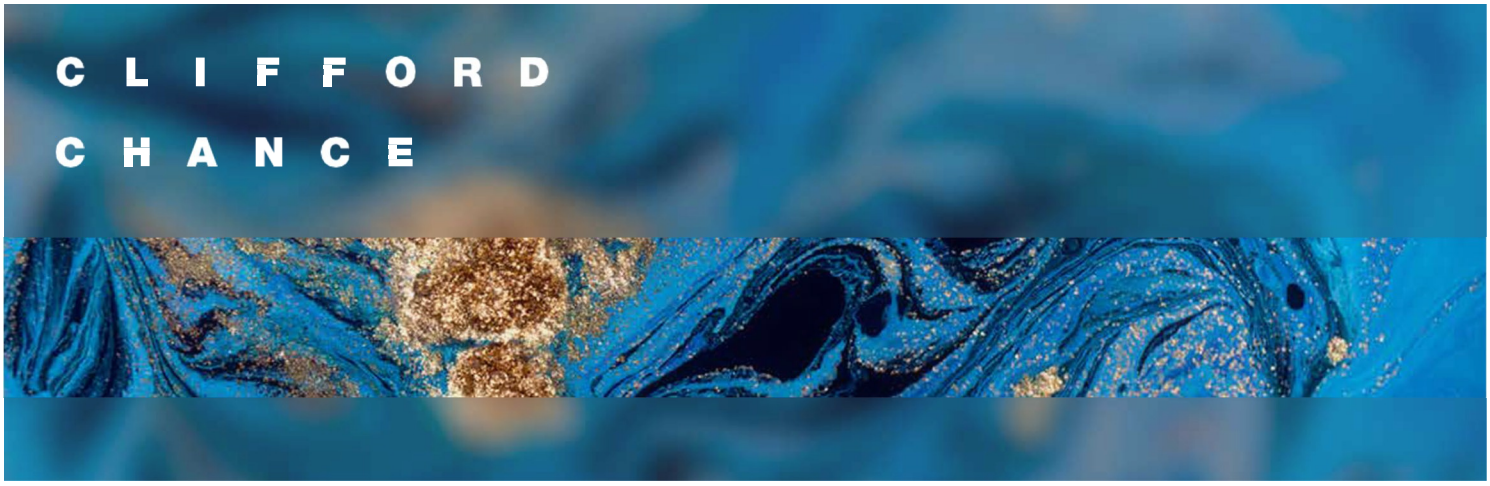

CORONAVIRUS: LABOUR ASPECTS IN RELATION TO THE COVID-19 CRISIS

Following the declaration on 14 March of a State of Emergency and the exceptional health crisis situation in Spain, many business activities have been suspended and several labour-related provisions have been issued, mainly by means of a Royal Decree-Law which enters into force on 18 March. Companies having to cancel or curtail their activities due to the health crisis and restrictions imposed under the State of Emergency may apply to the Labour Authorities to begin an urgent and rapid procedure to suspend employment contracts due to force majeure. Other measures include: more streamlined procedures for processing contract suspensions for other objective reasons related to the health crisis, greater protection against unemployment due to these contract suspensions, extended rights for workers in terms of the reduction or adaptation of working hours and remote working as a suitable alternative means to avoid work stoppages and the risk of contagion.

Key issues

- STATE OF EMERGENCY
- ROYAL DECREE-LAW ON URGENT EXTRAORDINARY MEASURES IN RELATION TO COVID-19 IN THE LABOUR CONTEXT
- OTHER MEASURES AVAILABLE TO COMPANIES

1. STATE OF EMERGENCY

Royal Decree 463/2020, dated 14 March, declaring a State of Emergency ("*Estado de Alarma*") in Spain ("RD 463/2020") contains several measures which directly affect the labour aspects of companies. RD 463/2020 has been amended by Royal Decree 465/2020 of 17 March, which authorises Spain's Ministry of Health to modify the scope of activities affected by the restrictions imposed. The main measures affecting labour and employment are as follows:

- **Litigation and administrative procedures: deadlines for legal formalities, limitation and expiry periods**

  These measures affect all proceedings that are currently underway.

  Legal and procedural deadlines

  All legal and procedural deadlines are suspended and all limitation periods for litigation established at all jurisdictional levels are suspended and interrupted, and will resume when RD 463/2020 or its extensions cease to be in force.

With regard to employment, this means that all litigation and other legal activities are suspended, as well as the periods established for such legal activities to be carried out.

This suspension and interruption do not affect, however, collective claims proceedings and proceedings for the protection of fundamental rights and public freedoms.

Administrative deadlines

All administrative deadlines are suspended and all limitation periods for administrative proceedings are interrupted, and will resume when RD 463/2020 or its extensions cease to be in force.

This directly affects conciliation hearings pending to be held before the mediation, arbitration and conciliation bodies. Consequently, no conciliation hearings will be held, although some Autonomous Communities may permit the electronic submission of conciliation claims.

Limitation and expiry periods of actions and rights

The limitation and expiry periods of any actions and rights are suspended while the state of emergency and any subsequent extensions, as the case may be, remain in force.

- Thus, for example in the case of dismissals, the period of 20 business days in which to challenge a dismissal is suspended, and any business days falling within the period when the state of emergency is declared will not count as part of that term.

- **Suspension of activities**

  The "*opening to the public of shops and retail establishments*" is suspended, meaning the closure also of food service establishments and restaurants, cultural centres, leisure and events facilities, recreational, gaming and betting activities, and in particular all those listed in the annex to RD 463/2020.

  Note that RD 463/2020 does not mandate the general stoppage of activities, but only those expressly prohibited and which are furthermore not included among the exceptions set out in the Royal Decree itself.

  It is also important to note that RD 463/2020 establishes the suspension or closure of "*any other activity or establishment which, in the opinion of the competent authority, may entail a risk of contagion*". Therefore, more suspensions of specific activities may be decreed.

  For those activities affected by the suspension order, the legislation on the suspension of employment contracts due to force majeure will apply directly, following the procedure described in section 2 below.

  Those companies that can continue to carry out their activities must reduce the number of personnel physically present at the workplace to a minimum and ensure that employees maintain a safe distance one from another so as to prevent contagion.

  Note that, as an exception to the restriction on freedom of movement under RD 463/2020, people are still able to travel to their workplace to render their services; therefore, employees are not prevented from working at their workplace.

2. ROYAL DECREE-LAW ON URGENT EXTRAORDINARY MEASURES IN RELATION TO COVID-19 IN THE LABOUR CONTEXT

Temporary Collective Dismissal, Suspension of Employment or Reduction of Working Hours (ERTEs)

- **ERTEs due to force majeure**

Concept of temporary force majeure in relation to Covid-19

According to Royal Decree-Law 8/2020, of 17 March, on urgent extraordinary measures to address the economic and social impact of Covid-19 (the "RDL"), which enters into force on 18 March, suspensions of employment contracts and reductions of working hours caused directly due to a stoppage of activity as a result of the Covid-19 virus, including the declaration of a state of emergency, can be considered to fall under the concept of "temporary force majeure" when they entail the following circumstances:

- The suspension or cancellation of activities, temporary closure of premises frequented by the public, public transport restrictions and, in general, of the mobility of persons and/or goods.
- The list of activities suspended is included in the annex to RD 463/2020.
- A lack of supplies, constituting a major hindrance to the ordinary continuation of activities.
- Those due to urgent and extraordinary situations caused by the contagion of personnel or the adoption of preventative isolation measures ordered by the health authorities, which must be duly substantiated.

Procedure for ERTEs due to force majeure under the RDL

The procedure for the suspension of employment contracts due to force majeure requires the approval of the Labour Authorities. To obtain this approval, companies must submit a report correlating their stoppage of activity to the impact of the Covid-19 crisis, together with the corresponding supporting documentation, as the case may be.

Companies must notify their employees of this application for an ERTE and submit the aforementioned report and supporting documentation to the employees' legal representatives (*Representación Legal de los Trabajadores*) ("RLT"), should they exist.

Once the application is received, the Labour Authorities may ask (or not, as this is optional) the Labour Inspectorate and Social Security for a report, which the latter must issue, as the case may be, within no more than 5 days. The Labour Authorities must adopt a decision also within a maximum of 5 days from when the application was received.

The decision of the Labour Authorities will merely verify the existence of force majeure, but it will fall to the company to apply the contract suspension measures it decides, after informing the employees' representatives and the Labour Authorities themselves. The suspension of

contracts of reduction of working hours will become effective as from the date on which the event causing the force majeure was produced.

Employees may challenge the company's decision to suspend their contracts. Likewise, in the event the Labour Authorities find that force majeure does not exist, the company may challenge the decision in the labour courts.

- **ERTEs on economic, technical, organisational and production-related grounds**

  Aside from the cases of force majeure addressed in the foregoing section, ERTEs may be activated for economic, technical, organisational and production-related reasons related to Covid-19, in which case the following particularities will apply regarding the regime that previously applied:

  The ERTE procedure is begun by means of a notification to the relevant Labour Authority and the simultaneous opening of a consultation period with the RLT, which will last for 7 days. If the employees have no RLT, the representative committee negotiating the consultation period will consist of the most representative trade unions or three employees from the company itself (appointed pursuant to Article 41 of the Spanish Workers' Statute ("WS")).

  The representative committee must be constituted for negotiation purposes beforehand. The maximum term for constituting it is 5 days, as of when the company mandatorily notifies its intention to begin the procedure.

  The Labour Authorities will forward the company's notification to the unemployment benefit management entity and may ask (or not, as this is optional) for a report from the Labour Inspectorate and Social Security. This report must be issued, as the case may be, within a non-extendable term of 7 days.

  Following the conclusion of the consultation period, the employer will notify the employees and the Labour Authorities of its decision on the suspension of contracts. The Labour Authorities will notify the unemployment benefit management entity of the company's decision.

  When the consultation period concludes with an agreement, it will be assumed that just cause for an ERTE exists and it can only be appealed before the labour courts on grounds of fraud, wilful misconduct or a misuse of powers in the conclusion thereof.

  It is important to note that the RDL only modifies procedural issues; thus, the grounds and documentation required to support this type of ERTE (including the technical report, when it is due to technical, organisational or production-related reasons) apply in the same terms to those already established by law.

  Lastly, the RDL establishes that the particular provisions it contains will only apply to those ERTE procedures begun following its entry into force, whereas the measures protecting against unemployment and exempting employers from the payment of Social Security contributions (explained

below) will apply to ERTEs underway on the date the RDL enters into force.

Unemployment Protection

The RDL establishes certain improvements in the protection against unemployment granted to employees who are affected by collective dismissals or the temporary reduction of working hours due to economic, technical, organisational or production-related reasons or force majeure, based on the circumstances set out in the RDL (i.e. directly arising as a result of a stoppage of activity deriving from the various government measures adopted as a consequence of Covid-19, including the declaration of a state of emergency).

These improvements are as follows:

- The right is acknowledged for employees to receive the contributory unemployment benefit, even if they have not been employed long enough to have made the minimum Social Security contributions as is required to earn this benefit.
- The time during which this benefit is received will not count towards using up the maximum benefit accrual periods established by law.

In any event, the duration of the benefit will be until the end of the employment contract's suspension period or the temporary reduction of working hours which were caused by the circumstances set out in the RDL.

The submission of applications for the unemployment benefit and subsidy past the deadlines established by law does not entail a reduction of the duration of the right to the corresponding benefit.

Exemption from the Payment of Social Security contributions

The RDL establishes an exemption for employers from making Social Security contributions on behalf of the company in the event of ERTEs due to temporary force majeure as a result of Covid-19, during the period when contracts are suspended or working hours is reduced, in the following cases:

- companies with fewer than 50 employees registered with the Social Security on 29 February 2020 will be exempt from the payment of 100% of the company's contribution and from payment of joint tax quotas; and
- companies with 50 employees or more who are registered with the Social Security will be exempt from the payment of 75% of the company's contribution and from payment of joint tax quotas.

This exemption will not have an impact on employees, as this period will still be considered an effective contribution period for all purposes.

Right to adapt and reduce working hours

The RDL establishes a series of guarantees so that the labour rights of persons who have to absent themselves from work in order to care for their spouse/common law partner or family members up to the second degree of kinship are not negatively affected.

- Adaptation/reduction of working hours in order to care for spouse/common law partner or family members up to the second degree of kinship
  Employees who prove that they have a duty to care for their spouse/common law partner or family members up to the second degree of kinship will be entitled to adapt/reduce their working hours in the event of exceptional circumstances related to the actions taken by the governing Authorities to avoid transmission of Covid-19. These circumstances will be understood to exist when: (i) the employee must be present in order to care for any of the persons listed above who, for reasons of age, illness or disability, need personal and direct care as a result of Covid-19; (ii) decisions have been adopted by the governing Authorities in relation to Covid-19 that imply the closure of educational or any other kind of centres that provide care or attention for the person in need thereof; and (iii) the person who, until then, had provided the direct care or assistance of the employee's spouse/common law partner or family members up to the second degree of kinship is unable to do so as a result of just cause related to Covid-19. The employee is responsible for the initial specification of the adaptation of working hours, provided it is justified, reasonable and proportionate, taking into account the duly demonstrated care needs and the organisational requirements of the company. In this regard, the RDL states that both the company and the employees must do all that is possible to reach an agreement.
  The adaptation may consist, among other things, of a change of shift, alteration of schedule, flexible schedule, split or continuous shift, change of work centre, change of functions, change in the manner services are provided (including remote working), or any other change available in the company or that could be implemented that is proportional and within reason.
- Special reduction
  A special reduction of working hours is envisaged in the scenarios set out in Article 37.6 WS when the exceptional circumstances referred to above arise, with the reduction being in proportion to salary. This special reduction will be regulated by the provisions of Articles 37.6 and 37.7 WS and other applicable legislation, except for the following: (i) 24 hours' prior notice to the employer will be required, and (ii) it may apply to 100 % of the workday if necessary, which must be justified and be proportional and within reason depending on the company's situation.

Finally, the RDL allows employees benefitting from an adaption/reduction of working hours or from any other legally envisaged conciliation rights, to temporarily waive or modify the existing terms of their arrangement in order to adapt it to the exceptional situation derived from Covid-19.

Commitment to preserve employment and validity period of the RDL

The extraordinary labour measures established in the RDL will be subject to the company's commitment to preserve employment during six months as from the date on which it resumes its activities. We understand that this commitment will be related to those provisions that could benefit companies, by simplifying procedures or giving specific advantages.

In other respects, the RDL establishes that the measures established therein will remain in force for the period of one month (except for those with a different set term), notwithstanding possible extensions established in the future.

Other measures

Self-employed persons whose activities are suspended as a result of the situation outlined in RD 463/2020 or when their turnover during the month prior to the benefit application date is reduced by at least 75% in relation to their average turnover for the previous six months, will be entitled to an extraordinary benefit due to stoppage of activities, provided the prerequisites in Article 17 RDL are met.

The benefit will apply during one month as from the date of entry into force of Royal Decree 463/2020, and will be extended, as the case may be, until the last day of the month in which the state of emergency ends.

The time during which this extraordinary benefit is received will be considered an effective contribution period and will not reduce the benefit periods due to the work stoppages, to which beneficiaries may be entitled to in the future.

3. OTHER MEASURES AVAILABLE TO COMPANIES

As an alternative to the options described in the previous point, companies may implement any of the following measures:

- **Remote working**

  One of the most popular measures adopted by companies to reduce contact between their employees and therefore minimise the risk of contagion is to implement a remote or teleworking regime if the nature of the activities or work posts in question so allow.

  The RDL establishes remote working as the preferred option, indicating that in order to ensure business continuity, companies will implement organisational systems, in particular via remote working, as a priority and alternative mechanism as opposed to companies having to temporarily cease or reduce activities, provided that such measure is technically and reasonably possible and that the efforts involved in implementing it are proportionate.

  In accordance with the Manual previously published on this situation by the Ministry of Employment, this consists of a temporary and exceptional measure, in force only while the exceptional circumstances that led to it continue to exist, bearing in mind the provisions of the applicable collective bargaining agreement (if the remote working arrangement is regulated therein) as well as applicable legislation (for example, the provisions of Article 13 WS), and without limiting the rights of the employees affected by this measure or entailing costs therefor.

As a general rule, the remote working must be based on a written agreement reached between the company and employee, although given the exceptional nature of the situation and in accordance with the provisions of the RDL, in the absence of an individual or collective agreement, the company may also adopt this measure on a general basis for those of its employees who can work from home in order to protect the health of its employees, as a preventive measure forming part of the recommendations of the health authorities and in the exceptional context of the current situation. In all cases it is necessary to inform the employees in writing.

The Prevention of Occupational Risks regulations establish the obligation on the part of the company to assess the risks associated with the work post. In the case of remote working, such obligation means that the company must carry out an assessment of the occupational risks existing in the employee's home from where he/she is providing the remote services. Given the difficulty for companies to comply with this obligation in the current situation, the RDL includes a self-assessment mechanism to be carried out by the employee with respect to the risks existing in his/her remote work post, in order to abide by such obligation.

In addition, the RDL expressly refers to remote working as one of the measures which employees can request in order to exercise their right to adapt their working hours to be able to exercise duties of care in the exceptional circumstances related to Covid-19 described in the preceding point.

Lastly, the RDL establishes in its Eighth Additional Provision, the immediate implementation of the SME Accelerate Programme (accessed via the portal Red.es) which sets forth a series of initiatives and support measures available to SMEs to help contribute to their digitalisation and facilitate the application of remote working solutions. Attached to the RDL is an Annex providing more details on the SME Accelerate Programme.

- **Irregular distribution of working hours**

  Another alternative available is the application of measures involving the irregular distribution of working hours, where hours worked are decreased over several days or a specific period of time, with the employee then recovering these hours over the rest of the year.

  The regime for the irregular distribution of working hours is regulated in Article 34.2 WS, which establishes that, in accordance with the provisions of the applicable collective bargaining agreement or, failing that, pursuant to a collective agreement between the company and the employees' representatives, the irregular distribution of working hours may be established over the course of the year. In the absence of an agreement, where efforts have been made to reach one, the company may distribute a maximum of 10% of the annual working hours on an irregular basis over the course of the year. In any case, the irregular working hours must respect the minimum daily and weekly rest periods established by law, and the employee must be given prior notice of at least 5 days.

  Any unworked hours will be compensated in accordance with the provisions of the collective bargaining agreement or, if this is not specifically established, pursuant to an agreement between the company and the employees' representatives. In the absence of an agreement, the

differences deriving from the irregular distribution of working hours must be compensated within a period of 12 months as from the date on which they occurred.

The essential difference between this measure comprising the irregular distribution of working hours and temporary collective dismissal procedures (ERTE involving reduced working hours) described in point 2.1 above, is that, whereas in the case of ERTEs there is an effective reduction of working hours by suspending the employment contract during the hours not worked by the employee (with the ensuing reduction of the employment services which the employee was expected to provide), in cases of the irregular distribution of working hours there is no reduction of services or of the annual working hours established in the applicable collective bargaining agreement, and it is merely a reorganisation, which must be specific and precise, of the hours during which such services are provided. Therefore, unlike ERTEs, during the application of the irregular distribution of working hours, the employee will continue receiving the same salary, and although this measure offers flexibility to the company, it does not release it from its salary obligations.

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