SQUIRE PATTON BOGGS

# Coronavirus Disease 2019 (COVID-19) Update

# Legal Issues in Spain

18 March 2020

The purpose of this document is to guide companies to mitigate the impact of the coronavirus disease 2019 (COVID-19), commonly known as the "coronavirus" or COVID-19, on their Spanish business, workforce, supply chains, administrative deadlines, etc.

Here, you will find a summary of the main legal issues to have in mind, key to the development of business activities in Spain, along with some recommendations that we suggest for companies for the performance of their activity in the current environment.

## WHAT THE "STATE OF ALARM" MEANS FOR ALL OF THE SPANISH TERRITORY

On the 14 of March 2020, the Spanish Council of Ministers agreed and issued **Royal Decree 463/2020 by means of which the State of Alarm was put in place for the management of the health crisis caused by COVID-19** (hereinafter, the Royal Decree).

The State of Alarm affects **the entire Spanish territory for a period of 15 calendar days**, extendable subject to the approval of the Spanish Parliament (the Alarm Period).

During the Alarm Period, the authority with full power to apply and make effective the Royal Decree is be the Spanish Central Government. Likewise, the State Security Forces, the Regional Police and the Municipality Police are under the direct command of the Homeland Security Minister. Police and other state agents will carry out the necessary checks and controls on persons, goods, vehicles, premises and establishments to guarantee the full effectiveness and implementation of the Royal Decree.

Moreover, the Royal Decree also foresees the intervention of the Spanish armed forces, who will have the same status and faculties as the non-military state agents when carrying out the functions set out in the Royal Decree.

The purpose of this note is to summarize the measures agreed by the government in both the **Royal Decree** and the subsequent rules issued up to the day of this Report.

### Mobility Restrictions of Persons and Vehicles

On a general basis, mobility is forbidden except for individual displacements **limited to essential activities. Essential activities** are the purchase of food, medicine, the access to health centers or financial institutions, return to official residence or the assistance to sensitive persons. Movement of citizens to their work places is also permitted and has to be duly proven.

The Homeland and Security Minister may order, if necessary, road closure or road section closure.

### Measures Affecting the Education Sector

Throughout the Alert Period, any education will be done using online modalities, whenever possible. All education centers will remain shut down in the Alert Period.

Retail and Commercial Activities and Measures in Relation to Civil and Religious Ceremonies

The Royal Decree states, as a general principle, that all kinds of retail premises and establishments shall remain closed throughout the Alarm Period.

There are limited retail activities allowed. Retail shops selling the following items and/or providing the following services may remain open:

- Food and beverages
- Pharmaceuticals, medical, optical and orthopedic products
- Motor fuel
- Hygiene products in general
- Press, stationery, tobacco, technological and telecommunication equipment, pet food, internet or telephone related products
- The national post and private courier companies
- Dry cleaning and laundry services

Hotel and restaurant activities are in suspension with the exception of food delivery services. Likewise, all kind of libraries, monuments, as well as premises and establishments where public shows, sports and leisure activities take place, will remain closed. Any other activity or establishment that, in the opinion of the authority, may involve a risk of infection are also suspended.

Access to religious places of worship, as well as the attendance to civil and religious ceremonies, including funerals, is permitted subject to the effective implementation of health measures.

## Measures to Strengthen the National Health System and to Ensure the Supply of Goods and Services

The Minister of Health will be in direct communication with civil authorities of the Public Administrations and in particular, the health authorities, to ensure they are operational and to secure an efficient distribution of technical and human resources throughout the Spanish territory. Therefore, all civil and military health resources, both public and private, are under the command of the Minister of Health.

The Ministry of Health will guarantee the supply of the necessary products for the efficient running of the public health system.

## Transport Restrictions and Measures

Public and private passenger transportation is reduced by at least a half, except for local rail services, which will be kept on a regular basis. Passenger transport vehicles (such as taxis and Uber cars) have to adopt daily cleaning protocols based on the relevant recommendations provided by the Ministry of Health.

## Court Proceedings and Administrative Deadlines

Furthermore, according to the Additional Provisions of the Royal Decree, the **time limits foreseen in the court proceedings regulation for all Court Orders are suspended and interrupted as per the entry into force of the Royal Decree.** The time limits will start counting once the State of Alarm is over.

Notwithstanding the foregoing, the relevant judge or court may instruct the practice of any judicial proceedings that may be necessary to avoid irreparable damage to the rights and legitimate interests of the parties to the proceedings.

Similarly, administrative deadlines are suspended and, in general, prescription and expiration terms to exercise any legal actions and rights are in suspension throughout the Alarm Period.

The **Royal Decree has entered into force and is fully effective since its publication in the *Official Gazette,*** BOE 67/2020, published on the **14 of March 2020.**

# EXTRAORDINARY URGENT MEASURES APPROVED BY THE GOVERNMENT OF SPAIN TO ADDRESS THE ECONOMIC AND SOCIAL IMPACT OF COVID-19

Since the issue of Royal Decree 463/2020 establishing the State of Alarm for the management of the health crisis caused by COVID-19, the government of Spain has approved several Royal Decrees Laws with extraordinary urgent measures of a commercial, real estate, tax labor, administrative, court proceedings and financial nature, to address the economic and social impact of COVID-19, which we describe below:

## Corporate Measures – Mortgages and Social Assistance

Under Royal Decree-Law 8/2020 of 17 March, on extraordinary urgent measures to address the economic and social impact of COVID-19, the government has approved the following measures:

### Mortgage Debt for the Purchase of Primary Residence

The government has put in place measures to ensure the moratorium of mortgage debt on the purchase of the primary home of those who suffer from extraordinary difficulties in servicing their payment because of the COVID-19 crisis.

Such measures will apply to debtors, under the following cases of economic vulnerability, of loans or secured loans agreements with a real estate mortgage:

a. The mortgage debtor becomes unemployed or, if they are an entrepreneur or a self-employed, suffers a substantial loss of income or a substantial drop in their sales.

b. That all household members' income does not exceed, in the month preceding the request for a moratorium:

    i. Generally speaking, the three-fold limit is the monthly Multi-Effect Public Income Indicator (hereinafter IPREM).

    ii. This limit will increase by 0.1 times the IPREM for each dependent child in the household. The increase applicable per dependent child shall be 0.15 times the IPREM for each child in the case of a single-parent household.

    iii. This limit will by 0.1 times the IPREM for each person over 65 years of age who is a member of the household.

    iv. In the event that any of the members of the family unit have a disability of more than 33%, a situation of dependency or illness that permanently incapacitates them for an employment activity, the limit provided for in sub-paragraph (i) shall be four times the IPREM, without prejudice to the cumulative increases per dependent child.

    v. The limit provided for in sub-paragraph (i) shall be five times the IPREM, when the mortgage debtor is a person with cerebral palsy, mental illness or intellectual disability, with a recognized degree of disability equal to or greater than 33%, or a person with physical or sensory disability, with a degree of recognized disability equal to or greater than 65%, as well as in cases of serious illness that accredits the person or their caregiver, to carry out an employment activity.

c. That the mortgage fee, plus basic expenses and supplies, be greater than or equal to 35% of the net income received by all members of the household.

d. That, because of the health emergency, the family unit has suffered a significant alteration of its economic circumstances in terms of housing access effort, in the terms defined in the next point.

For this purpose:

a. That there has been a significant change in economic circumstances where the effort of the mortgage burden on household income has multiplied by at least 1.3.

b. That there has been a substantial drop in sales when this fall is at least 40%.

c. By household consisting of the debtor, their spouse not legally separated or a registered *de facto* partner and the children, regardless of their age, who reside in the dwelling, including those linked by a relationship of guardianship, guardianship or family care and their non-legally separated spouse or registered *de facto* partner, residing in the dwelling.

For establishing the situation of economic vulnerability, the debtor must prove it to the creditor by submitting the following documents:

a. In the case of a legal situation of unemployment, by means of a certificate issued by the managing entity of the benefits, which lists the monthly amount received in respect of unemployment benefits or allowances.

b. In the event of cessation of activity of self-employed persons, by means of a certificate issued by the State Agency of the Tax Administration or the competent body of the Autonomous Community, where appropriate, based on the declaration of cessation of activity declared by the interested party.

c. Number of people living in the residence:

    i. Family book or *de facto* domestic partnership document

    ii. City registration relating to persons registered at the residence, with reference to the time of submission of the supporting documents and to the previous six months

    iii. Declaration of disability, dependence or permanent inability to carry out an employment activity

d. Ownership of the property:

    i. Simple note from the Real Estate Registry for all members of the household

    ii. Deeds of sale of the home and the granting of the loan with a mortgage guarantee

e. Responsible declaration of the debtor or debtors relating to the fulfilment of the requirements to be considered without sufficient financial resources under this Royal Decree Law.

The government provides that the same measures shall also apply to the guarantors and guarantors of the principal debtor, in respect of their primary residence and with the same conditions as those laid down for the mortgage debtor.

Non-debtor guarantors, guarantors and mortgagers in cases of economic vulnerability may require the entity to exhaust the principal debtor's assets, without prejudice to the application to the principal debtor, where appropriate, of the measures provided for in the Code before claiming the secured debt, even if the contract had expressly waived the benefit of exclusion.

In addition, the government provides that debtors falling within the scope of the RD may request from the creditor, up to 15 days after the end of the term of this RD-L, a moratorium on the payment of the mortgage-guaranteed loan for the acquisition of your primary residence. The debtors shall accompany, together with the request for a moratorium, the abovementioned documentation.

Once the aforementioned documentation has been received, the creditor will proceed to its implementation within a maximum period of 15 days.

Once the moratorium is granted, the creditor entity shall inform the Bank of Spain of its existence and duration for accounting purposes and of non-allocation thereof in the calculation of risk provisions.

The moratorium application referred shall entail the suspension of the mortgage debt for the period stipulated for it and the consequent non-application during the period of validity of the moratorium of the early maturity clause contained in the contract of the mortgage.

During the term of the moratorium, the creditor may not demand payment of the mortgage fee, nor of any of the concepts that comprise it (return on equity or interest payments), either in full, or in a percentage. No interest will accrue either.

In relation to secured loan or loan contracts secured with a real estate mortgage in which the debtor is in the cases of practical economic vulnerability and proves to the entity in that circumstance, the application of default interest for the term of the moratorium. This inapplicability of interest shall apply only to debtors or contracts covered by the rule developed by the government.

The debtor of a mortgage-guaranteed loan or loan that has benefited from the moratorium measures set out in the rule without meeting the requirements laid down therein shall be liable for any damages that may have occurred, as well as all expenses generated by the implementation of these easing measures, without prejudice to the responsibilities of any other order to which the debtor's conduct may give rise. In this regard, it should be noted that the amount of damages and expenses may not be less than the benefit wrongly obtained by the debtor for the application of the rule. The debtor who, voluntarily and deliberately, seeks to place or remain in cases of economic vulnerability in order to obtain the application of these measures, will also be liable, with the accreditation of this to the entity with which the loan or credit is arranged.

## Extraordinary Measures Applicable to Legal Persons Under Private Law

Even if the statutes had not provided for this, during the alarm period, the sessions of the governing and administrative bodies of associations, civil and commercial societies, the governing council of the cooperative societies and the board of trustees of the foundations may be held by videoconference that ensures authenticity and bilateral or plurilateral connection in real time with the image and sound of the attendees in remote. The same rule shall apply to the delegated commissions and other compulsory or voluntary commissions that it had constituted. The session shall be deemed to have been held at the domicile of the legal person.

Even if the statutes did not provide for this, during the period of alarm, the agreements of the governing and administrative bodies of associations, civil and commercial societies, the governing council of the cooperative societies and the board of trustees of the foundations may be adopted by written vote and without a session whenever decided by the President and should be adopted at the request of at least two of the members of the body. The same rule shall apply to the delegated commissions and other compulsory or voluntary commissions that it had constituted. The session shall be deemed to have been held at the registered office.

The provisions of Article 100 of Royal Decree-Law 1784/1996 of 19 July approving the Regulation of the Commercial Register, even if they are not commercial companies, shall apply to all these agreements.

The period of three months from the end of the financial year for the governing or administrative body of a mandatory legal entity to formulate the annual, ordinary or abbreviated, individual or consolidated accounts and, if legally enforceable, the management report, and to formulate the other documents that are legally binding by company law is suspended until the end of the state of alarm, resuming again for another three months from that date.

In the event that, at the date of declaration of the State of Alarm, the governing or administrative body of a legal entity required has already formulated the accounts for the previous financial year, the period for the accounting verification of those accounts, if the audit is mandatory, shall be deemed to be extended for two months from the end of the state of alarm.

The ordinary general meeting to approve the accounts for the previous financial year shall necessarily meet within three months of the end of the deadline for the purpose of the annual accounts.

If the convocation of the general meeting had been issued prior to the declaration of the State of Alarm, but on the day of the statement was after that declaration, the administrative body may modify the place and time provided for the meeting or revoke the convening agreement by announcement published at least 48 hours on the company's website and, if the company does not have a website, in the Official State Gazette. In case of revocation of the convocation agreement, the administrative body shall make a new call within the month following the date on which the alarm status has ended.

The notary who is required to attend a general meeting of members and release minutes of the meeting may use real-time means of remote communication that adequately ensure the fulfilment of the notarial function.

Even if legal or statutory cause arises, in capital companies, the partners may not exercise the right of separation until the end of the State of Alarm and extensions thereof that, if applicable, are agreed.

The withdrawal of contributions to cooperative partners that cause decommissioning during the duration of the alarm status is extended until six months have elapsed since the end of the alarm status.

In the event that, during the term of the State of Alarm, the term of duration of the company fixed in the social statutes elapses, the dissolution of full rights will not take place until two months have elapsed from the end of that state.

In the event that, before the declaration of the State of Alarm and during the term of that state, the legal cause or statutory cause of dissolution of the company is met, the legal period for the call by the administrative body of the general meeting of partners to adopt the agreement to dissolve the company or the agreements intended to ener the case is suspended until the end of that State of Alarm.

If the legal or statutory cause of dissolution has occurred during the term of the State of Alarm, administrators will not be liable for social debts incurred in that period.

## Suspension of the Expiry Period of the Register Seats

During the term of the State of Alarm and, where appropriate, extensions of the same that could be agreed, the following measures shall be taken:

First, the expiry period of presentation seats, preventive entries, mentions, marginal notes and any other registration seats that may be cancelled over time is suspended.

Second, the calculation of the deadlines will resume the day after the end of the alarm status or its extension if applicable.

## Term of the Duty of Application for Competition

1. While the State of Alarm is in effect, the debtor who is in a state of insolvency shall not have the duty to request the declaration of competition. Until two months have elapsed from the end of the alarm status, judges will not allow for the processing of necessary tender applications that were submitted during that state or filed during those two months. If a voluntary tender application has been submitted, it shall be accepted for processing, preferably, even if it is not later.
2. You shall also not have the duty to apply for a declaration of competition, while the State of Alarm is in force, the debtor who has communicated to the court competent for the declaration of tender the comb of negotiation with creditors in order to reach a refinancing agreement, or an out-of-court payment agreement, or to obtain accessions to an advance proposal for an agreement, even if the period referred to in the fifth paragraph of Article 5a of Law 22/2003 of 9 July, Insolvency, had expired.

## TAX MEASURES

### Royal Decree-Law 7/2020

From a tax perspective, in order to mitigate the impact that COVID-19 may have on the most vulnerable sectors of the economy, e.g., SMEs and self-employed individuals, the Spanish tax authorities will allow the deferral of tax payments, provided the following requirements are met:

- Tax payment due between 13 March and 30 May 2020, both inclusive
- Tax due not exceeding €30,000
- Only taxpayers with a turnover not exceeding €6,010,121.04 in 2019 will be entitled to request such deferral

Finally, the deferral will be granted for a six-month-period, and no late payment interest will be accrued during the first three months.

### Royal Decree-Law 8/2020

The payment periods of the tax debt for settlements made by the Administration, the maturities of the terms and fractions of the deferment and fractionation agreements granted, the deadlines for meeting the requirements, embargo measures and requests for information, to make claims in procedures for the application of taxes, penalties or declaration of invalidity, repayment of undue income, rectification of material errors and revocation, will be extended until April 30, 2020, if they are not finalized at the entry into force of Royal Decree-Law 8/2020, that is, 18 March 2020.

However, if those deadlines are communicated from 18 March 2020, after Royal Decree-Law 8/2020 comes into force, deadlines will be extended until 20 May 2020.

Finally, the deeds of formalization of contractual novation of loans and mortgage loans that occur under Royal Decree-Law 8/2020 will be exempted from the gradual quota of notary documents of the modality of documented legal acts of the Tax on Patrimonial Transfers and Documented Legal Acts.

## EMPLOYMENT MEASURES

This section has been drafted taking into account in particular Royal Decree establishing the State of Alarm and Royal Decree-Law 8/2020 of extraordinary urgent measures to address the economic and social impact of COVID-19, with entry into force on 17 March 2020.

### What are an employer's health and safety obligations in relation to its staff in these circumstances?

Employers have a duty to ensure the health and safety of their employees and other persons related to the company (e.g., clients, providers, etc.) against occupational risks.

This would include taking reasonable steps to control the spread of the coronavirus at sites under the control of the employer.

Employees are under a legal obligation to cooperate with their employer and other duty holders to enable them to comply with health and safety legislation.

Taking this into account, teleworking is established as a priority measure against temporary suspension or reduction of activity. In such a scenario, employers may be required to provide the employee any additional supplies or equipment necessary to facilitate home working.

In order to facilitate the exercise of teleworking, the obligation to carry out a risk assessment will be understood to have been fulfilled through a self-assessment made by the employee.

### Should employers place restrictions on travel and displacements?

Yes, companies could place restrictions on business travel and displacements in order to guarantee the health and safety of its employees.

Apart from this, according to the declaration of the State of Health Emergency (State of Alarm) approved by the Spanish government by Royal Decree 463/2020 that entered into force on 14 March 2020, mobility is prohibited except for individual displacements limited to basic activities. Basic activities include buying food, medicine, access to health centers or financial institutions, returning to official residence or helping vulnerable people. Citizens are also allowed to move to their workplaces and must be properly tested.

### What should employers do if a member of staff is confirmed as having the virus and has recently been in the workplace?

In such circumstances, the employer, together with the Health and Safety Prevention Service, must activate any protocol implemented in the company.

The Spanish government has not recommended closing workplaces, so the normal activities of the company must continue, but they should follow best practice guidance against the spread of the virus. This may include temporary suspension or transfer of staff during sanitization, etc.

### How should employers deal with a member of staff who refuses to come to work because they are concerned about the risk of infection?

The absence will be only justified if a medical service orders the employee to self-isolate.

Therefore, if an employee has not been isolated by an authorized body or at the request of the employer, e.g., after a business trip to a high-risk area, the absence would be unjustified and the employer could apply disciplinary measures. Nevertheless, the employer should take steps to understand an employee's concerns before taking any action.

In the undesirable event that coronavirus spreads such that there is real reason to suspect infection in the workplace and immediate legislative measures are not adopted, employees may invoke the risk to their health established in Article 21.2 of the Law on the Prevention of Occupational Risks to justify their absence for work.

## If staff want to wear facemasks at work, are employers entitled to say no?

According to the recommendations of the *Ministerio de Sanidad*, generally healthy people do not need to wear facemasks, so employers in the majority of circumstances can object to the wearing of them. They may agree to some flexibility on this in relation to the elderly or those with pre-existing conditions that put them at greater risk of harm than would normally apply.

If staff is concerned about contracting the virus, they should follow normal best practice about reducing the risk of infection, including washing hands frequently, etc.

## What happens with employees affected by the virus?

They will considered to be on sick leave. The sick leave period has been considered by the government as an accident at work. This implies that the affected employee will receive a public sick leave benefit equivalent to 75% of their monthly social security contribution base.

The monthly social security contribution base is usually equivalent to their regular monthly salary, with a maximum cap of €4,070.10. Therefore, if some of your employees receive a monthly salary higher than this maximum amount, they will only receive from the State the amount of €3,052.27 (75% of €4,070.10).

Having said that, we should also analyze whether or not the different Collective Bargaining Agreements (CBA) impose the obligation for the company to supplement the public sick leave benefit.

## What happens with employees who have to remain at home due to family circumstances (i.e., to take care a minor child or an old/ill relative)? What measures has the government implemented in relation to the adaptation of the timetable and the reduction of the working hours in these cases?

Employees who prove that they have to remain at home due to family circumstances, as well as relatives by inbreeding until the second degree, shall be entitled to the accommodation of their work day and/or to the reduce it thereof in exceptional circumstances related to the transmission of COVID-19.

Such circumstances shall be deemed to be in the case where:

- The presence of the employee is necessary for the care of any of the indicated persons who, for reasons of age, illness or disability, need personal and direct care as a direct consequence of COVID-19
- Decisions taken by the authorities related to COVID-19 involve the closure of schools or of any other nature that
- The person who has so far been in charge of the immediate care or assistance of the family member could not continue to do so for justified reasons related to COVID-19

## Adapting the Work Timetable

The adaptation of the day in these cases is a right whose initial specificity corresponds to the worker, provided that it is justified, is reasonable and proportionate, taking into account the specific needs of care and the needs of the company. So you have to do everything you can to come to an agreement.

Adaptation may consist of:

- Shift change
- Time alteration
- Flexible schedule
- Split or continuous day
- Change of work center
- Changing functions
- Change in the way work is provided, including remote work provision

## Part Time

Workers shall be entitled to a special reduction in working hours in the situations provided for in Article 37.6 of the Workers' Statute (e.g., care for children under 12 years of age, persons with disabilities and sick or elderly relatives) when the exceptional circumstances envisaged occur. This reduction shall be governed by Articles 37 of the Workers' Statute, except for the following:

- You must be informed to the company 24 hours in advance
- You can reach 100% of the day
- In the case set out in the second paragraph of Article 37.6, it will not be necessary for the family member requiring care and care not to carry out paid activity

If the employee is already enjoying any right of conciliation, they may temporarily waive it or have the right to have it modified so that it can better accommodate the current exceptional circumstances.

## Can employers impose employees to utilize vacation time during this period?

In Spain, it may not be valid imposing employees to use paid holiday during these circumstances where the business activity is low as a consequence of the coronavirus.

We understand that this may be considered invalid because courts (following the doctrine of the European Court of Justice) have declared that holidays are periods of time to exclusively rest and linked to the personal/family life. Therefore, there should be no restrictions in this regard when an employee is on holiday.

Therefore, considering that during these periods, employees may not be able to travel and carry out all the personal/family activities usually done on annual leave. We understand that this possibility will not be allowed by the courts in case of challenge by the employees.

Having said that, please note that in Spain, holiday periods of time must be agreed between the parties. If there is no agreement, usually, it is common practice that the employer decides the period of time related to half of the vacation days and the employee decides the period of time related to the other half. If no agreement is reached, a court will decide and will also take into account the company´s organizational needs.

### If the situation worsens and employers are considering closing one of their sites, do employers have a right to lay off staff in these circumstances? Are employers obliged to continue to pay staff?

According to Article 47 of the Workers' Statute, employers can apply a temporary employment suspension (ERTE) or a reduction of working hours if economic, technical, organization, productive or *force majeure* reasons are met. In normal circumstances, this process would include a consultation period.

In the current circumstances, a wide number of companies can apply for an urgent process based on *force majeure* reasons. The urgent process is more simple and straightforward. In essence, in the current circumstances, a large number of companies can apply for an urgent process based on *force majeure* reasons. The urgent process is more simple and straightforward and has been regulated by the recent Royal Decree-Law 8/2020. This rule has clarified which situations are considered as force majeure:

- Loss of activity resulting from measures taken as a consequence of COVID-19, including the declaration of the State of Alarm, involving the suspension or cancellation of activities
- Lack of supplies that prevent the continuation of the activity
- Urgent and extraordinary situations due to staff infection
- Adoption of preventive isolation measures issued by the health authority

Regarding the proceeding:

1. It shall be initiated by an application form from the company, which shall be accompanied by a report on the link of the loss of activity as a result of COVID-19, and, where appropriate, the corresponding supporting documentation.
2. The company must communicate its request to the employees and provide the previous report and supporting documentation to the workers' representatives.
3. The labor authority will issue a resolution within five days, and its resolution will be limited to verify the existence, when applicable, of the alleged *force majeure*.
4. The labor authority may decide to request a report from the Labour and Social Security Inspectorate, which will be issued within five days.
5. The company is entitle to decide the applicable measure in relation to the suspension of employment contracts or reduction of working hours, which will take effect from the date of the event causing the *force majeure*.

The recent declaration of State of Alarm (*Estado de Alarma*) approved by the Spanish government by Royal Decree 463/2020 of March 14, implies a clear *force majeure* scenario in many of the business activities that will suffer an impact as a result of this extraordinary measure. This is particularly clear in various sectors, including retail, given only the shops selling the following items and/or providing the following services may remain open:

- Food and beverages
- Pharmaceuticals, medical, optical and orthopaedic products
- Motor fuel
- Hygiene products in general
- Press, stationery, tobacco, technological and telecommunication equipment, pet food, internet or telephone related products
- The national post and private courier companies
- Hairdressing, dry cleaning and laundry services

Restaurant activities have been suspended with the exception of food delivery services. Likewise, all types of libraries, monuments, as well as premises and establishments where public shows, sports and leisure activities take place, will remain closed. Any other activity or establishment that, in the opinion of the authority, may involve a risk of infection are also suspended.

If the existence of the alleged *force majeure* has not been established, the appropriate procedure for the suspension of contracts for economic, technical, organizational and production reasons may be initiated whose regulation has been modified by the Royal Decree-Law 8/2020.

The suspension of the employment contract in accordance with the provisions of Article 45.2 of the Workers' Statute, "exonerates from the reciprocal obligations to work and to remunerate work." However, in general, companies were not exempted from paying the employer's social security contributions during the ERTE.

However, Royal Decree-Law 8/2020 has established that in cases of ERTE by temporary *force majeure* linked to COVID-19; the General Treasury of Social Security will exempt the company from the payment of the business contribution, as well as the fees for concepts of joint collection, for the duration of the suspension or reduction of hours when the company:

- As of 29 February 2020, it had fewer than 50 workers registered in Social Security
- If the company has 50 or more workers in social security, the exemption from the obligation to quote will reach 75% of the business contribution

Such exemption shall have no effect on the employee, with the consideration of that period being in fact quoted for all purposes.

The exemption of quotas shall be applied by the General Treasury of Social Security at the request of the employer, upon communication of the identification of the employees and period of suspension or reduction of hours.

The obligation to pay contributions on behalf of employees is also suspended during this situation, as they are paid for by public unemployment services.

On the other hand, suspended employees can enjoy unemployment benefits during this situation.

In some cases, companies may want to supplement the unemployment benefit partially or wholly up to the employee's total wage, although it would not be mandatory, particularly in an ERTE due to force majeure where there is no negotiation with workers.

Urgent ERTE Process (*force majeure*) in further detail would be as follows:

The employer will start the ERTE due to *force majeure* by filing the application form before the competent labor authority (the competent labor body of the Autonomous Community). Together with the application form, the employer must attach any necessary evidence to support its decision. The application form and the competent labor authority will change depending on the region where the employer operates.

At the same time, the employer must notify its decision to the workers' representative. If there are not workers' representatives in the work center, the employer must notify and inform directly all employees.

Once the application has been submitted, the competent labor authority shall obtain a report from the Labour and Social Security Inspectorate. It can also carry out or request any other actions or reports it considers essential, but the decision must be issued within a maximum of five days from the date when the application was filed in the register of the competent body.

If necessary, before issuing a decision, the labor authority may, within one day, hear the company and the workers' legal representatives.

The decision of the labor authority must be limited, where appropriate, to confirm the existence of the *force majeure* alleged by the employer. However, the employer is the one entitled to take the decision on the application of suspension measures that will be effective from the date of the event causing the *force majeure*.

The employer must communicate this decision to the workers' representatives (or, in their absence, directly to the employees) and to the labor authority.

If the existence of the alleged *force majeure* has not been established, the appropriate procedure for the suspension of contracts for economic, technical, organizational and production reasons may be initiated.

## Ordinary Suspension of Employment (ERTE) Process Based on Economic, Technical, Organizational and Production Causes

In this case, the procedure would be regulated by Title I of Royal Decree-Law 1483/2012 of 29 October, which approves the regulation in the procedures for collective redundancy and suspension of contracts and reduction of working hours, with the changes established in the new regulations:

If there are no workers' representatives, the representative committee for negotiation shall be composed of the most representative and representative trade unions in the sector and with legitimacy to form part of the negotiating committee of the collective agreement. The committee shall consist of one person for each of these trade unions, with decisions taken by the representative majorities.

In the case of the representative committee, that committee shall be composed of three workers, elected in accordance with Article 41.4 of the Workers' Statute.

In any case, the commission must be set up within five days.

f. The consultation period shall not exceed the maximum period of seven days.

g. The report of the Labour and Social Security Inspectorate, the request of which shall be empowered by the labor authority, shall be evacuated within seven days.

Considering that these are temporary measures that can only be maintained for the duration of the risk of the situation, if the company returns to normal activity, the measurement should be deactivated.

The suspension of the employment contract in accordance with the provisions of Article 45(2) of the Workers' Statute "exempts from the reciprocal obligations of work and to pay for work." In this ordinary ERTE case, the obligation to pay the business part in relation to social security contributions remains in force.

The obligation to pay contributions on behalf of employees is also suspended during this situation, as they are paid for by public unemployment services.

On the other hand, suspended employees can enjoy unemployment benefits during this situation.

In some cases, companies may want to supplement the unemployment benefit partially or wholly up to the employee's total wage, although it would not be mandatory, particularly in an ERTE due to *force majeure* where there is no negotiation with workers.

### What Are the New Rules Regarding Unemployment Benefits Arising From an ERTE – Either for Greater Cause or for Objective Reasons?

The Public Employment Service may take the following measures:

a. Recognition of the right to unemployment benefit to the workers concerned, even if they lack the minimum sought-after period of occupation.

b. Do not compute this time when unemployment benefit received for the purpose of consuming the maximum periods of perception.

To do this, it will be required that the start of the employment relationship had been before the date of entry into force of the new Royal Decree Law (i.e. they must be discharged on 17 March 2020).

These measures shall apply to the employees concerned whether, at the time of the decision, they have suspended a prior right to unemployment benefit or lack the minimum period of occupation listed to cause entitledness, or not would have received previous unemployment benefit.

In any case, a new right to contribution benefit for unemployment shall be recognized, with the following specialties in respect of the amount and duration:

a. The regulatory basis for the benefit shall be that resulting from the calculation of the average basis for the last 180 quoted days or, failing that, of the less time period, immediately preceding the legal situation of unemployment, worked under the relationship affected employment.

b. The duration of the benefit shall be extended until the end of the period of suspension of the employment contract or the temporary reduction of the working day.

During the period of validity of the extraordinary measures taken to combat the effects of the extension of COVID-19, which involve the limitation of the mobility of citizens or that affect the functioning of public services, applications for discharge the initial or resumption of unemployment benefit made outside the legally established time limits shall not mean that the duration of the entitlement to the corresponding benefit is reduced.

During the period of validity of the extraordinary measures taken to combat the effects of the extension of COVID-19, the Public Service for State Employment may take the following measures:

a. Authorize the managing entity to extend of its own motion the right to receive unemployment benefit in cases subject to the semi-annual extension of the right, so that the failure to apply does not lead to the interruption of the levying of the subsidy unemployment or the reduction in their duration.

b. In the case of beneficiaries of the subsidy for more than 52 years, payment of the subsidy and contribution to Social Security shall not be interrupted even if the filing of the required annual income declaration is made outside the deadline legally.

Finally, it is essential to note that extraordinary measures in the field of employment will be subject to the undertaking's commitment to maintain employment for the period of six months from the date of resumption of activity.

### FINANCIAL MEASURES

Under Royal Decree-Law 8/2020 of 17 March, on extraordinary urgent measures to address the economic and social impact of COVID-19, the government has approved a financial package of liquidity lines to companies through guarantees and loans to avoid a credit crisis in companies. The State guarantee line shall provide guarantees to the financing granted by credit institutions and credit institutions to undertakings and self-employed persons to meet their needs arising, inter alia, from invoice management, the need for circulation, maturities of financial or tax obligations or other liquidity needs amounting to up to €100 billion.

In addition, the government has approved the enabling of an extraordinary line of additional insurance coverage for SMEs in the amount of €2 billion for exporting companies with the insurance coverage of the Spanish Company of Export Credit Insurance, S.A. *Cía. de Seguros y Reaseguros* (CESCE) in its own name and on behalf of the State, lasting six months from the approval of the Royal Decree-Law 8/2020. This line is aimed at exporting companies in which the international business represents at least one-third of its turnover, with the necessary cash loans being eligible for the exporting company, without the need for its direct relationship with one or more international contracts, provided that they respond to new financing needs and not to pre-crisis situations of COVID-19.

Finally, the Executive has approved an amendment to pre-bankruptcy and insolvency legislation. To this end, while the State of Alarm is in force, the debtor who is insolvent shall not have the duty to apply for the declaration of competition and, until two months have elapsed from the end of the State of Alarm, the judges shall not accept for the processing of the necessary applications for tender that had been submitted during those two months. Likewise, the debtor who has communicated the negotiation with the creditors to reach a refinancing agreement of Article 5a of Law 22/2003 of 9 July, Insolvency, shall not have the duty to request the declaration of competition, while the State of Alarm is in force.

## ALARM STATE AND CAUSE OF MAJOR FORCE

We note below our preliminary analysis of the possible impact that the Declaration of the State of Alarm and the measures approved by the government of Spain may have in compliance with the contractual clauses and in particular, in the contracts of leases whose activities have been temporarily suspended.

Although the specific regulations applicable to leases in Spain, this is the LAU, do not include any provision in this regard, the Civil Code establishes as a general principle that the contracting parties will not be liable in cases of force greater. In particular, Article 1105 of the Civil Code provides:

#### Article 1105

"Apart from the cases expressly mentioned in the law, and those cases in which the obligation is declared, no one shall be responsible for those events which could not have been foreseen, or which, if foreseen, were inevitable."

Likewise, Article 1575 of the Civil Code contemplates the possibility of the tenant to request a reduction in the rent for losses arising from extraordinary and unforeseen fortuitous cases:

### Article 1575

"The tenant shall not be entitled to a reduction in the rent for sterility of the rented land or for loss of fruit from ordinary fortuitous cases; but it shall be entitled to a reduction in the rent for loss of more than half of the fruit from extraordinary and unforeseen fortuitous cases, unless otherwise agreed."

Extraordinary fortuitous cases are understood to mean fire, war, plague, unusual flooding, locust, earthquake or any other equally unusual event that the contracting parties could not reasonably have foreseen. Notwithstanding the above, although there are a few Spanish judicial resolutions defending the application of the previous article to cases of urban land leases, it is something very unusual and limited to rustic land.

On the other hand, according to Spanish Case Law, the extraordinary situation arisen as a consequence of the declaration of COVID-19 by the World Health Organization (WHO) as a pandemic, and the resolution and declaration of Sanitary Emergency Status (*Estado de Alarma*) approved by the Spanish government by Royal Decree 463/2020 of March 14, together with other resolutions approved by the respective competent regional authorities, complies with the terms and conditions stated by the Spanish Case Law to be considered as a *force majeure* scenario, subject to the following provisions.

In this sense, the judgement of the Supreme Court number 4688/1983 dated 30 September 1983, establishes that *force majeure*, in its singularity, will have to be studied in each specific case. The legal concept must be deducted from the set of circumstances that motivate the fact or event that, overcoming the will of the obligor and forcing them, determine them to break the corresponding obligation.

The Spanish Case Law provides the main characteristics of *force majeure* situations, among others, is an event that could not be foreseen in the ordinary and normal course of life, it is an unusual or extraordinary event and completely unpredictable and unavoidable, so its adverse effects cannot be avoided even if there is a prudent and diligent conduct by the parties, unavoidable event due to external factors and beyond the industrial sphere of the parties.

In this regard, the judgement of the Supreme Court number 1321/2006 dated 18 December 2006, establishes that "*force majeure* must be understood to be an event that takes place after the date of the agreement, which renders useless any diligent effort to achieve what has been agreed, (…); There must also be a total absence of fault, because fault is incompatible with *force majeure* and fortuitous event; and that "*force majeure*" must consist of a force beyond all control and foresight, and its occurrence must be weighed against the normal and reasonable foresight that the circumstances require to be adopted in each specific case, or inevitability in a practical possibility".

On the other hand, the judgement of the Provincial Hearing of Madrid number 521/2008 dated 21 November 2008, establishes that in order for the tenant to request the landlord a reduction in the rent by virtue of *force majeure* reasons, there should be a financial loss that makes it impossible to meet the expectations on which the contract was based. In this case, the judgement refers to the application of the "*rebus sic stantibus*" rule, which is intended to deal with problems arising from a sudden change in the situation or circumstances existing at the time of the signing of the contract, provided that the change is so relevant that it imposes an unreasonable burden or cost on one of the parties or frustrates the purpose of the contract (Judgement of the Supreme Court number 820/2013, dated 27 January 2013).

The rationale behind the principle "*rebus sic stantibus*" is that the clauses of a contract are agreed according to the concurrent circumstances at the time of its signature, so if the circumstances change substantially, the clauses should be modified accordingly.

Next to the above, it should be noted that the application of the principle of "*rebus sic stantibus*" requires the concurrence, *inter alia*, of the circumstances described in the judgment of Supreme Court No. 1259/1984, dated 27 June 1984, and which are as follows: (i) there has been an extraordinary alteration between the circumstances that exist at the time of the signing of the contract and those concurrent at the time of conclusion; (ii) As a result of such alteration, there is an exorbitant disproportion between the agreed services, beyond any calculation; (iii) It is a consequence of completely unforeseen situations; (iv) There is no means of rectifying the imbalance or losses suffered; and (v) their scope is compatible with the parties' actions in good faith.

As we indicated earlier, we must emphasize that the application of the principle described above is based on a highly restrictive scope and with a strict and limited formulation of its application requirements by case law.

The declaration of COVID-19 as a pandemic, granted by the State of Health Emergency and the resolution and declaration of the State of Health Emergency (State of Alarm) approved by the Spanish government by Royal Decree 463/2020 of 14 March, the external measures approved by the Spanish government to address the economic and social impact of COVID-19, together with other resolutions approved by the respective competent regional authorities, could be considered as an event that cannot be foreseen in the ordinary and normal course of life, is an unusual or extraordinary event and completely unpredictable and unavoidable, so its adverse effects cannot be avoided even with prudent and diligent conduct of the parties, being also an inevitable event due to external factors and beyond the industrial sphere of the parties.

Notwithstanding the foregoing, we must stress that the case law has considered and accepted the application of the principle of *force majeure* in a very restrictive and limited manner.

Accordingly, while the situation arising from COVID-19 could be considered as a case of *force majeure*, it should be analyzed individually on a case-by-case basis as described herein.

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations, nor should they be considered a substitute for taking legal advice.



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