What if the announcement of the call for the general shareholders meeting to approve the annual accounts have already been published?

The directors may modify the place and time established for the meeting or revoke the call. In the second case, they will have the obligation to call it again within the month following the end of the state of alarm.

What happens if a company is in cause of dissolution prior to or during the state of alarm?

In any of these cases, the legal term for the directors to call the general shareholders meeting to adopt the necessary measures is suspended until the end of the state of alarm. If the dissolution cause occurs during the validity of the state of alarm, the directors will not be liable for the debts contracted by the company during that period.

What other terms or rights have been altered by the RD 8/2020?

The two most important are: (i) the exercise of the separation right for shareholders of limited liability companies; and (ii) the reimbursement of contributions in cooperatives.

CONTACT

Maite Mascaró

Corporate Law

mmascaro@ecijalegal.com

+ 34 933 808 255

3 TAX

Which are the main rules approved by Spanish government to react to the situation produced by COVID-19 in Spain?

- Royal Decree-Law 7/2020, of March 12th;
- Royal Decree 463/2020, of March 14th;
- Royal Decree-Law 8/2020, of March 17th.

Which are the main emergency tax measures included in the Royal Decree-Law 7/2020, of March 12th?

RD 7/2020 has approved a tax relief for small and medium businesses and self-employed persons, it mainly consists of a tax debt payment deferral.

1. **Is it an automatic regime?**

   No, it is an optional regime.

2. **Who does this measure apply to?**

   Small businesses, whose turnover is below 6.010.121,04 euros in 2019 as well as self-employed professionals.

3. **Which debts are covered by this measure?**

   It will be granted a deferral of payment arising from tax returns whose filing deadline expires between March 13th and May 30th 2020.

   This deferral may also be granted to tax debts derived from withholdings and payments on account, output VAT and payments on account of Corporate Income Tax.

4. **Can debts be deferred without guarantee?**

   Yes, any tax debt below 30.000 euros may be adjourned without need for the debtor to provide security.

5. **Which is the maximum deferral term?**

   Six months.

6. **Does the deferral measure implies the accrual of late payment interest?**

   There is a partial relief. Interest will only accrue as from the third month of deferment. The first three months will be exempt from interest.

What other measures have been granted?

Essentially measures extending terms in tax proceedings and in the settlement of debts from a tax return issued by the Tax Authorities.

RD 8/2020 extends terms to April 30th and May 20th respectively. The first deadline is for notice of payment issued before the publication of the Royal Decree, the second one for payment requests issued thereafter. Those deadlines are to be considered of last resort, taxpayers may make avail of the longer terms which may have been offered by the Tax Authorities in their payment requests.

The extension of the terms also applies to deadlines on all sort of administrative procedures, requests for information, tax inspections, seizures and proceedings against the Tax Authorities.

Unfortunately, the terms for filing voluntary tax returns has not been extended, despite the difficulties which may result from the current blockade to business activities arising from the State of Alarm.

1. **Do the extensions above apply to customs regulations?**

   No, as customs matters have their own specific regulation.

2. **Notwithstanding the special measures, is the taxpayer allowed to fulfil his tax duties within the ordinary term not taking advantage of these specials measures?**

   Yes.

3. **Will the period elapsed between the entry into force of Royal Decree-Law to 30 April 2020 be taken into account for the maximum duration of a tax procedure?**

   No.

4. **Will the period elapsed between the entry into force of Royal Decree-Law and 30 April 2020 be taken into account for statute of limitations and statute of response purposes?**

   No.

Which are the main rules approved by the Catalan government to face the situation produced by COVID-19 in Spain?

What the Catalan authorities have approved is mainly a deferral from payment of the taxes it manages such as Transfer Tax, Stamp Duty and Tourists Tax. The moratorium will last through out the duration of the Emergency Period.

CONTACT

Santiago Ylla

Tax Law

santiagoylla@ecijalegal.com

+34 933 808 255

4 DATA PROTECTION

Data Protection Authorities worldwide have been publishing many guidelines, press releases, and reports in the past weeks addressing the issue of personal data protection in the midst of the COVID-19 pandemic outbreak. Companies are facing many questions on how to fulfil their obligations in this context. In Spain, the Spanish Data Protection Authority published a legal report available here, and frequently asked questions available here (Spanish).

This informative note will address some of the most common questions regarding the processing of personal data in the context of this public health crisis.

Can personal data protection regulations be disregarded?

No, they remain fully applicable.

This is confirmed by the Spanish Data Protection Agency's Report 0017/2020 (see above) and FAQs (see above) on COVID-19, as well as the European Data Protection Committee's Declaration on the processing of personal data in the context of the COVID-19 outbreak available here.

Further, these publications also highlight that the General Data Protection Regulation (hereinafter, referred to as the "**GDPR**")[1] already includes the required legal mechanisms to deal with a pandemic situation.

In what circumstances may personal data be processed in the context of the COVID-19?

As data controllers, companies might process personal data of their employees relating to: (1) Whether they have experienced symptoms similar to those caused by the COVID-19; (2) The body temperature of employees coming to the office; or (3), Whether an employee has been infected by the COVID-19.

Being health data, the data above is considered as sensitive data, and therefore, appropriate measures must be applied to protect it.

Is the data subject's consent required to process its personal data?

Most companies are already aware that the main legal basis for processing special categories of personal data is the explicit consent of the data subject.

However, there are also other provisions in the GDPR that make possible to process special categories of personal data where the processing is necessary: (1) To comply with legal obligations, (2) To protect vital interests of the data subject or of another natural person, and (3) For reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health.

In the specific COVID-19 case, the European Data Protection Board highlights that the GDPR provides for legal grounds to enable employers and competent public health authorities to process personal data in the context of epidemics, without the need to obtain the consent of the data subject. For example, when the processing of personal data is necessary for the employers, for reasons of public interest in the area of public health, or to protect vital interests, or to comply with another legal obligation.

[1] Regulation (EU) 2016/679 (EU) of the European Parliament and of The Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC available here.

Must employees be informed about the data processing?

Yes, companies must comply with their information obligations regarding this processing as provided for in the GDPR.

This information will generally have to be provided when the personal data is collected from the data subject. However, in the event that sensitive personal data is not collected from the data subject himself (i.e. where a third party has provided them), information to the data subject will have to be provided as soon as possible and always within the timeframes established by the GDPR.

Are there other issues in the regulation that must be taken into consideration?

Yes, for instance, many companies are implementing remote working to continue providing their services, while at the same time protecting their employees and contributing to the measures established by the government to stop the pandemic.

In such cases, it is recommended that that employees be reminded that the company's rules on use of devices provided continues to apply, and that security measures be implemented according to the nature of this situation.

In the event that it is not possible to provide corporate devices to all employees, the company would need to assess whether it authorizes the use of the employees' personal devices for professional use (known as "Bring Your Own Device"). Should the company decide to authorize such use, it will be necessary to establish specific BYOD rules and standards to, protect information security.

Concerning the disclosure of possible cases of affected persons to the company's employees, information should be provided without identifying the data subjects to preserve their privacy. However, the Spanish Data Protection Agency's FAQs allows identifying affected individuals whenever necessary to protect the health of other employees. In such circumstances, it is important to remind recipients of such information that it can only be used for the exclusive and specific purpose to prevent more infections and to adopt health protection safeguards.

CONTACT

Carlos Pérez

IT, Risk & Compliance

+ 34 933 808 255

cperez@ecijalegal.com

5 PUBLIC SECTOR CONTRACTING

Article 34 of RD 8/2022, of 17 March, on urgent extraordinary measures to deal with the economic and social impact of COVID-19, includes measures in the area of public procurement to alleviate the consequences of the pandemic situation and which affect public sector contracts under execution.

Are all existing and ongoing public sector contracts suspended?

No. Article 34.1 of the RD establishes different effects, both with regard to their possible suspension and with regard to compensation for the contractor, depending on the type of contract in question, therefore a case-by-case analysis must be carried out.

What about contracts for successive supplies and services?

Article 34.1 RD establishes that contracts for the successive provision of services will be suspended whenever their execution becomes impossible as a result of COVID-19 or due to measures implemented by the Authorities to fight it. This would be, for instance, the case of school transport service contracts. The suspension will be extended until the service can be resumed and the contracting authority notifies the contractor accordingly.

In these cases, the contracting body must compensate the contractor for damages suffered during the suspension period. Damages will be awarded, upon request and proof of existence and of their amount, for the following concepts:

- Salaries and related expenses paid to personnel assigned to the contract as of March 14th 2020;
- Expenses for maintenance of the final guarantee;
- Expenses for rental or maintenance of machinery, installations and equipment directly assigned to the execution of the contract;
- Expenses for insurance policies linked to the contract.

The rules set out in the Public Sector Contracts Act (*Ley de Contratos del Sector Público*) shall not be applicable in the event of suspension of the contract and, consequently, no compensation shall be paid for items other to those indicated, the suspension of the service shall not constitute a cause for termination of the contract.

Royal Decree indicates that both the suspension and the right to compensation will only proceed when the contracting body, at the request of the contractor expressly resolves on the impossibility of executing the contract. Should the contracting body fail to respond to the request of the contractor to such an extent, the request shall be deemed rejected.

What about other supply and service contracts?

Royal Decree contemplates the failure of meeting deadlines as a result of COVID-19 or of the measures taken by the authorities. In such cases, whenever contractor offers his

undertaking to meet his commitments and requests and extension of the deadline, the contracting body must grant such an extension for a period at least equivalent to the time lost due to the circumstances indicated. No penalties will be applied. .

Moreover, the contractor will be entitled to compensation for the additional salary costs incurred as a result of the time lost, up to a maximum of 10% of the contract price and subject to justification.

What about construction contracts?

The contractor may request their suspension or the extension of their execution period in the event that the factual situation created by COVID-19 or the measures adopted by the Authorities prevent its performance and until the cause preventing the continuity disappears.

The suspension or extension of the deadline will only be applicable when the contracting body, at the request of the contractor resolves the request favourably. As in previous cases, administrative silence will be considered as a rejection of the contractors' request.

The contractor shall be entitled to receive compensation for the concepts mentioned above. However, the right to receive compensation is subject to the condition that both the contractor and its subcontractors and suppliers are up to date with the fulfilment of their labour and social obligations as of 14 March 2020 and that the contractor is up to date with the fulfilment of its obligations to pay its subcontractors.

What about concession contracts for works or services?

The concessionaire will have the right to re-establish the economic and financial balance of the concession, either by extending the term to a maximum of 15% from the duration initially intended or by modifying its economic regime. This mechanism will only be applied at the concessionaire's request and with proof of the reality and amount of the loss of income and increase in costs incurred as a result of the de facto situation created by COVID-19 or the measures adopted by the authorities in their fight against the pandemic, provided that the granting entity is unable to execute the contract for the reasons indicated.

What about contracts in the so-called "excluded sectors"?

The measures indicated will apply, mutatis mutandis, to contracts awarded by public sector entities within the framework of Law 31/2007 or of Book I of Royal Decree-Law 3/2020, on procurement in the water, energy, transport and postal services sectors.

What about the contracts linked to the crisis by COVID-19?

Logically, the above measures will not apply to contracts for pharmaceutical, health care or any other services or supplies linked to the COVID-19 crisis. Nor may contracts for security, cleaning or maintenance of computer systems be suspended, nor those necessary to ensure the mobility and security of transport infrastructures and services.

Is it possible that measures additional to those of RD be adopted?

Yes, by Minister of Transport, who is given the competence to adopt any measures that he considers appropriate within the scope of his powers, and which may even involve the modification of causes for suspension of agreements.

Is it possible to award contracts through emergency procedures?

Yes, but only the Central State Administration, not the other public entities.

CONTACT
Miquel Àngel Alonso
Public Law Department
ma.alonso@ecijalegal.com
Tel: +34 933 808 255

6 PRIVATE AGREEMENTS

Can COVID-19 exempt from the fulfilment of private contracts?

Yes, in cases where the purpose of the agreement has been forbidden, restricted or limited by reason of the declaration of the state of alarm and the measures implemented to combat COVID-19. As this would constitute an unforeseeable or inevitable event, it would be possible to invoke force majeure (art. 1105 Civil Code) or the "rebus sic stantibus" clause (as per existing Spanish Case Law Courts) to try to obtain the resolution, review or suspension of an existing agreement subject to any of those circumstances.

How different are the causes of force majeure and the "rebus sic stantibus"?

While the cause of force majeure allows to exempt or limit the contractual responsibility of the party who cannot fulfil its obligations, including the termination of the agreement, the clause "rebus sic stantibus" seeks to rebalance benefits amongst the parties, considering the disproportion and the imbalances that the new circumstances have created in one of them.

What should be done while the State of Alarm remains in force?

Considering that diligence is required to all parties in an agreement, if a party wishing to mitigate potential damage is advised to send a statement to the other party alleging the existence of a cause of force majeure which may prevent or hinder the fulfilment of his

contractual obligations, opening the door to a claim to apply a rebus sic stantibus provision.

CONTACT

Jordi Pujante

Dispute Resolution and Litigation

jpujante@ecijalegal.com

+ 34 933 808 255

ECIJA