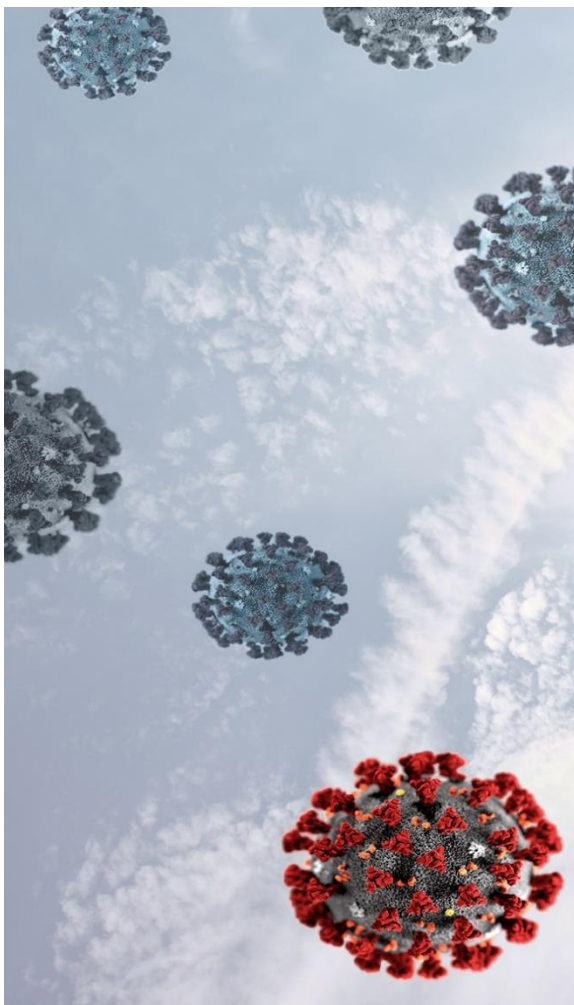

Royal Decree-Law 18/2020: extension of ERTE, of exemptions and of other measures adopted by the Spanish government

Legal flash

June 8, 2020

On May 13, 2020, [*the Official Gazette of the Spanish State*](#) published Royal Decree-Law 18/2020, on social measures to preserve employment (“RDL 18/2020”), reflecting the Social Agreement for the Preservation of Employment signed by the Spanish government, trade unions and employer association representatives. It came into force on the same day it was published in the Official Gazette of the Spanish State, and its provisions have been provided greater flexibility through consultations resolved by the Labor Ministry and by the General Treasury of Social Security (“TGSS”).



RDL 18/2020 aims to provide guarantees to companies and encourage them to call back employees subject to a temporary redundancy plan (“ERTE”) when it becomes possible, and maintain other measures to avoid termination. The solutions adopted are explained below.

- Limit the duration of ERTE on the grounds of *force majeure* until no later than June 30, 2020.
- Distinction between “total” and “partial” *force majeure* to impose, in the latter case, the definitive return to work of employees subject to an ERTE.
- Foster employees’ return to work by extending exemptions from paying social security contributions covering employees called back to work.
- Extend the prohibition against dismissals on the grounds of COVID-19 until June 30, 2020.
- In the case of companies that have carried out an ERTE on the grounds of *force majeure*, determine the scope of commitment to maintain jobs and restrict the possibility of distributing dividends among shareholders.
- Exemption on the guarantee to maintain jobs in companies at risk of insolvency.



ERTE on the grounds of *force majeure*: extension and new exemptions

How long can companies extend an ERTE on the grounds of *force majeure*?

- › Until no later than June 30, 2020, unless the *force majeure* causing the ERTE arises from the risk of infection among the workforce or from another government restriction that extends beyond that date.
- › However, the government could approve a potential extension of ERTE on the grounds of *force majeure* beyond 30 June.

What is the difference between a total and partial *force majeure* from May 13, 2020?

- › ERTE on the grounds of *force majeure* may continue to be applied in May and June in two ways:
 - as a total *force majeure*, if the activity is still subject to restrictions that prevent it from resuming and from calling back employees, or
 - as a partial *force majeure*, if restrictions have been lifted and the company is able to resume its activity and call back employees.
- › To be able to apply for the exemptions on employer contributions offered by the government, companies must inform the General Treasury of Social Security (“TGSS”) through the RED System of the type of *force majeure* affecting them.

Can companies decide whether they are undergoing a total or partial *force majeure*, or to remove employees from an ERTE and then subject them again to the same plan?

- › Yes, the Labor Ministry and the TGSS’s interpretive criteria following the publication of RDL 18/2020 have provided greater flexibility to these measures, allowing companies greater room for maneuver. However, this does not grant any exemption on having to give an objective justification for the decisions taken, which the Labor Inspectorate and courts may review at a later date.
- › As regards declaring partial *force majeure*, certain conditions have been eased, including that (i) companies can assess whether, despite restrictions being lifted, they are in a position to resume their activity from a business perspective; (ii) any preparatory activities to resume their activity are not considered to be the start of a partial *force majeure* event; (iii) a partial *force majeure* can be declared in some work centers and total *force majeure* in others, even under the same ERTE; (iv) employees—even the whole staff— subject to an ERTE can be removed from it (without the company notifying a complete waiver of the ERTE) and then placed on the same ERTE again if the business activity does not pick up, which will also allow companies to re-apply for the corresponding exemptions on social security contributions.

What are the consequences if the *force majeure* is total?

- › First, the company can continue to apply the ERTE to its employees.



- › Second, RDL 18/2020 allows companies to request an exemption on social security contributions corresponding to May and June, according to the following parameters:

PERCENTAGE OF EXEMPTED EMPLOYER CONTRIBUTIONS			
No. employees registered as of February 29, 2020	Employees covered by the employer contribution	May 2020	June 2020
Fewer than 50	All those affected by the ERTE	100%	100%
More than 50		75%	75%

What are the consequences if the *force majeure* is partial?

- › Companies must call employees affected by an ERTE back to work “to the extent necessary,” prioritizing adjustments relating to the reduction of working hours (i.e., with the reduction of working hours taking precedence over a full return to work to reduce the “time exposure” of employees in workplace).
- › The company must give the following notifications:
 - If all of its employees return to work, it must previously notify the Public State Employment Service (“SEPE”), and it must inform the labor authority within 15 days.
 - If it calls back some of its employees subject to an ERTE, whether on a full-time or part-time basis, the company must previously notify the SEPE. Although it is not required to inform the labor authority, it is advisable to do so.
- › The company can also request an exemption on social security contributions for employees that are still subject to an ERTE and for those it calls back to work, applying the following deductions—depending on the month, the number of employees and whether they are included in the ERTE—which aim to foster the return to activity:

PERCENTAGE OF EXEMPTED EMPLOYER CONTRIBUTIONS			
No. employees registered as of February 29, 2020	Employees covered by the employer contribution	May 2020	June 2020
Fewer than 50	Those returning to work	85%	70%
More than 50		60%	45%
Fewer than 50	Those still suspended	60%	45%
More than 50		45%	30%



ERTE on objective grounds

What possibilities does RDL 18/2020 allow as regards ERTE based on economic, organizational, and production (“ETOP”) grounds when an ERTE on the grounds of *force majeure* comes to an end or after June 30, 2020?

- › Note that to carry out an ERTE based on ETOP grounds, the company must negotiate with the employees’ legal representatives (or, if applicable, an *ad hoc* committee made up of company employees), which does not require administrative authorization.
- › If it does so before June 30, 2020, it must follow the special simplified procedure provided under article 23 of RDL 8/2020 (see our [Legal Flash](#)).
- › Companies may start negotiating this procedure during the ERTE on the grounds of *force majeure*.
- › If negotiations begin after the ERTE on the grounds of *force majeure* has ended, the effects of measures involving the suspension of work contracts or reduced working hours will be retroactive to the date that ERTE ended.

Unemployment benefits

Until when can employees benefit from the extraordinary unemployment measures?

- › The exceptional measures on unemployment protection provided in sections 1-5 of article 25 of RDL 8/2020 (without a grace requirement or other future benefits being used up) will be in force until June 30, 2020.
- › From that date onwards, unless this term is extended, ordinary unemployment benefits will apply.
- › Unemployment protection measures for permanent seasonal workers (article 25.6 RDL 8/2020) will be in force until December 31, 2020.

Restrictions on dividend distribution and tax havens

What restrictions have been imposed on companies whose tax domicile is located in a tax haven?

- › Companies and entities whose tax domicile is located in a tax haven cannot benefit from the extension of ERTE on the grounds of *force majeure*.



Can companies distribute dividends if they have carried out an ERTE and applied an exemption on employer contributions?

- › Companies with 50 or more registered employees (or employees on an equivalent register) as of February 29, 2020, and that distribute dividends corresponding to the tax year in which these ERTE were carried out (usually 2020), must previously pay the amount corresponding to the exemption on social security contributions.
- › A case-specific analysis is required of the distributions to shareholders included in this scenario, as well as the extent of non-compliance.
- › To avoid the lack of distributed dividends resulting in the shareholders' right of separation under article 348bis.1 of the Spanish Companies Act, the year 2020 will not be taken into account for these purposes.

Prohibition against dismissals, temporary contracts and maintenance of jobs

Until when has the prohibition against dismissals on grounds related to COVID-19 been extended?

Until June 30, 2020. Consequences arising from non-compliance will require a case-by-case analysis.

Until when will the suspension of the period computed for temporary contracts affected by an ERTE involving suspension last?

Until June 30, 2020. Consequences arising from non-compliance will require a case-by-case analysis.

If a company that has carried out an ERTE on the grounds of *force majeure* and applied the exemptions on employer contributions subsequently dismisses employees, how will it be affected by the guarantee to safeguard jobs?

- › If the company dismisses employees affected by an ERTE, it will breach its commitment to maintain jobs.
- › For the termination of a contract to be considered a breach of the commitment to preserve employment, it must meet the following requirements:
 - The termination affects an employee subject to an ERTE.
 - Termination must occur within the six months following the total or partial return to work of employees affected by an ERTE.



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- Termination of contracts should be for reasons not inherent to employees, which means that companies can terminate certain contracts without breaching this commitment.
- Specific consideration is given to highly variable businesses and those offering seasonal employment to ascertain whether the commitment to maintain jobs has been fulfilled.
- Companies that breach the commitment to maintain jobs must pay the full amount of exempted employer contributions, together with a 20% surcharge and the applicable late payment interest.
- However, companies at risk of insolvency, as provided under article 5.2 of the Insolvency Act, are not obliged to fulfill the commitment to maintain jobs.

For additional information, please contact Cuatrecasas.

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