



May 2020

Labour Law Department

SOCIAL MEASURES TO PROTECT EMPLOYMENT IN THE FACE OF THE ONGOING HEALTH CRISIS ARISING FROM COVID-19

Royal Decree-Law 18/2020, of 12 May, on social measures to protect employment (hereinafter, "**RD-L 18/2020**") was published on 13 May 2020.

The main measures agreed, as referred to throughout RD-L 18/2020, are set out below (systemised for each type of "**ERTE**¹):

I. ERTE DUE TO FORCE MAJEURE (TOTAL OR PARTIAL)

- **Extension:** ERTE provisions on grounds of Total Force Majeure ("**FMT – Fuerza Mayor Total**") have been extended, i.e. in scenarios arising due to grounds "*preventing re-commencement*" of business activities; and also for ERTE on grounds of Partial Force Majeure ("**FMP – Fuerza Mayor Parcial**"), relating to companies permitted to "*partially recommence*" their business activity **but only until 30 June 2020 as maximum cut-off date.**
- **Reinstatement:** employees subject to lifting of provisions must return to work, as required by the company to perform the business activities, **with an emphasis on making adjustments by reducing the working day.** Additionally, companies must inform the competent employment authority of the reinstatement/full waiver of the ERTE, with 15 days from the date on which employees returned to work.
- **Exemption from Social Security contributions:** employees subject to Total Force Majeure (FMT) arrangements will continue to attract the same percentage exemptions to Social Security contributions as set out in RD-L 8/2020 (see earlier AJ Commentary published in March 2020). For Partial Force Majeure (**FMP**) **scaled Social Security contributions are now reduced for workers (i) returning to work (ii) continuing temporary layoff under ERTE.**

(i) Workers returning to work, in companies with a workforce of:

Fewer than 50 employees:

- 85% exemption in May
- 70% exemption in June

More than 50 employees:

- 60% exemption in May
- 45% exemption in June

¹ *Expediente de regulación temporal de empleo – E.R.T.E.* [Labour law provision permitting temporary laying-off of workers].

(ii) Employees still laid off under ERTE, in companies with a workforce of:

Fewer than 50 employees:

- 60% exemption in May
- 45% exemption in June

More than 50 employees.

- 45% exemption in May
- 30% exemption in June

In order for the exemptions to apply, companies must duly inform the Spanish Social Security Department (TGSS - *Tesorería General de la Seguridad Social*) and public employment service (SEPE - *Servicio Público de Empleo*) of the total or partial force majeure scenario and must list the persons affected together with the period of suspension from work or reduced working day. Companies must also attach a declaration accepting liability.

- **Restrictions:** The option to apply for an ERTE under this RD is not available to companies **with registered offices in a tax haven; nor may share dividends be processed** corresponding to the tax year in which these ERTES were applied, unless **the sum total of the Social Security contributions exemptions was previously repaid.**
- **Maintaining employment:** for **six months calculated from the date of the commencement** of the business activity, deemed to be the date on which employees subject to the ERTE effectively returned to work and even if the return to work is partial or only applies to some employees.

Breach of employment maintenance conditions will not apply to all types of job extinction, i.e. if an employment contract is extinguished as the result of disciplinary dismissal deemed appropriate, or resignation, death, retirement or permanent total incapacity, absolute or major disability of the employee, or because persons employed under a discontinuous-permanent contract are no longer required, and as long as the laying off does not amount to dismissal but rather an interruption to employment. Specifically, in relation to provisional employment contracts, the undertaking to maintain employment will not be deemed breached if the contract is extinguished due to expiry of the agreed time period for completion of the work or of the service subject of the provisional employment contract, or if the business activity subject of the employment contract cannot immediately be performed.

Companies at risk of commencing insolvency proceedings **are not obliged to adhere to the employment maintenance commitment.**

Breach of the employment maintenance commitment entails the obligation to repay the full amount of contributions companies were relieved from paying, together with a surcharge and late payment interest corresponding to the particular instance.

II. ERTE ON ECONOMIC, TECHNICAL, ORGANISATIONAL OR PRODUCTIVE GROUNDS (“ETOP”)

- **New 'ETOP' types of ERTE:** can be negotiated up until 30 June 2020 under FastTrack proceedings established in RD 8/2020 (see earlier AJ Commentary in March 2020) preferably with trade unions rather than an ad hoc committee.
- **ETOP ERTES already in force:** ERTES on ETOP grounds, already in force on the date this Royal Decree-Law comes into force **will continue to apply subject to the same terms and conditions and up to the date notified.**
- **"Linkup" with an earlier ERTE FM [grounds of force majeure]:** applications for ETOP ERTES **may be commenced during an ERTE on grounds of force majeure.** If an ERTE on ETOP grounds is applied for and granted after an ERTE FM has come to an end, **the effects of the new ETOP ERTE will be backdated to the end date of the earlier ERTE FM.**

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III.-ADDITIONAL PROVISIONS

The additional provisions brought in, established under the additional provisions section of RD-L 18/2020 and applicable to any ERTE modality, are as follows:

- **Extraordinary Measures on unemployment protection continue in force.** i.e. calculations from day one with no grace period requirement, until 30 June 2020, and 90 days' unemployment benefit for discontinuous permanent employment until 31 December 2020.
- **Prohibition on dismissals during an ERTE on Covid-19 grounds** (until 30 June 2020).
- **ERTES FM and extraordinary measures may be extended.** by resolution of the Council of Ministers, either to
 - (i) permit a subsequent extension to ERTES on grounds of force majeure in response to restrictions on business activities related to health reasons and continuing beyond 30 June 2020;
 - (ii) continue exemptions to Social Security contributions;
 - (iii) extend contributions exemptions to the new ETOP ERTES;
 - (iv) continue furlough measures (differing by sector and applicable legislation).
- **Tripartite Committee [CEOE² and CEPYME³ / UGT⁴ and CCOO⁵ / Government]** has been set up to track measures put in place, monitor the exchange of data and information, and to put forward and discuss any additional measures a Committee member may propose.

² Spanish Confederation of Employers' Organisations – *Confederación Española de Organizaciones Empresariales*

³ Spanish Confederation of Small and Medium-sized Enterprises – *Confederación Española de Pequeñas y Medianas Empresas*

⁴ General Union of Workers – *Unión General de Trabajadores*

⁵ Trade Union Confederation of Workers' Unions - *Confederación Española de Comisiones Obreras*