



March 2020

Employment Law Department

SUPPLEMENTARY EMPLOYMENT-RELATED MEASURES TO MITIGATE THE EFFECTS OF COVID-19

Further to the declared State of Emergency and Royal Decree Law 8/2020 (see earlier commentary in AJ March 2020), the Spanish government has now brought in some new additional measures to clarify or in some way supplement those already enacted due to the extraordinary and urgent scenario. **Royal Decree- Law 9/2020, of 27 March, adopting supplementary employment-related measures to mitigate effects arising from COVID-19** has therefore been published (Spanish Official Gazette, 28 March 2020, entry into force on the same date). The main points in particular [and some related observations] are outlined below:

- **Termination of employment due to Covid:** dismissals on the basis of economic, technical, organisational or production grounds or alleging force majeure, which are all grounds set out in legislation on the new temporary provisions for laying off employees (ERTE, the acronym in Spanish) as established in Articles 22 and 23 Royal Decree Law 8/2020, deriving from COVID-19, will be deemed **"unfounded"**. [With regard to legal consequences of such "unfounded" dismissals, a literal interpretation leads to the assumption that such dismissals will be deemed unlawful and void, according to the specific circumstances of each case].
- **Tacit approval:** the recital of grounds for this new legislation clarifies that administrative silence ex. Art 24 Law 39/2015 shall be deemed tacit approval in relation to **ERTEs due to force majeure**. [Given the flood of applications and the fact that the non-extendable 5-day deadline available to the Employment Authority to decide each application has proven extremely short. For that reason and from a practical viewpoint, we consider the express reference to the Law on Common Administrative Procedure of Public Administrations as clarification in that regard].
- **Unemployment administration:** companies are obliged to file a **collective application for benefits** with the Spanish employment authorities (**SEPE**, the acronym in Spanish). Applications must be set out on forms provided by SEPE. In addition to the previously published requirements, notification must now include specific individual details for each work centre.

The 5 day filing deadline is calculated either from the date the employer applied for the provisional ERTE status, in instances of force majeure, or **from the date the company notified the competent employment authority of its decision**, in cases alleging economic, technical, organisational or production grounds. [Please note that for applications filed before the new legislation, the 5-day deadline runs from 28 March].

- **Short-term contracts:** applicable to all modalities of short-term contracts, including training, substitution and work placements. According to the adopted measure, **short-term contracts entered into by companies seeking ERTE arrangements will not have been extinguished when the ERTE period ends.** This is because the ERTE interrupts the defined contract term. [The new legislation only refers to instances when employment is suspended, with no reference to reduced working days; nevertheless, extrapolation by analogy leads one to assume short-term contracts will also be protected in those cases].
- **Duration of ERTes:** **The maximum duration for** ERTes on the basis of force majeure, **is equal to the duration of the state of emergency** decreed by Royal Decree 463/2020 and any extensions thereto (currently extended to 11 April). [The aforesaid duration applies equally to expressly agreed ERTes and to those arising by tacit agreement due to administrative silence; ERTes entered into through collective-bargaining arrangements are different to Covid-19 related and more usually rely on production related grounds].
- **Effective date:** the **effective date for provision of benefits**, alleging force majeure, is taken as the date of **the event that gave rise to the ERTE**, i.e. from the time the business activity ceased. For ERTes sought on economic, technical, organisational or production grounds, the effective date shall at all events **be the same as or later than the date on which the company informed** employment authorities of the company resolution. [We understand it will be possible to backdate ERTes alleging force majeure to a point in time later than the State of Emergency declaration (14 March)]
- **Penalty system:** this applies to applications for ERTes found to contain “**falsehoods or inaccuracies**” stated in order to improperly obtain benefits.

In such instances, and without prejudice to legally corresponding **administrative or criminal liability**, the company concerned will be obliged to lodge the **amounts of benefits received by the employee** with the administrative body, deducting such amounts from corresponding unpaid salary amounts and capped at the sum total of such amounts. [It should be remembered that Social Security related offences become time-barred after 4 years].

- **Ex officio control:** a collaborative arrangement has been put in place involving the Works and Social Security Inspectorate, the National Tax Administration, State Security Forces, to avoid fraud in relation to the measures implemented to enable companies to suspend or reduce employment as a result of the exceptional situation of the State of Emergency brought about by COVID-19. This collaborative arrangement includes confirming **the existence of grounds as alleged in applications and notices of temporary employment regulation dossiers [ERTes]** brought on grounds established in Articles 22 and 23 Royal Decree-Law 8/2020, of 17 March. [Action plans will be implemented to review ERTes and alleged grounds].