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# PHASE 1 IN SPAIN: Labor law challenges arising from the reduction of restrictions in certain sectors and regions

Legal flash

May 11, 2020

The [\*Official Gazette of the Spanish State\*](#) dated May 9, 2020, has published Order SND/399/2020, of May 9, relaxing certain national restrictions established following the declaration of the state of emergency on implementing Phase 1 of the transition plan to a new normality.



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The regulation, in force since May 11, 2020, is a step towards resuming activity in certain sectors in regions that, from that date, move into Phase 1 (listed in the [\*Annex\*](#)).

Below we analyze the most relevant aspects.

- Resuming or extending activity in the sectors allowed to reopen means that employees affected by a temporary redundancy plan (“ERTE”) must be released from it, and that strict safety, hygiene and occupational risk prevention measures must be adopted, which may include the adjustment of working conditions and conducting medical examinations.
- Retail establishments and those providing services can now carry out their activity subject to fewer restrictions than in Phase 0.
- As a new feature, outdoor terraces of establishments providing restaurant and catering services, as well as hotels and tourism establishments, can reopen, subject to restrictions.
- Moreover, air and maritime travel has resumed in the Balearic and Canary Islands.



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## Labor law implications arising from resuming activity or relaxing Phase 0 restrictions

Companies that can resume part of their activity, on implementing Phase 1 and Phase 0 of the transition plan to a new normality approved by the Spanish government (Orders SND 388/2020 and SND 399/2020), must also reinstate part of their staff, based on business needs, which means they must be prepared to respond to the people management challenges explained below.

### Remote working as a preferred measure and work-life balance

- Under Order 399/2020, in Phase 1, whenever feasible, **remote working must be still encouraged** in the case of employees who are able to work remotely.
- In this context, note that remote working is an **organizational measure** considered preventive (to avoid infection) and preferable (when technically feasible and proportional in terms of the effort required of the company). This measure will be in force for another three months following the end of the state of emergency (article 5 RDL 8/2020, with respect to article 15 RDL 15/2020).
- Also, companies must be prepared to received **requests from employees for the adjustment and reduction of working hours** (including, among other measures, remote working) on the grounds of work-life balance related to COVID-19, in the terms of the MECUIDA scheme (article 6 RDL 8/2020).

### Managing the return to work of employees subject to an ERTE

- Companies allowed to resume their activity and that have implemented an **ERTE involving the suspension or reduction of working hours** for all or part of their staff can progressively reinstate the employees necessary to resume their activity, giving the legally required notice.
- To this end, they must fulfill the most recent **criteria established by the Ministry of Labor**, which allows companies to change the initial scope of the ERTE and defines the procedure to do so.
- Also, the Spanish government has reached an **agreement with the most representative trade unions and employer associations** to extend the length of ERTE on the grounds of *force majeure* (until June 30, 2020) and facilitate the transition from ERTE on the grounds of *force majeure* to ERTE on objective grounds, if necessary.



- It is still necessary to issue a company certificate or statement to justify the mobility of citizens for employment reasons (according to the mobility restrictions regulated under article 7 Order 399/2020).

### Occupational risk prevention measures and medical examinations

- Companies must observe the **strict health and safety, prevention and hygiene measures** regulated in detail under Orders 388/2020 (see [Legal Flash Phase 0](#)) and 399/2020, as well as in the Guidelines published by the Ministry of Health for each sector ([here](#)), which mainly refer to the aspects below.
  - Hygiene and occupational risk prevention measures to protect employees
  - Hygiene and health and safety measures to protect customers
  - Cleaning and disinfection measures adapted to the characteristics and degree of use of centers, entities, premises and establishments
- To this end, it is essential for companies to have a **comprehensive protocol that adapts to each organization's needs** and includes the health and safety measures for each phase and group (paying close attention to particularly vulnerable employees), and an **operational protocol** they can implement if employees show symptoms or become infected.
- The possibility of companies being able to conduct **temperature screening or diagnostic tests** on employees as a health surveillance measure and a condition to be able to enter the workplace must be analyzed on a case-by-case basis to ensure the following requirements are fulfilled:
  - The guidelines set out by the company's Occupational Risk Prevention Services.
  - The recommendations of the competent health care authorities.
  - Prior administrative authorization, if required (e.g., in Catalonia).
  - Labor and data protection regulations, considering the criteria published by the Spanish Data Protection Agency (see [Legal Flash](#) on temperature screening and testing in the workplace).

### Adjustment of working conditions to avoid the agglomeration of people at the workplace

- Moreover, as a result of the restricted opening conditions laid down for Phase 0 and Phase 1, companies must make any **adjustments to working schedules** that are necessary to fulfill the health and safety regulations and **avoid the agglomeration of people** (regardless of whether they are employees) at work centers during foreseeable peak times or when crowds are likely to build up.



- A risk is considered to arise when there is **no reasonable expectation** of being able to **observe the minimum physical distance requirements**, particularly on entering and leaving the workplace.
- In these cases, as well as cases where the opening times of establishments are sought to be extended, companies that need to **adjust employees' working conditions** (e.g., working hours and shifts) must follow the **procedures provided by law and under the applicable collective bargaining agreement**, which may require prior negotiations.

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## Reopening of certain sectors

### Retailers and service providers

- During Phase 1, following Order SND/414/2020, the possibility of opening retail premises and establishments is subject to the following requirements:
  - Their **useful display and sales area must take up no more than 400 m<sup>2</sup>** and, if larger, they can still open by **delimiting this space to create a smaller surface area** (up to 400 m<sup>2</sup>).
  - They cannot be located in parks or shopping centers with no direct and independent access from the outside.
  - It is no longer necessary to arrange an appointment.
  - **The total capacity must be reduced to 30%** (if there are several floors, customers must spread out evenly between them).
  - The **two-meter security distance is required between customers** (if unfeasible, only one customer at a time is allowed inside the establishment).
  - **Preferential times slots** must be assigned to customers over 65 years of age.
  - **Goods can be collected** at establishments on a staggered basis, avoiding crowds.
  - All applicable health and safety, hygiene, and prevention measures must be observed.
- As a new feature, on an appointment-only basis, car dealers, Technical Inspection of Vehicles centers, and garden centers are allowed to reopen, **regardless of their display area**, as well as state-licensed gambling entities.

### Restaurant and catering services

- During Phase 1, **outdoor terraces** of establishments providing restaurant and catering services are allowed to reopen on the following conditions:
  - **Maximum capacity:** 10 people per table or group of tables.



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- **Security distance:** Distance of two meters between tables.
  - **Capacity:** The number of tables is reduced by 50% with respect to the previous year (municipal license).
  - Applicable health, safety and hygiene measures must be observed.
- It is still **strictly forbidden to consume food or beverages inside** these establishments.

### Hotels and tourism establishments

- These establishments are allowed to **reopen with no capacity restrictions**, although the free movement of persons is still limited (article 7 Order 399/2020).
- **Restaurant and cafeteria** services can resume when required for the establishment to provide adequate accommodation, although these services can only be offered to customers staying at the establishment.
- Indoor common areas must remain closed.

### Other sectors in which restrictions have been relaxed in Phase 1

- Education and university centers can open to carry out disinfection, conditioning and administrative tasks. University laboratories can also resume activity.
- Cultural events and shows, subject to capacity restrictions, and audiovisual productions.
- Sports practice (professional, top-level, high-performance sportspeople, those participating in events of national interest, and those belonging to a sports federation).
- Active and nature tourism.
- Libraries and museums.

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## AIR AND MARITIME TRAVEL RESUMES IN THE BALEARIC AND CANARY ISLANDS

- Under Order TMA/400/2020, of May 9, published in the [\*Official Gazette of the Spanish State\*](#) dated May 10, 2020, restrictions **are lifted** from May 11 at 0:00 hours (or midnight at the beginning of the day) on **commercial air travel between the peninsula and the Canary Islands, the Balearic Islands and inter-island connections**. The Order also regulates the **maritime transport of passengers** during Phase 1, limiting the access to these services to passengers that need to use them for any of the mobility reasons provided under article 7 of Royal Decree 463/2020, such as professional or business obligations, returning to one's place of habitual residence and looking after the elderly.



- For this purpose, it establishes that the **capacity of each aircraft cannot exceed 50%** to ensure adequate separation between passengers.
- In the case of maritime transport, all passengers must comply with the health and safety measures imposed by the competent authority.

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