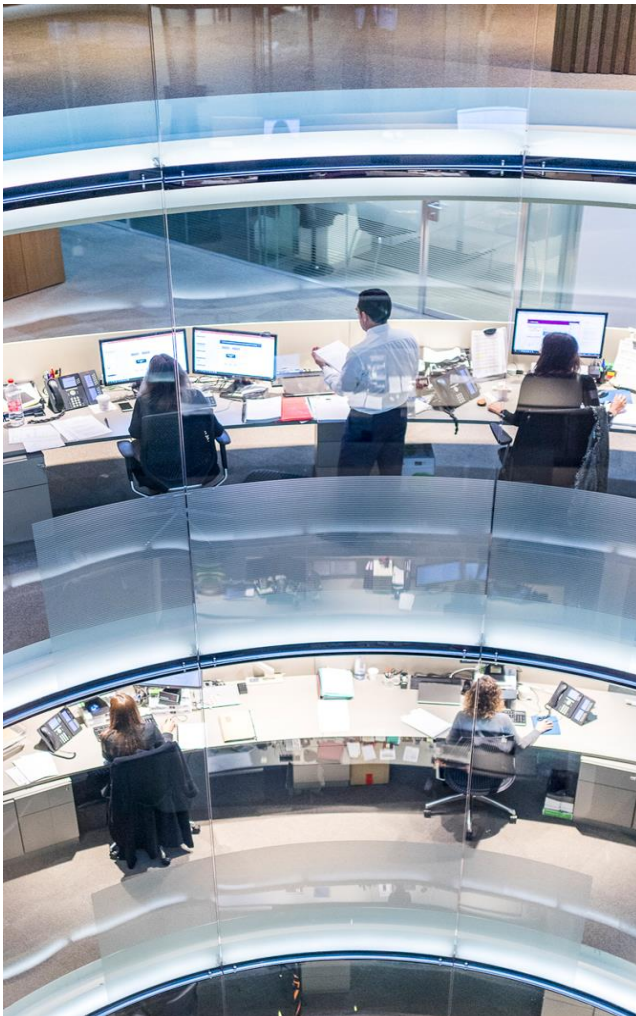


Labor and Employment



Newsletter 2nd quarter 2020

March - June 2020

NEW DEVELOPMENTS

Related to COVID-19

1. Extension of ERTE and other measures adopted by the Spanish government
2. First rulings on ERTE on the grounds of *force majeure*
3. Prohibition to dismiss employees and risk of terminations being declared null and void
4. Labor inspection campaign

Unrelated to COVID-19

5. Calculating paid leave
6. Dividing service contracts between more than one transferee
7. Lack of documentation justifying collective dismissals
8. Forthcoming legal developments



In terms of labor and employment, the last quarter has mainly been marked by measures adopted to tackle the COVID-19 crisis, the most recent development being RDL 24/2020, under which ERTE have been extended until September 30, 2020, and ERTE on the grounds of *force majeure* (“ERTE FM”) have been adapted to the new containment measures adopted.

However, in recent weeks, as activity is resumed, new labor law issues have arisen that affect companies’ management of labor relations. Also, the reform agenda with new draft bills under way is gradually moving forward.

The eight main developments are explained below.

DEVELOPMENTS RELATED TO COVID-19

1. EXTENSION OF ERTE AND OTHER MEASURES

> Continuity of ERTE on the grounds of *force majeure*

ERTE FM to face the restrictions on activity arising from COVID-19 can be extended, in principle, until September 30, 2020, in the terms established under RDL 24/2020, of June 26.

The extension follows the current trend towards granting higher social security exemptions to companies based on the employees they have called back to work rather than those still subject to the ERTE.

> Possible scenarios for ERTE FM after RDL 24/2020

RDL 24/2020 establishes three possible scenarios for ERTE FM from July 1, 2020, with the following consequences:

- **Transitional ERTE.** The extension of ERTE FM until September 30, 2020, will be possible if a company continues to have difficulties “*due to geographical or sectoral characteristics,*” as stated in the preamble of RDL 24/2020. Companies can request an exemption on contributions

until September 30, 2020, in line with the following new percentages in decreasing order:

% OF EXEMPTED EMPLOYER CONTRIBUTIONS				
Employees registered on February 29, 2020	Which employees	July	August	Sept.
Fewer than 50	All those affected by the ERTE	70%	60%	35%
More than 50		50%	40%	25%

- **ERTE of companies that have resumed activity.** Extension until September 30, 2020, of ERTE FM requested under article 22 RDL 8/2020, with the obligation to call back employees where necessary to carry out the activity. Companies can request the following exemption on contributions until September 30, 2020:

% OF EXEMPTED EMPLOYER CONTRIBUTIONS		
Employees registered on February 29, 2020	Which employees	July, August and September 2020
Fewer than 50	Active	60%
	Non-active	35%
More than 50	Active	40%
	Non-active	25%

- **ERTE on the grounds of *force majeure* in the case of a new outbreak:** If companies cannot carry out their activity due to new restrictions or contention measures, as in the case of those operating in the county of Segrià, including the city of Lleida, and the Barcelona metropolitan area, they must file for a new ERTE FM under article 47.3 of the Workers Statute. Companies can request an exemption of contributions until September 30, 2020, in line with the following percentages:



% OF EXEMPTED EMPLOYER CONTRIBUTIONS

Employees registered on February 29, 2020	Which employees	July, August and September 2020
Fewer than 50	Active	60%
	Non-active	80%
More than 50	Active	40%
	Non-active	60%

- Flexibility provided to the continuity of the first two cases of ERTE FM, and to employees being subject to an ERTE or returning to work, does not exempt companies from having to give an objective justification for the decisions they take, which the Labor Inspectorate and courts may review in the near future.

➤ **Measures for companies implementing an ERTE on economic, technical, organizational or production grounds (“ETOP”): exemption from contributions is introduced**

The following measures apply to companies already implementing an ERTE ETOP and those intending to implement one after July 1, 2020:

- To adopt this measure, 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.
- ERTE ETOP in force on June 27, 2020, will continue to apply until the date specified in the company’s notification.
- The company may start negotiating this procedure during the ERTE FM.
- If the negotiation starts before September 30, 2020, it must follow the special simplified procedure provided under article 23 of RDL 8/2020.

- If negotiations begin after the ERTE FM has ended, the effects of measures involving the suspension work contracts or reduced working hours will be retroactive to the date that ERTE ended.

- Companies that initiated an ERTE ETOP before or after RDL 24/2020 entered into force—if, in the latter case, it immediately followed an ERTE FM—and until September 30, 2020, can apply the same exemptions on contributions for ERTE FM as companies having resumed activity.

➤ **Restrictions on companies that apply ERTE FM or for objective reasons**

- 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 must meet the following requirements:

- They must maintain jobs in the company during 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 registered as of February 29, 2020, **cannot distribute dividends** among shareholders corresponding to the tax year in which these ERTE were carried out, unless they previously pay back the exempted contributions.



- It is arguable whether these restrictions, as well as the interruption of the length of temporary employment contracts, would be applicable to ERTE FM in case of new outbreaks, in view of the silence of the law.
- **Common labor measures relating to activities in place or that have been resumed**
 - Remote working as a preferable measure until September 21, 2020, where this is technically possible and proportionate for the company, and as a preventive measure to be fostered, when the nature of the activity allows this, until the health crisis ends.
 - If applicable, the company must have a progressive return-to-work plan including occupational risk prevention measures for employees who continue to provide services in the workplace (e.g., physical distance of at least 1.5 meters; hygiene, cleaning and prevention measures; and supply of personal protection equipment) in compliance with the orders and guidelines issued by the authorities for each sector. Companies that do not adopt reasonable health and safety measures in the workplace may face administrative liability (fines and social security surcharges), civil and criminal liability—which may even extend to directors—when damages occur. Also, the risk of reputational damage cannot be overlooked.
 - A contingency plan or operational protocol for COVID-19 infection is required, covering company employees, contractor companies and self-employed workers, in coordination with the internal or external health and safety service.
 - Special adjustment or reduction of working hours at the request of employees to deal with greater needs for work-life balance as a result of the health crisis.
- **Other labor measures to tackle the economic and social effects of COVID-19**
 - Employees affected by an ERTE related to COVID-19 are entitled to an exceptional unemployment benefit (without a grace requirement or future unemployment benefits being used up) until September 30, 2020.
 - Prohibition to dismiss employees or terminate employment contracts on the grounds of COVID-19 until September 30, 2020.
 - Also, until September 30, 2020, the length of temporary employment contracts and the reference periods have been interrupted for the same amount of time as the period suspended during an ERTE.
 - Following RDL 24/2020, companies cannot request a six-month moratorium (this was only possible for the contributions of April, May and June) or a deferred payment of social security debts (this was only possible for the months of March, April and May).
 - Stricter fines against companies have been approved to avoid fraudulent attempts to collect undue unemployment benefits.

For more details, see our legal flashes on [RDL 8/2020](#), [RDL 9/2020](#), [RDL 10/2020](#), [RDL 11/2020](#), [RDL 15/2020](#), [RDL 18/2020](#), [RDL 21/2020](#) and [RDL 24/2020](#); as well as our [Legal Flash](#) on social security benefits for companies, our [Legal Flash](#) on the new normality following the state of emergency: regional regulations, and our [Guide](#) on resuming business activity in Spain.

2. FIRST RULINGS ON ERTE ON THE GROUNDS OF FORCE MAJEURE

In the last weeks of this quarter, the first rulings have been handed down, all from instance courts, on ERTE FM applied to tackle the effects of COVID-19. These rulings have mainly addressed the following issues of interest:



- **Concept of *force majeure*.** Some rulings state, for example, that *force majeure* causes include scenarios where activity has been reduced, despite not being suspended directly due to the state of emergency, but indirectly as a result of lockdown and the restrictions on free movement (breakdown and roadside assistance). Another court ruling underlines that a company offering an essential activity can implement an ERTE FM for employees not affected by the essential nature of that activity.
 - **Processing an ERTE FM.** In this regard, the courts have indicated, for example, that a company can begin processing an ERTE ETOP while an ERTE FM is in force; and that the term to request an ERTE FM may be extended by the authorities.
 - **Challenging the Labor Authority's decision.** Rulings handed down on this issue confirm, for example, that it is mandatory to attempt a pretrial conciliation before filing a lawsuit against an ERTE FM; and that the appropriate procedural channel to challenge a decision from the Labor Authority on the existence of *force majeure* is the procedure to challenge administrative acts concerning labor and social security issues provided under article 151 of the Spanish Labor Court Act ("LRJS"). In turn, challenging an authorized ERTE FM, if filed individually, must follow the procedure specified under article 138 of the LRJS, and if filed collectively, must follow the procedure for collective disputes specified under article 153 of the LRJS.
- 3. PROHIBITION TO DISMISS EMPLOYEES AND RISK OF TERMINATIONS BEING DECLARED NULL AND VOID**
- RDL 24/2020 extends until September 30, 2020, the prohibition in force against dismissals, provided under article 2 of RDL 9/2020.
 - The debate on this measure is centered on how the dismissal should be declared if the prohibition is not observed: null or unfair? Neither the Spanish Supreme Court nor the High Court of Justice has issued any rulings on this law, but a recent decision handed down by Labor Court no. 3 of Sabadell has declared the individual dismissal of one employee (fraudulently employed through a temporary contract) as null because it did not comply with the prohibition to dismiss employees.
- 4. LABOR INSPECTION CAMPAIGN**
- In the coming months, companies that have carried out an ERTE due to the COVID-19 crisis are likely to receive a visit or a notice from the labor inspectorate as a result of the inspection campaign, which has already begun, to detect fraud in ERTE and to monitor the responsible use of public funds.
 - Specifically, the campaign aims to increase inspection visits to detect breaches and irregular practices, to verify whether activity has been resumed without previously informing the Public State Employment Service, and to ascertain whether employees brought back to work have been doing extra hours while others are still subject to an ERTE.
- DEVELOPMENTS UNRELATED TO COVID-19**
- 5. CALCULATING PAID LEAVE**
- In addition to the labor measures adopted to tackle COVID-19, among the latest legal developments in the last quarter, the most noteworthy are Supreme Court judgments no. 229/2020 and no. 257/2020, respectively dated March 11 and March 17, 2020 ([TECNIBERIA Case](#) and [ASEMPLEO Case](#)), which have closed the debate under way with the Spanish Court of Appeals on ***dies a quo*** and **the calculation of paid leave days**.



- › In both decisions, the Supreme Court ruled that paid leave requires a triggering event, i.e., a situation of need that must be dealt with and can only apply on working days, that is, allowing the employee to take time off work. This means that (i) paid leave **only applies to working days**; and (ii) employees can only benefit from paid leave **while the triggering event persists**, up to the limit established by law or convention.
- › The criterion set by the Supreme Court makes it essential to review the conventional improvements to the length of paid leave and companies' internal HR policies on granting and calculating paid leave.

6. DIVIDING SERVICE CONTRACTS BETWEEN MORE THAN ONE TRANSFEREE

- › We highlight CJEU Judgment March 26, 2020, Case C-344/18 (ISS FACILITY SERVICES NV). In a case involving a public contract for cleaning services in which the contract (previously awarded to ISS Facilities) was divided into three lots among two new contractors, the Court ruled that, in the contract of one of the workers, who was assigned to all of the market lots, the contractor awarded the activity to which the worker provided most services should not be subrogated into the whole contract, because that would impose on the company obligations greater than those entailed by their transfer to the undertaking concerned. Otherwise, the solution was to transfer the rights and obligations arising from the contract of employment to each of the transferees, in proportion to the tasks performed by the employee concerned, provided that the division of the contract of employment as a result of the transfer is possible and neither would adversely affect the safeguarding of the rights of the worker (which must be determined by national courts).

7. INSUFFICIENT CONTENT IN THE DOCUMENTATION JUSTIFYING COLLECTIVE DISMISSALS

- › Another recent judgment of interest is no. 33/2020 of the Spanish Court of Appeals, dated April 17, 2020 (RYANAIR Case), annulling **RYANAIR's** collective dismissal based on **production and organizational grounds due to its failure to negotiate in good faith during the consultation period**, having provided documentation the content of which was considered insufficient. The Chamber concluded as follows:
 - Notices sent to employees were written in English.
 - The **technical report was deficient**, it was unsigned, and was drafted without considering any documents other than those provided by the company itself, omitting any reference to the expertise of its author.
 - The **report** referred to a market circumstance of a **temporary or transitory nature**, namely the delay in the **delivery of aircrafts** and the uncertainty caused by **Brexit**.
 - The **poor reinsertion plan and employment measures** indicated the company's unwillingness to mitigate the consequences of the cessation.
 - Finally, the company's actions were **in breach of the law** for several reasons, including unnecessarily delaying the consultation period; making mass offers on an individualized basis; and announcing the complete closure of the Girona base, when the company really intended to gain flexibility.

8. FORTHCOMING REGULATORY DEVELOPMENTS

- › In the coming months, more labor and employment developments are expected affecting the following issues:
 - **Equality plans regulations.** A draft royal decree has been published governing the regulations on equality plans and the report



analyzing the regulatory impact, now in the process of [public information and consultation](#).

- **Equal pay.** The Spanish Ministry for Labor and Social Economy has opened a public consultation on the draft royal decree governing the regulations on equal pay between women and men. The rule will further develop the section on equal pay provided under Royal Decree Law 6/2019, of March 1, on urgent measures guaranteeing equal treatment and opportunities for men and women at work.
- **Remote working.** Finally, the [Council of Ministers](#) has approved, on the motion of the Spanish Ministry for Labor and Social Economy, the agreement authorizing the urgent administrative processing of the draft bill on remote working.

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