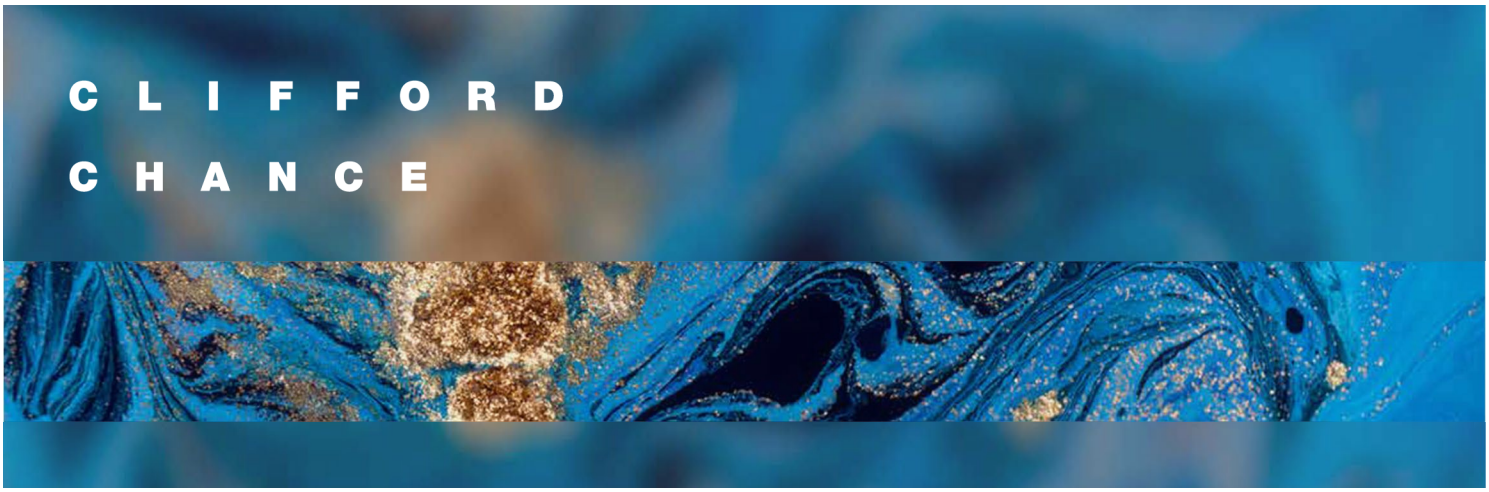

LABOUR ASPECTS IN RELATION TO THE CORONAVIRUS CRISIS IN SPAIN – UPDATE AS AT 26 MAY 2020

Key matters

- State of Emergency, Transition Plan and resumption of judicial and administrative activity
- Labour measures adopted to address the socio-economic impact of Covid-19
- Other measures available to companies
- *Resumption of activities and health and safety measures*

Following the declaration on 14 March of the State of Emergency and the exceptional health crisis situation in Spain, several labour-related provisions were issued, mainly by means of Royal Decrees-Laws ("**RDL**"). Following the entry into force of RDL 8/2020, of 17 March, on urgent extraordinary measures to address the economic and social impact of COVID-19 ("**RDL 8/2020**"), other provisions were passed to update or complement the measures established therein (RDLs 9/2020, of 17 March; 10/2020, of 29 March; 11/2020, of 31 March; 15/2020, of 21 April; and 16/2020, of 28 April), and the Council of Ministers approved the "Plan for the Transition Towards a New Normal" on 28 April 2020 ("**Transition Plan**") and *the subsequent RDL 18/2020, of 12 May ("**RDL 18/2020**"), successive Ministerial Orders on the flexibilization of restrictions previously imposed and preventive measures for the return to on-site work for certain activities*.

In this briefing we will provide a comprehensive summary of the key measures approved up to *26 May 2020* with respect to employment relationships, *showing in blue italics the new measures approved after our last update from 30 April, for ease of identification.*

1. STATE OF EMERGENCY, TRANSITION PLAN *AND RESUMPTION OF JUDICIAL AND ADMINISTRATIVE ACTIVITY*

Royal Decree 463/2020, of 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 was 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, *and finally Royal Decree 537/2020 of 22 May ("**RD 537/2020**") extends the State of Emergency until 7 June 2020 and applies*

the Transition Plan, establishing a specific procedure for the de-escalation of restrictive measures, aiming for the application of a progressive deconfinement and normalisation of activities. Additionally, RDL 16/2020 introduces certain legal amendments for the progressive resumption of court activities *and RDL 18/2020 extends the duration of ERTEs (defined below) due to temporary force majeure until 30 June 2020 and establishes measures to safeguard employment and protect employees during the transition to a "new normal" scenario.*

The main measures applicable during the State of Emergency and the subsequent resumption of activities affecting labour and employment can be summarised as follows:

- **Transition Plan**

  The Transition Plan calls for the progressive reopening of establishments and resumption of activities that were suspended with the declaration of the State of Emergency, through a three-stage process beginning on 10 May 2020 and expected to end in late June 2020. *All Spanish provinces are currently in either Stage 1 or 2 and judicial and administrative activity is to resume at this time.*

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

  These measures affect those labour and employment procedures *that were underway when the State of Emergency was declared*.

  Legal and procedural deadlines

  According to RD 537/2020, effective as of 4 June 2020, the suspension of procedural deadlines will be lifted. Previously, RD 4623/2020 had established the suspension and interruption of procedural deadlines related to all jurisdictional divisions until the State of Emergency was lifted.

  With regard to employment, this means that all litigation and other legal activities, as well as the periods established for such legal activities to be carried out, are suspended *until 4 June*. However, this suspension and interruption does not affect collective claims proceedings and proceedings for the protection of fundamental rights and public freedoms.

  RDL 16/2020 establishes that legal and procedural periods will recommence upon the lifting of the suspension of proceedings, and that periods for appealing decisions handed down during the suspension period or in the 20 business days following its end (in proceedings subject to the suspension) will be doubled.

  Administrative deadlines

  According to RD 537/2020, effective as of 1 June 2020, all administrative deadlines that were suspended will resume or will recommence, if this was so established by law during the State of Emergency. Previously, pursuant to RD 4623/2020, all administrative deadlines were suspended and limitation periods for administrative proceedings were interrupted (and their resumption was not foreseen until the State of Emergency was lifted). This directly affected conciliation hearings pending to be held before the mediation, arbitration and conciliation bodies. Consequently, *no conciliation hearings have been held during the State of Emergency*, although some Autonomous Communities *have permitted* the electronic submission of conciliation claims, *and some Autonomous Communities*

such as Madrid have begun issuing summons to appear in on-site conciliation hearings and will soon organize online conciliation hearings.

Limitation and expiry periods of actions and rights

According to RD 537/2020, effective as of 4 June 2020, the suspension will be lifted for those limitation and expiry periods of actions and rights that were suspended by the commencement of the State of Emergency. Thus, for example in the case of dismissals, the period of 20 business days in which to challenge a dismissal is suspended, and any days falling within the same period during the State of Emergency and *up until 4 June* will not count as part of that period.

Labour and Social Security Inspectorate deadlines and administrative proceedings

RDL 15/2020 establishes the suspension of deadlines for actions by the Labour and Social Security Inspectorate (*Inspección de Trabajo y Seguridad Social*, "**ITSS**"), *which has been maintained until 1 June 2020 pursuant to RD 537/2020*, except in cases where the ITSS's involvement is necessary to safeguard the public good or in cases related to Covid-19.

All deadlines in proceedings to impose penalties for labour infringements and proceedings for the settlement of pending Social Security contributions are subject to the suspension of administrative deadlines established in RD 463/2020 *until 1 June 2020*.

Electronic filing of writs

As from 13 April 2020 and until the State of Emergency is lifted, all writs to be filed at court offices may be submitted – and distributed to the appropriate bodies – online through Lexnet (or equivalent systems), although the suspension and interruption of the procedural deadlines and periods explained above is maintained.

Measures for the reactivation of courts

According to RDL 16/2020, 11 to 31 August 2020 are declared business days, there are plans to temporarily hold court activities in both the morning and afternoon, online hearings are given preference (if technical conditions allow), and certain labour-related proceedings are given urgent and preferential treatment, including dismissals, conflicts over measures to adapt working hours or others adopted in the context of this health crisis, and challenges to temporary collective dismissal procedures (*expediente de regulación temporal de empleo*, "**ERTE**") (also allowing collective procedures to be applied in the case of individual challenges affecting more than five employees).

- **Suspension of activities**

  The "opening to the public of shops and retail establishments" was suspended *while the State of Emergency remained in force*, 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. *Through the implementation of the Transition Plan, these establishments and activities previously suspended are gradually being reopened and resumed.*

  Note that RD 463/2020 *did not* mandate a general stoppage of activities, but only of those expressly prohibited and which are furthermore not

included among the exceptions set out in RD 463/2020 itself. The Order of 19 March 2020 suspended the opening to the public of hotel and tourist accommodation establishments, *which are now gradually resuming their activities under the Transition Plan.*

For activities affected by the suspension orders, the legislation on the suspension of employment contracts due to force majeure is applicable, according to the procedure referred to 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.

2. LABOUR MEASURES ADOPTED TO ADDRESS THE SOCIO-ECONOMIC IMPACT OF COVID-19

- **Temporary collective dismissal, including suspension of employment or reduction of working hours (ERTEs)**

A. ERTE due to force majeure

The concept of temporary force majeure in relation to Covid-19

According to RDL 8/2020, which entered 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 the 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.

RDL 15/2020 states that companies that carry out activities considered essential may experience one or more of the above situations categorised as force majeure in relation to activities that are not considered essential, for which they may activate ERTEs. However, force majeure will not be deemed applicable for these purposes, even if any of the above situations arises, if they affect activities considered essential.

If the reasons that led to the application of an ERTE due to force majeure now allow the partial resumption of activities, in line with the flexibilization of previous restrictions, companies must reinstate employees affected by the ERTE, to the extent necessary so as to be able to carry out their business activities, giving preference to adjustments in relation to the reduction of working hours.

Procedure for ERTEs due to force majeure under the RDL

The procedure for the suspension of employment contracts or reduction of working hours due to force majeure requires the approval of the labour authorities. To obtain this approval, companies must submit appropriate supporting documentation, including a report correlating their stoppage of activity with the impact of the Covid-19 crisis.

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**"), if they have such representatives.

RDL 8/2020 provides the labour authorities with a maximum of five business days to process such applications, although in some Autonomous Communities this deadline has been extended up to 10 days (in which case the interested party must be notified). If this term elapses with no express decision, the ERTE is approved following administrative silence.

The decision of the Labour Authorities will merely verify the existence of force majeure; it falls to the company to apply the contract suspension measures or reduced working hours that it has decided on, after informing the RLTs and the Labour Authorities. The suspension of contracts or 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. Likewise, if the Labour Authorities do not approve the ERTE due to not verifying the existence of force majeure, the company may challenge the decision in the labour courts.

Duration

RDL 18/2020 sets forth that temporary force majeure applies to the period during which companies are affected by the reasons established in Article 22 of RDL 8/2020, which prevent them from resuming their activity (in the case of companies under a partial force majeure ERTE, from the moment these reasons allow the partial resumption of activity), while such reasons exist and, in any event, until 30 June 2020.

However, ERTEs due to force majeure may be extended if restrictions to activity still apply on 30 June 2020 due to the situation of the health crisis then.

Commitment to maintain employment contracts in ERTEs due to force majeure

RDL 8/2020 (amended by RDL 18/2020) establishes the obligation to maintain employment contracts for six months (as of the resumption of activities, even in case of partial resumption or when resumption affects only part of the workforce) for those companies that had activated an ERTE due to temporary force majeure caused by Covid-19, except for those companies at risk of insolvency.

This obligation would be considered breached if companies terminate employment contracts of personnel affected by the ERTE. But companies will not be considered to have breached this commitment if they terminate employment contracts due to: disciplinary dismissal declared fair, voluntary resignation, *death*, retirement, permanent disability, *end of call-in process of permanent seasonal employees* or, in the case of temporary contracts,

the expiry of the agreed term or completion of the project or service to which the contract was tied or *when the contracted activity cannot be immediately carried out.*

RDL 18/2020 sets forth that the commitment to maintain employment will be assessed taking into account the specific characteristics of each sector of activity and applicable labour laws and regulations, considering, in particular, the specific circumstances of those companies that present a strong variability and seasonality related to employment.

In the event of a breach of this commitment, companies will have to reimburse any amounts corresponding to Social Security contributions that benefited from payment exemptions, and pay surcharges and applicable default interest as the ITSS may have previously determined.

Restrictions related to dividend distribution and tax transparency

RDL 18/2020 prevents companies which have their tax domicile in countries or territories classified as tax havens from benefiting from the rules and special measures under RDL 8/2020 on ERTEs due to temporary force majeure. This restriction seems to apply only to the employer entity (i.e. the one which is party to the employment contract), since this would be the entity which would have activated the ERTE and which would benefit from the Social Security contribution exemption, regardless of the corporate domicile that other entities within the same group or its own shareholders may have.

Additionally, RDL 18/2020 establishes that companies with more than 50 employees as at 29 February 2020 which activate ERTEs due to force majeure (benefiting from the Social Security contribution exemption) will be prohibited from distributing dividends corresponding to fiscal year 2020, unless they first pay the amounts not paid because of the exemption that they may have benefited from.

Procedure in case of resumption of activity

Companies must notify the Labour Authority of their total withdrawal (when applicable) from the ERTE due to force majeure within 15 days following the effective date of resumption of their activities, after having first notified the State Public Employment Service (SEPE) of any changes to the data contained in the collective application initially submitted to apply for unemployment benefits.

B. ERTEs on economic, technical, organisational and production-related grounds

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 company must notify its employees or their RLT of its intention to activate an ERTE so that, within a maximum of 5 days, a representative committee can be set up to negotiate during the subsequent consultation period. If the employees have no RLT, the representative committee will comprise the most representative trade unions, or three company employees (appointed pursuant to Article 41 of the Spanish Workers' Statute, "**WS**"). The procedure begins with notification to the appropriate Labour Authorities and the simultaneous opening of the consultation period with the representative committee, which lasts for no more than seven 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.

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 RDL 8/2020 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.

RDL 8/2020 states 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 that were underway on the date that RDL 8/2020 entered into force.

Finally, pursuant to the provisions of RDL 18/2020, companies can start processing ERTEs for economic, technical, organisational or production-related reasons while an ERTE due to force majeure is still in place. RDL 18/2020 also establishes that, when ERTEs for economic, technical, organisational or production-related reasons are activated after the end of an ERTE due to force majeure, the end date of the ERTE due to force majeure will be considered the start date of the latter ERTE for economic, technical, organisational or production-related reasons, with retroactive effects.

- **Unemployment protection**

  Employees affected by ERTEs

  RDL 8/2020 establishes certain improvements in the unemployment protection granted to employees affected by ERTEs processed thereunder:

  – Employees may apply to receive the contributory unemployment benefit, even if they have not been employed long enough to have made the legally established minimum Social Security contributions.

  – The time during which this benefit is received will not count towards using up the maximum benefit accrual periods established by law.

  The application for unemployment benefit must be made by the company, via electronic means and as a collective application, pursuant to the specific timeframes and procedures established in RDL 9/2020.

  Meanwhile, given the large number of ERTEs approved following administrative silence (due to the huge volume of ERTEs processed) and therefore without effective verification on the part of the Labour Authorities of the alleged grounds, RDL 9/2020 (amended in RDL 15/2020) establishes that applications presented by companies that contain misrepresentations or inaccuracies, or that are not sufficiently connected to the grounds in question – meaning that the benefits were obtained improperly or the deductions were applied improperly –, will be considered punishable conduct. In such cases, the company will have to pay the ERTE management entity the amounts improperly received by the

employee, who will reserve the right to the salary corresponding to the ERTE period initially authorised (discounting the amount received as unemployment benefits). Specific reviews by the ITSS are envisaged for such purposes.

These measures will apply until 30 June 2020.

Other groups

RDL 15/2020 extends unemployment protection previously explained to seasonal permanent employees (i) whose activity is interrupted or who cannot be readmitted to their position as a result of Covid-19; and (ii) who do not meet the requirement of being legally unemployed or whose contribution period is insufficient to qualify for benefits. *Unemployment protection established under RDL 8/2020 for seasonal permanent employees will apply until 31 December 2020.*

Moreover, RDL 15/2020 considers the following persons to be in a situation of legal unemployment: (i) those whose employment relationship was terminated by the employer during the trial period, on or after 9 March 2020; and (ii) those who voluntarily terminated their last employment relationship after 1 March 2020 because they had received a definitive offer of an employment contract with another company, which subsequently withdrew the offer as a result of Covid-19.

- **Exemption from the payment of Social Security contributions**

  RDL 8/2020 establishes an exemption for employers from making Social Security contributions in the event of ERTEs due to temporary force majeure caused by Covid-19, in the following cases:

  – companies with fewer than 50 employees registered with the Social Security system on 29 February 2020 will be exempt from the payment of 100% of the company's contributions and from payment of items collected jointly therewith (*conceptos de recaudación conjunta*, "joint tax quotas"); and

  – companies with 50 employees or more who are registered with the Social Security system will be exempt from the payment of 75% of the company's contribution and from payment of joint tax quotas.

  RDL 18/2020 establishes the percentages and conditions applicable to the indicated exemptions from payment of Social Security contributions during the months of May and June 2020, differentiating between the event of force majeure from the event of partial force majeure, and depending on the number of employees employed by the company as at 29 February 2020.

  – *Total force majeure: 100% payment exemption for companies with fewer than 50 employees; and 75% payment exemption for companies with 50 or more employees.*

  – *Partial force majeure: (i) in relation to employees who resume their activity, 85% payment exemption during the month of May and 70% exemption during the month of June, for companies with fewer than 50 employees; and 60% payment exemption during the month of May and 45% payment exemption during the month of June for companies with 50 or more employees; and (ii) in relation to employees whose activity remains suspended, 60% payment exemption during the month of May and 45% payment exemption during the month of June for companies*

with fewer than 50 employees, and 45% payment exemption during the month of May and 30% payment exemption during the month of June for companies with 50 or more employees.

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

In order to benefit from the exemption on the payment of Social Security contributions incurred during the months of May and June 2020, companies must notify the Spanish General Treasury of the Social Security (TGSS) of their being in a situation of total or partial force majeure (by identifying the affected employees and the relevant period of suspension/reduction of working hours) by means of a signed confirmation ("declaración responsable") sent electronically through its document submission system "Sistema RED", before requesting the calculation of the corresponding quota payments.

The Council of Ministers may resolve to further extend this measure beyond 30 June 2020 or to extend its application to ERTEs for economic, technical, organisational or production-related reasons.

- **Moratorium on payment of Social Security contributions and deferral of debts**

  RDL 11/2020 envisages the granting of six-month interest-free moratoriums for the payment of Social Security contributions and joint tax quotas, corresponding to the accrual period running from April to June 2020. The Order of 24 April 2020 specifies that this moratorium can be granted to companies in certain sectors of activity, identified therein by their Spanish Activities (CNAE) code, whose activities were not suspended pursuant to the State of Emergency. This moratorium is incompatible with the exemption from the payment of Social Security contributions throughout an ERTE due to force majeure.

  Moreover, companies may apply for any debts they were to pay to the Social Security system between April and June 2020 to be deferred at an interest rate of 0.5%.

  Applications for moratoriums or deferrals will be made through the "Sistema RED" online document submission system within the first ten calendar days of the corresponding contribution period.

- **Right to adapted and reduced working hours (the "MECUIDA" Plan)**

  RDL 8/2020 establishes a series of guarantees to enforce the labour rights of persons who have to absent themselves from work in order to care for their spouses/common law partners or family members up to the second degree of kinship:

  – Adaptation/reduction of working hours in order to care for spouses/common law partners or family members up to the second degree of kinship in the event of exceptional circumstances related to the actions taken by the government to avoid transmission of Covid-19. The adaptation may consist, among other things, of a change of shift; alteration of schedule or reduction of working hours; relocation; change of duties; change in the manner services are provided, including remote working; or any other change available at the company or that could be implemented that is proportionate and within reason.

The employee may make an initial specification of the adapted working hours, provided it is justified, reasonable and proportionate, taking into account the duly demonstrated care needs and the organisational requirements of the company. RDL 8/2020 states that both company and employee must do all they can to reach an agreement.

- A special reduction of working hours in the scenarios set out in Article 37.6 WS is envisaged when the exceptional circumstances referred to above arise, with the proportional reduction in salary. This special reduction will be regulated by the provisions of Articles 37.6 and 37.7 WS and other applicable legislation, without prejudice to the following: (i) 24 hours' prior notice to the employer will be required, and (ii) the reduction may be of the entire workday if necessary, which must be justified and be reasonable and proportional with respect to the company's situation.
- Finally, RDL 8/2020 allows employees benefitting from adapted/reduced working hours, or from any other legally established work-life balance rights, to temporarily waive or modify the existing terms of their arrangement in order to adapt it to the exceptional situation caused by Covid-19.

These guarantees will remain in force for three months after the State of Emergency is lifted (including any extensions approved by the government).

- **Valid grounds for the termination of contracts**

  RDL 9/2020 excludes force majeure and economic, technical, organisational and production-related reasons associated with Covid-19 as valid "justified reasons" for the termination of employment contracts. This is because the aforementioned grounds are considered by RDL 8/2020 as "temporary causes" deriving from the current health crisis, which could justify the temporary suspension of employment contracts ("**ERTEs**), but not as valid "structural causes" to justify contractual terminations.

  As a preliminary interpretation of this matter, we can conclude that, in practice, the main consequence of the above exclusion of these unjustified causes would be that, in the event of litigation, terminations of employment contracts based on force majeure or economic, technical, organisation or production-related reasons associated with Covid-19 would be declared unfair dismissals (in the event of individual dismissals based on objective reasons), or unjustified collective dismissals ("*no ajustados a derecho*").

  As a consequence, considering that RDL 9/2020 does not expressly set forth that terminations based on the aforementioned grounds are to be considered null and void, we can conclude that such terminations would be regarded as effective, but subject to the statutory severance compensation established for unfair dismissals (i.e. generally, 33 days of salary per year of service – or 45 days of salary per year of service rendered prior to 12 February 2012 – capped at 2 years of salary), instead of being subject to the lower statutory severance payment established for fair dismissals base on objective grounds (i.e. 20 days of salary per year of service, capped at 1 year of salary).

  Given the novelty of these types of legal provisions, we cannot rule out the possibility that Spanish labour courts may give them a different legal interpretation. Therefore, it seems advisable that the grounds used to

justify terminations carried out during the current situation be carefully analysed and modulated.

This measure will apply until 30 June 2020.

- **Temporary contracts**

  RDL 9/2020 allows for the interruption of the duration and validity period of any temporary contracts that are suspended (instead of reducing the working hours) as a result of an ERTE due to force majeure or economic, technical, organisational and production-related reasons related to Covid-19, whereby such duration will be extended for the amount of time such contracts remain suspended under the ERTE.

  According to the Directorate General for Labour, should a situation arise during the suspension period or after activities have resumed and during any extensions that "renders the object of the contract null and void", that is, which puts an end to such contract in a valid and objective manner, its termination will be deemed fully enforceable in compliance with the prerequisites and legal regime established in Article 49.1.c) WS (e.g. the termination of the interim contract due to substitution or termination of the relief contract upon reaching retirement age).

  This measure will apply until 30 June 2020.

- **Recoverable period of paid leave for employees who do not render essential services**

  RDL 10/2020 establishes an obligatory recoverable period of paid leave for employees of companies whose activities were not brought to a standstill by the declaration of the State of Emergency and are not categorised as essential in the Annex to RDL 10/2020.

  Although this measure expired on 9 April 2020, the parties must negotiate the recovery of working hours between the day after the State of Emergency is lifted and 31 December 2020.

  The recovery must be negotiated in a consultation period with the RLT, lasting a maximum of seven days. In the absence of RLTs, a committee must be formed within five days, comprising the most representative trade unions or ad hoc representatives appointed in accordance with Article 41 WS. If no agreement is reached, the company will notify the employees and the representative committee of its decision as to the recovery of working hours within seven days.

  The recovery must respect minimum rest periods, maximum yearly working hours and rights to work-life balance, and must be notified at least five days in advance.

3. OTHER POTENTIAL MEASURES AVAILABLE TO COMPANIES

As an alternative to the options described in section 2 above, companies may implement any of the following measures:

- **Remote working**

  RDL 8/2020 establishes remote working as the preferred option, indicating that in order to ensure business continuity, companies will implement organisational systems, in particular remote working, as a priority

alternative to having to temporarily cease or reduce activities, provided that the system is technically and reasonably feasible and that the efforts involved in implementing it are proportionate.

Therefore, companies continuing with their activities must implement a remote working system where job posts allow, bearing in mind the provisions of the applicable collective bargaining agreement and applicable legislation, without limiting the rights of the employees affected by this measure or burdening them with costs.

As a general rule, remote working must be based on a written agreement between the company and employee. However, given the exceptional nature of the situation, and in accordance with the provisions of RDL 8/2020, in the absence of an individual or collective agreement, the company must adopt this measure for all 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 health crisis. The company must inform its employees in writing in all cases.

Spanish occupational risk prevention 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 employees homes, from where they provide remote services. Given the difficulty for companies to comply with this obligation in the current situation, RDL 8/2020 includes a self-assessment mechanism to be carried out by employees with respect to the risks existing in their remote work posts, in order to observe such obligation.

In addition, RDL 8/2020 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, as described in the preceding section.

According to RDL 15/2020, this measure will remain in force for three months after the State of Emergency is lifted (including any successive extensions approved by the government). This notwithstanding, the Transition Plan establishes that certain protocols will be introduced in Stage 3 (envisaged in principle for mid-June) for the "return of employees to their places of work", which means that the deadline of the prioritisation of remote working (which can be understood as an obligation on the part of companies to facilitate the remote provision of services where possible) is likely to be modified in order to bring it in line with the Transition Plan.

- **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, irregular working hours must respect the minimum daily and weekly rest periods established by law, and the employee must be given at least five days' prior notice.

Any unworked hours will be compensated in accordance with the provisions of the collective bargaining agreement or, in their absence, 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 the irregular distribution of working hours and ERTEs involving reduced working hours, described in section 2 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 services which the employee was expected to provide), in cases of irregular distribution of working hours there is no reduction of services or of the annual working hours established in the applicable collective bargaining agreement; it is merely a reorganisation, which must be specific and precise, of the hours during which such services are provided. Therefore, unlike in ERTEs, the employee will continue receiving the same salary during the application of the irregular distribution of working hours. Consequently, although this measure offers flexibility to the company, it does not release it from its salary obligations.

4. RESUMPTION OF ACTIVITY AND HEALTH AND SAFETY MEASURES

Return to on-site work at the workplace, when this is appropriate considering each company's circumstances, obliges companies to put in place a set of specific preventive measures in order to minimize contact between employees (and between employees and customers/clients) in an attempt to reduce the contagion of Covid-19.

The Spanish Government has published several guides and recommendations which summarize the main hygiene and safety distancing measures that must be observed by companies and employees when their activities resume or "normalise".

Likewise, as a result of the flexibilization of certain nation-wide restrictions established after the State of Emergency was declared, due to the implementation of Stages 1, 2 and 3 of the Transition Plan, several regulations have recently entered into force (Ministerial Orders SND/399/2020 of 9 May, SND/414/2020 of 16 May and SND/442/2020 of 23 May), which establish hygiene and preventive measures applicable to employees of the specific sectors of activity contemplated in such Ministerial Orders. However, we understand that the set of measures included therein would also apply to other activities with similar risk scenarios, in the absence of more specific regulations.

Generally, an update of the risk assessment will have to be prepared and, according thereto, also an update of the health and safety plan, which specifically mentions the potential risk of contagion of Covid-19 and

suitable preventive and protective measures (with the corresponding participation of employees' legal representatives).

Notwithstanding the above, these Ministerial Orders, guides and recommendations set out, in general terms, the following preventive measures which companies must apply before, during and after resumption of on-site work at the workplace:

- *Maintenance of remote working should be facilitated when possible and non-essential commuting for labour-related reasons must be avoided.*
- *Employees must keep an interpersonal safety distance of at least 2 metres and the company must arrange work posts and organize work in a manner that makes it possible to observe this safety distance. When this cannot be guaranteed, the company must ensure that employees are provided with the appropriate personal equipment according to the existing level of risk (which includes the use of face masks).*
- *Crowds must be prevented from forming in communal areas and also during the workplace entrance/exit times, which must be staggered by introducing schedule adjustments. The use of lifts must be limited to a maximum occupancy of one person at a time, unless it is possible to guarantee the two-metre minimum safety distance.*
- *Employees must be provided with hygiene products, such as soap and hydroalcoholic gels.*
- *Enhanced cleaning tasks must be carried out daily, especially of areas, structures and objects that are touched more frequently, such as windows and door handles, as well as equipment that is regularly used by employees.*
- *Facilities must be ventilated regularly, for at least five minutes each day.*

In line with the above, Order SND/422/2020, of 19 May, establishes the compulsory use by persons of face masks when in the streets, outdoors and in any indoor public space or which is open to the public, when it is not possible to keep the two-metre minimum interpersonal safety distance.

In addition, companies may consider adopting other measures within the context of their health and safety plan, such as temperature taking or Covid-19 testing conducted by qualified staff, provided they perform these health monitoring and personnel protection duties while duly respecting employees' rights to privacy and personal data protection.

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