

# GUIDELINES ON MANAGING ERTEs AND RESUMING BUSINESS ACTIVITY IN SPAIN

EMPLOYMENT AND HEALTH AND SAFETY ISSUES  
COMPANIES SHOULD CONSIDER AFTER COVID-19

July 6, 2020



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# MANAGING ERTEs AND RESUMING BUSINESS ACTIVITY



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## END OF STATE OF EMERGENCY AND NEW NORMALITY

- On **June 21, 2020**, the state of emergency in Spain ended (after 98 days).
- The Spanish government has issued **Royal Decree-Law 21/2020**, of June 9, adopting urgent prevention, contention and coordination measures to tackle the health crisis caused by COVID-19 ([see Legal Flash](#)):
  - **Remote working** is preferable if feasible and returning to on-site work should be progressive.
  - The minimum interpersonal security distance between workers is reduced to **1.5 meters**.
  - Companies' obligations regarding occupational risk prevention services to tackle the risk of infection continue.
- The **autonomous regions** have defined regulations on capacity, disinfection, prevention and refurbishment, particularly for retail establishments, hotels and tourist accommodation establishments, and restaurant and catering services (click [here](#) to read our Legal Flash with details on the regulations in the different autonomous regions).

# END OF STATE OF EMERGENCY: MANAGING ERTES (1/3)

## POSSIBLE SCENARIOS AFTER ROYAL DECREE-LAW 24/2020:

- **Transitional ERTes:** Companies with ERTes on the grounds of total *force majeure* on June 30, 2020, that have not resumed their activity due to their geographic or sectoral characteristics. New exemption percentages on contributions until September 30, 2020:

PERCENTAGE OF EXEMPTED EMPLOYER CONTRIBUTIONS				
No. employees registered as of February 29, 2020	Employees covered by the employer contribution	July 2020	August 2020	September 2020
Fewer than 50	All those affected	70%	60%	35%
Over 50	by the ERTE	50%	40%	25%

- **ERTes of companies that have resumed activity:** Extension until September 30, 2020, of ERTes on the grounds of *force majeure* requested under article 22 RDL 8/2020, with employees being called back where necessary to carry out the activity. Communication obligations in cases in which companies reject ERTes totally or partially.

PERCENTAGE OF EXEMPTED EMPLOYER CONTRIBUTIONS		
No. employees registered as of February 29, 2020	Employees covered by the employer contribution	July, August and September 2020
Fewer than 50	Active	60%
	Non-active	35%
Over 50	Active	40%
	Non-active	25%



## END OF STATE OF EMERGENCY: MANAGING ERTES (2/3)

### POSSIBLE SCENARIOS AFTER ROYAL DECREE-LAW 24/2020 (“RDL 24/2020”):

- **ERTEs on the grounds of *force majeure* in the case of a new outbreak:** If a company cannot carry out its activity due to the new restrictions or contention measures, it must file for a new ERTE on the grounds of *force majeure* under article 47.3 of the Workers Statute. Exemption percentages on contributions:

PERCENTAGE OF EXEMPTED EMPLOYER CONTRIBUTIONS		
No. employees registered as of February 29, 2020	Employees covered by the employer contribution	July, August and September 2020
Fewer than 50	Active	60%
	Non-active	80%
Over 50	Active	40%
	Non-active	60%

- **ERTES based on economic, technical, organizational, and production grounds (“ERTES ETOP”).** The following specialties have been approved:
  - ERTES ETOP valid on June 27, 2020 will continue to apply until the date planned in the company’s communication.
  - If ERTES ETOP are started before and after the entry into force of RDL 24/2020, provided, in the latter case, that they start immediately after an ERTE on the grounds of *force majeure*, and until September 30, 2020, companies can apply the procedural rules provided under article 23 of RDL 8/2020 and the exemptions on contributions for ERTES on the grounds of *force majeure* if they have resumed activity.
  - It is possible to negotiate an ERTE ETOP during the validity of an ERTE on the grounds of *force majeure*.
  - Retroactive effects in the case of negotiation after an ERTE on the grounds of *force majeure*.



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## END OF STATE OF EMERGENCY: MANAGING ERTEs (3/3)

### RESTRICTIONS AFFECTING COMPANIES THAT CARRY OUT AN ERTE:

- **Companies cannot request overtime from their employees, outsource the activity, or hire new employees**, whether directly or through a temporary work agency, except to carry out tasks that their own employees are unable to fulfill (and provided they have informed the workers' legal representatives).
  
- Companies that apply the **exemption from social security contributions** during the validity of an ERTE related to COVID-19:
  - They must **maintain jobs in the company** in the terms established under the Sixth Additional Provision of RDL 8/2020, during the **six months** after the total or partial **return to work** of employees affected by an ERTE. That six-month period will start from **June 27, 2020**, for companies benefiting for the first time from the extraordinary measures on contributions from the date RDL 24/2020 entered into force.
  - Companies with 50 or more employees as of February 29, 2020, **cannot distribute dividends** among shareholders corresponding to the tax year in which these ERTEs were carried out, unless they previously pay back the exempted contributions.

# CONDITIONS TO RESUME ACTIVITY



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## CONDITIONS TO RESUME ACTIVITY (1/5)



### REMOTE WORKING VS. ONSITE WORK

- **Until September 21, 2020:** Remote working is considered preferable as a preventive measure (if technically feasible and proportionate for the company).
- **From September 21, 2020 until the health crisis is officially over:** remote working has to be promoted when possible as a preventive measure.
- **Once the health crisis due to Covid-19 is over:** back to remote working as an alternative to on-site work under individual agreement.
- Remote working is an **appropriate preventive measure** in the case of **vulnerable employees** and to achieve **work-life balance** (article 6 RDL 8/2020).
- **Legal concept of remote working:** employees who work from their home (or designated place) in a principal or main way (article 13 Workers Statute).
- **Health & safety measures:** Ministry of Health's advice on emotional wellbeing ([here](#)) and management of the psycho-social risks ([here](#)) of remote working.
- New bill regulating remote working ([here](#)).



## CONDITIONS TO RESUME ACTIVITY (2/5)

### MINISTRY OF HEALTH'S RECOMMENDATIONS ON EMPLOYMENT



## WHERE ARE THE HYGIENE AND HEALTH AND SAFETY MEASURES PUBLISHED?

Read a summary of **legal obligations and good practice guidelines** to prevent the risk of workplace exposure to SARS-CoV-2 according to **activities/sectors** ([here](#)).

- **Royal Decree-Law 21/2020**, of June 9, adopting urgent prevention, contention and coordination measures to tackle the health crisis caused by COVID-19 ([Legal Flash](#))
- **Regulations according to autonomous regions and sectors**: see [Legal Flash](#) on regulations by autonomous regions.
- Procedure for action for **occupational risk prevention services** to address exposure to SARS-CoV-2. Ministry of Health, dated June 19, 2020 ([here](#))
- Procedure for **action to deal with new cases** of SARS-CoV-2 infection. Ministry of Health ([here](#))
- **Prevention of health & safety risks at work vs. COVID-19** - non-exhaustive list of sources of information- INSST ([here](#))



## CONDITIONS TO RESUME ACTIVITY (3/5)

### MINISTRY OF HEALTH'S RECOMMENDATIONS ON EMPLOYMENT



## WHAT ARE THE MAIN GENERAL RECOMMENDATIONS APPLICABLE TO ALL SECTORS?

- Anyone with **symptoms** or who has come into contact with **someone who has COVID-19** must not go to work and must contact prevention services.
- Minimum **interpersonal security distance** of 1.5 meters
- **Commuting:**
  - Travel options that guarantee physical distancing
  - Special rules for the use of own vehicles, taxis and vehicles for hire
  - Compulsory use of masks on public transport
  - Need to have company certificate or statement justifying mobility for employment reasons
- **Waste management and disinfection of work centers**
  - Businesses open to the public must be disinfected twice a day
- **Personal hygiene measures:**
  - Frequent hand washing, and immediately after coughing or sneezing, and before eating or smoking
  - Avoid touching face, nose and eyes
  - Cover mouth when coughing and use tissues



## CONDITIONS TO RESUME ACTIVITY (4/5)

### KEY CONSIDERATIONS ON PREVENTION



## KEY ORGANIZATIONAL ISSUES

- ✓ **Leading the return to work:** Own or outsourced prevention services (“O/OPS”)
- ✓ **Adapting the work center:** physical distancing (1.5 meters), shift system to avoid crowds; hygiene, disinfection and ventilation measures; waste management; and personal protective equipment.
- ✓ **Protocol to carry out tests and monitor the temperature of employees,** in line with the Ministry of Health’s instructions and the Spanish Data Protection Agency’s criteria.
- ✓ **Particularly vulnerable employees** must be identified in each company and their workspaces must be adapted.
- ✓ **Remote working and specific health and safety measures:** management of emotional wellbeing and of psycho-social risks.
- ✓ **Contingency plan** if the preventive measures cannot be adopted or a new outbreak occurs.



## CONDITIONS TO RESUME ACTIVITY (5/5)

### PRACTICAL ADVICE



### PRACTICAL ADVICE

**Be proactive in managing the company's health and safety preventive policies**

**Set up a staff training and information plan**

**Draft updated protocols that adapt to the organization to avoid liabilities:**

- ✓ Protocol on the return to the workplace
- ✓ Protocol on health surveillance, medical examinations (temperature monitoring and blood tests) and data protection
- ✓ Protocol on infection or outbreak management
- ✓ Review outsourced prevention services agreements and civil liability policies

# DIFFICULTIES THAT COULD ARISE ONCE ACTIVITY IS RESUMED





## DIFFICULTIES THAT COULD ARISE ONCE ACTIVITY IS RESUMED

### MANAGING THE RETURN TO WORK



- ✓ **An employee's test comes back positive, an employee becomes infected or shows symptoms**
  - Inform the O/OPS and activate the operational protocol.
  - The employee must not go to the work center.
  
- ✓ **Employees do not want to go to work due to fear or to the lack of safety measures, or the workers' legal representatives ask for the productive activity to be stopped**
  - O/OPS certificate and assessment of specific case.
  - Possible application of an ERTE on the grounds of *force majeure*.
  
- ✓ **The employees ask for a reduction or adjustment of working hours, e.g., to provide services through remote working or flexible work**
  - The request must be dealt with quickly and with sensitivity, in line with the remote working policy and considering work-life balance needs.
  
- ✓ **The company receives a visit from the Labor and Social Security Inspectorate.**
  - Immediate management with lawyers and O/OPS



## DIFFICULTIES THAT COULD ARISE ONCE ACTIVITY IS RESUMED

### PRACTICAL ADVICE



### PRACTICAL ADVICE

- ✓ Follow the state and regional prevention obligations, whether general or those applicable to the company's activity or sector.
- ✓ Be proactive in managing health and safety measures.
- ✓ Deal quickly and sensitively with requests regarding measures to achieve work-life balance.
- ✓ Adapt remote working protocols to the new scenario.
- ✓ Review the digital code of conduct.
- ✓ Adapt the daily working time registry (no fingerprint recognition).
- ✓ Design a continuous training and information plan for employees.



# LEGAL OPTIONS TO TACKLE THE CRISIS



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## LEGAL OPTIONS TO TACKLE THE CRISIS

### FLEXIBLE WORKING ARRANGEMENTS



#### IF THE COMPANY'S NEGATIVE SITUATION IS TEMPORARY:

- ✓ **Temporary redundancy plans (“ERTE”) on the grounds of *force majeure* and ERTE based on economic, organizational or production grounds**
  - Suspension or reduction of working hours depending on the circumstances arising during and after the de-escalation plan
  - Special regime until September 30, 2020
  
- ✓ **Review policies on remuneration, working hours, shifts and tasks using different legal means, based on the following:**
  - Whether the conditions are provided under the collective bargaining agreement
  - Temporary or definitive measure
  - Validity of the collective bargaining agreement
  - Seriousness and context of the company's situation

#### IF THE COMPANY'S NEGATIVE SITUATION IS STRUCTURAL:

- ✓ **Termination, dismissals and early retirement, depending on:**
  - Prohibition against dismissals on the grounds of COVID-19 until September 30, 2020
  - Commitment to maintain jobs for six months after resumption of business activity or from June 27, 2020
  - Employees over 50 years of age affected by an ERTE



## EMPLOYMENT MEASURES TO TACKLE THE CRISIS

## SOCIAL SECURITY MEASURES



- ✓ **New exemption on employer contributions** while an ERTE on grounds of *force majeure* or an ERTE ETOP lasts.
- ✓ **Moratorium on social security contributions** for April, May and June 2020 for certain activities listed in Order ISM/371/2020, of April 24.
- ✓ **Deferral of social security debts** that should, by law, be paid between April and June 2020.

# LIABILITY FACING COMPANIES



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## COMPANY LIABILITY

### IN CASE OF NON- COMPLIANCE



**CRIMINAL.** Not adopting reasonable health and safety measures in the workplace to avoid the infection of staff (even if no infection occurs).

**ADMINISTRATIVE.** Not adopting reasonable health and safety measures in the workplace to avoid the infection of staff (even if no infection occurs).

**SOCIAL SECURITY SURCHARGES.** Not adopting reasonable health and safety measures in the workplace to avoid the infection of staff (if infection occurs).

**CIVIL.** Not adopting reasonable health and safety measures to avoid the infection of staff (if infection occurs), which can be extended to the personal assets of the company directors.

**LABOR AND EMPLOYMENT.** Voidance or inadmissibility of measures in case of infringement of labor regulations.

**DATA PROTECTION.** Infringement of regulations on processing employees' personal and particularly sensitive data (e.g., related to health), as, for example, in the case of medical examinations.

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