

NEWSLETTER CORONAVIRUS **SIGNIFICANT LEGAL ASPECTS¹**

1. Introduction

On January 30, 2020, the situation relating to the new coronavirus (2019-nCoV) has been declared to be a public health emergency of international concern by the World Health Organization. Since then, a series of measures have been adopted in order to protect people's health and safety and to mitigate the economic effects of said emergency situation.

This document has two main objectives:

- i) To make an accurate analysis of the measures and recommendations adopted by the Spanish government and by all the competent Public Administrations, especially those measures having the greatest economic, business and legal impact.
- ii) To estimate the legal institutions, mechanisms and solutions already existing in the Spanish legal system, which may be apt to deal with the economic and legal consequences caused by the abovementioned health emergency situation.

MEASURES AND RECOMMENDATIONS BY THE AUTHORITIES

2. Declaration of state of alarm and measures adopted by the Spanish Government (Royal Decree 463/2020 dated 14 March 2020)

2.1. Declaration of state of alarm

The Royal Decree 463/2020 dated 14th March 2020 declares a state of alarm in order to manage the health emergency situation caused by COVID-19 in Spain. In addition, it establishes restrictions on freedom of movement, temporary requisitions and compulsory personal performances, restraints of educational and training activities, restraint of commercial activities, activities carried out in cultural facilities, in recreational venues, hospitality and restoration activities and other additional measures in relation to places of worship and to civil and religious ceremonies, measures aimed to strengthen the National Health System throughout the whole nation, measures to guarantee the supply of goods and services necessary for the protection of public health, transportation related

¹ This document has been drawn up on March 15, 2020 and, as of its publication, the firm will promptly update the information contained herein with those provisions that modify or amend it.

measures, measures to guarantee food supply, customs transit measures, measures to guarantee electrical supplies, oil derived products and natural gas, measures on crucial operators of essential services and measures relating to public and private means of communication.

2.2. Measures to limit freedom of movement of people; freedom to attend workplaces which remain open

During the time the state of alarm is in force, citizens will only be allowed to move on public roads and streets in order to carry out the activities described in article 7 of the Royal Decree.

Amongst the activities therein described, citizens are allowed to go to work provided that the workplace remains open in accordance with the following provision.

2.3. Measures of restraint to commercial activities, activities of cultural and recreational facilities, hotel and restaurant activities and other additional activities

These measures, being especially relevant economically, consist in closing retail establishments, with the exception of retail commercial establishments relating to food, beverages, basic necessities and essential products, pharmaceutical, medical, optical and orthopaedic products, hygiene products, hairdressing salons, press and stationery, fuel, tobacconists, technological and telecommunication equipment, pet food, internet commerce, telephone or correspondence, dry cleaners and laundries. Any other activity or establishment that in the opinion of the competent authority may cause a risk of infection is suspended.

Museums, archives, libraries, monuments, as well as all venues where shows and functions open to the public sporting events and leisure activities are held, as indicated in the annex to the Royal Decree, are temporarily closed or suspended.

Hospitality and restaurant activities are suspended (with the exception of home delivery services) as well as parades and folk festivals.

2.4. Suspension of procedural time-limits

The additional provision number two of the aforementioned Royal Decree, for present purposes, establishes **the suspension of procedural time limits**.

The exceptional nature of the state of alarm, with the drastic measures that it entails, especially limitations to the free movement of citizens in the abovementioned cases, justifies the suspension of the procedural time-limits, as follows:

- 1) In general, suspension of time limits affects all Courts activities in every field , provided that they will start running again when the Royal Decree declaring the state of alarm, or the extension thereof, will no longer be in force.
- 2) However, as an exceptional measure, guard duty will be maintained in the criminal law field and the suspension shall not apply to the *habeas corpus* process, to arrests and detentions to orders of protection and to urgent actions in the field of prison surveillance nor to any precautionary measure regarding violence against women or minors. In the investigation phase, the competent judge or Court may order the performance of any other urgent action which may be regarded as not to be delayed.
- 3) Suspension of the procedural time limits shall not apply in the following cases either:
 - Procedure for the protection of fundamental human rights provided for in articles 114 and following of Law 29/1998, dated 13th July 1998, regulating administrative litigation, or filing of judicial authorizations or ratifications provided for in article 8.6 of the aforementioned law.
 - Procedures of collective dispute and for the protection of fundamental rights and public freedoms regulated by Law 36/2011, dated 10th October 2011, regarding social jurisdiction.
 - Judicial authorization for mandatory custody due to mental disorder provided for in article 763 of Law 1/2000, dated 7 January 2000, concerning Civil Proceedings.
 - The adoption of measures or provisions for minors' protection provided for in article 158 of the Spanish Civil Code
- 4) Finally, as a general exception , any judge or Court are allowed to order any judicial actions that they may considers necessary in order to prevent irreparable damage to the legitimate rights and interests of the parties in a proceeding.

On its part, the Permanent Commission of the General Council of the Judiciary, in an extraordinary session and in view of the Royal Decree 463/2020, has allowed the suspension of all judicial proceedings in the country for as long as the state of alarm will be in force.

Only the essential services of the Administration of Justice shall be maintained, guaranteeing specific actions.

2.5. Suspension of administrative time-limits

In addition to the foregoing, the Third Additional Provision also orders the suspension of administrative time limits therefore suspending all deadlines relating to proceedings against public entities for all the duration of the Royal Decree except for the following:

- The competent authority, through a substantiated resolution, may agree upon the measures deemed to be strictly necessary to avoid serious damages to the rights of the interested party in a proceeding. That is, only as long as the affected party agrees with the measure or with the fact that the time limit is not suspended.
- The aforementioned suspension will not affect the proceedings and resolutions that refer to situations strongly related to the facts justifying the state of alarm.

Some Self Governing Communities have issued similar provisions with suspension of administrative time limits to proceedings in their jurisdiction.

2.6. Suspension of expiry and Statute of limitations

Finally , Additional Provision Number Four orders **the suspension of expiry and Statute of limitations of all claims and rights** whatsoever for the duration of the state of alarm.

3. **Urgent measures to react to the economic impact of COVID-19 (Royal Decree Law 7/2020)**

Last Friday, March 13th, a day before the declaration of the state of alarm, the Royal Decree 7/2020 came into force. It includes measures of special commercial interest, including the following:

a) **Support measures in the field of Tourism industry**

- **Thomas Cook budget line:**

The budget line set out in article 4 of the Royal Decree-Law 12/2019, dated 11 October 2019, which adopts urgent measures to mitigate the effects of the opening of insolvency proceedings of the Thomas Cook business group, will be extended to all companies and self-employed workers with registered office in Spain and whose activity was included in the National Classification of Economic Activities (CNAE) of the tourism field indicated in the First Additional Provision of this Royal Decree. To the budget initially provided for in article 4 of Royal Decree-Law 12/2019 an additional 200 million euros will be added.

Instructions have been given to the Official Credit Institute (ICO) to carry out the necessary procedures with financial institutions in order to make the extended budget line available to companies within a maximum period of ten days from its entry into force.

- **Companies' bonus for permanent seasonal contracts in tourism and hospitality:**

Tourism and hospitality companies that generate productive activity in February, March, April, May, June and that in the same period hire or maintain workers with permanent seasonal contracts, may grant a bonus in said months of 50 percent of business contributions to Social Security for common contingencies, as well as for the concepts of joint collection of Unemployment, Wage Guarantee Fund (FOGASA) and Professional Training of said workers. This bonus will be applicable from January 1, 2020 until December 31, 2020.

The bonus set out in this article will be applicable in the whole country, except for Balearic Islands and Canary Islands in February and March 2020.

b) Transitional financial support measures

- **Postponed payment of tax liabilities:**

For the purposes set out in article 65 of the General Tax Law, Law 58/2003, dated 17 December 2003, a postponement of the payment of tax liabilities corresponding to all declarations and self-assessments whose submission and payment deadline falls between the date of entry into force of the Royal decree-law(included) and May 30, 2020 (included), as long as the requests submitted up to that date meet the requirements referred to in article 82.2.a) of the General Tax Law.

It is important to note that this postponement will also be applicable to those tax liabilities set out in letters b), f) and g) of article 65.2 of the General Tax Law. Therefore, the approved postponement covers liabilities deriving from withholding taxes and payments, output taxes (like VAT) and instalment amounts of Corporate Tax.

The conditions of the postponement will be the following: **a) The term will be six months and b) No default interest will be accrued during the first three months of the postponement (this means, in practice, the application of an annual interest rate of 1.875% on the amount of the postponed liability).**

In order for the postponement to be granted the debtor needs to be an individual or an entity with a volume of operations not exceeding 6.010.121,04 euros in 2019.

- **Request for an extraordinary postponement of the repayment schedule for loans granted by the General Secretary of Industry and Small and Medium Enterprises:**

The **beneficiaries of the financial support instruments for industrial projects may request the postponement of the payment of the principal amount and / or interests of the current annuity**, as long as their payment deadline falls in less than 6 months from the entry into force of this Royal decree-law, when the health crisis caused by COVID-19 has caused for these beneficiaries downtime, a reduction in the volume of sales, or interruptions in the supply of the value chain that makes it difficult or impossible to make the payment. Should this request be granted, it will imply the corresponding restraining of the refund schedule.

c) Public procurement measures:

The application of direct or indirect measures of any kind by the management bodies of the General State Administration to deal with COVID-19 will justify the need to act immediately, under the provisions of article 120 of Law 9 / 2017, dated November 8th, relating to Contracts in the Public Sector.

In accordance with the above, the emergency procedure will be applicable to all contracts signed by the General State Administration, its public bodies and other Public Law entities in order to comply with the measures related to people's protection and other needs adopted by the Council of Ministers and to face COVID-19.

4. Royal Decree-Law 6/2020 of 10th March adopting specific urgent measures in the economy and for the protection of public health

On Wednesday, March 11th, the Royal Decree-Law 6/2020 entered into force. The abovementioned includes among its measures, to exceptionally consider periods of isolation or contagion of workers as a consequence of the COVID-19 virus as an accident in the workplace for the purposes of temporary incapacity.

5. Other recommendations of business interest issued by the Public Administrations regarding the COVID-19

At a regional level, it should be noted that, amongst the recommendations included in the Agreement of March 13th, 2020, of the Andalusian Government Council, in compliance

with the Order of the Health and Family Council pursuant to which prevention measures are adopted for public health reasons as a consequence of the COVID 19 the following provision is added: *Whenever possible companies ought to promote smartworking, flexible hours, staged shifts and meetings by videoconference. Also companies are encouraged to elaborate plans of continuity of the business that could anticipate the actions to be carried out considering the situation caused by the Coronavirus.*

POSSIBLE ACTIONS AND RECOMMENDATIONS TO FOLLOW

6. Approach to those legal institutions, mechanisms and solutions already existing in our legal system to face the economic and legal consequences caused by the health emergency situation

6.1. Duties of entrepreneurs and corporate bodies

6.1.1. Specific measures. Action plans:

Considering the existing situation entrepreneurs and, where appropriate, corporate bodies, **must comply with the regulatory provisions issued by the competent authorities**, adopting and communicating the specific applicable measures within their organizations.

On the other hand, corporate bodies and, where appropriate, their delegate commissions and management committees, **must analyse the impact that the actual situation has on the entity, establishing an action plan** that contemplates specific and gradual measures to be adopted depending on the circumstances and their evolution. The action plans must be prepared considering the different activity areas of each company (labour, business-financial, operational and commercial fields).

In this exceptional situation, corporate bodies **must be monitoring the evolution of events and of the execution of the measures at any time**. The meetings and measures that are being adopted and executed must be adequately documented so that diligent action can be credited.

In this sense, in order to comply with the measures and recommendations of the authorities and after analysing, in each case, the legal and statutory rules applicable to each entity, it would be maybe possible to hold the sessions online, as well as adopting agreements in writing without holding a meeting in accordance with the provisions of corporate regulations relating to Boards of directors.

6.1.2. Regular functioning of corporate bodies:

Without prejudice to the evolution that may occur, it is advisable that, in addition to the specific issues outlined in the previous section, corporate bodies continue to carry out their functions and comply with their relevant legal obligations.

In this regard, as indicated in the previous section, **physical presence must be replaced by alternatives means provided for by the applicable and statutory regulations.**

Most companies are currently preparing their annual accounts for 2019 and, in this regard, said companies shall continue with the preparatory work and actions aimed to complete their financial statements. Should this not be possible, it will have to be properly documented and justified.

Likewise, if there are entities that have summoned ordinary general meetings, each case ought to be assessed in order to decide whether said meetings can be held or not.

If an ordinary general meeting has been maintained, the appropriate corporate body entitled to call off the meeting should be identified and in case the meeting will still be held as planned rights of the shareholders shall be preserved by holding said meetings online, using remote voting and representation mechanisms

6.1.3. Breach of financial obligations

If, as a consequence of the emergency, there is an impact that prevents or may prevent the regular fulfilment of obligations, it will be necessary to analyse in each case, if filing of **creditors pre-bankruptcy claim** is applicable, in accordance with the provisions set forth in Spanish Bankruptcy Law. Such claim should be submitted within two months from when the insolvency situation is known or should have been known, in order to avoid liability of the directors and the freezing of some judicial enforcement and seizure proceedings that may occur.

6.2. Contractual situations

In compliance with our legal system, contracts are binding and compel the parties to abide by the provisions thereby agreed upon according to the applicable law.

However, under these exceptional circumstances, it is necessary to analyse whether, in each case concepts such as **force majeure** and the jurisprudential concept called "**rebus sic stantibus**" (Hardship) clause shall be applied.

In any case those concepts shall not be applied on a general basis, **each contract and their covenants having to be examined individually before resorting to other legal remedies.**

6.2.1. Force Majeure

Force majeure is defined as the occurrence of an extraordinary, unpredictable event that could in no way have been avoided, not even using all possible diligence and in which no negligent or malicious action can be accounted on the party who intends to use said concept as an exception.

The two requirements to be met in order to consider an event as force majeure are: (1) said event could in no way be foreseen nor (2) could it be avoided, it being impossible to resist to and it must necessarily be elsewhere originated.

As far as debtors are concerned , force majeure could: (1) exonerate them from liability for non-compliance; (2) release them from fulfilling their obligations; or (3) suspend the fulfilment of the obligation in those cases in which it could be simply temporary

It should be assessed whether **force majeure shall be applicable to some contractual relationships and if any definition or application of force majeure has been provided for in said contracts.**

In addition to the case of force majeure, our Supreme Court has distinguished those cases in which the provision is considered to be exorbitant or excessively burdensome (*rebus sic stantibus* clause).

6.2.2. *Rebus sic stantibus* clause (Hardship)

It is a jurisprudential concept that can give rise to termination or amendment of a contract due to the supervening alteration of the concurrent circumstances at the moment of its conclusion.

In this respect, the following requirements shall be fulfilled: There must be (1) an extraordinary, unforeseeable and not ascribable to anybody alteration of circumstances at the time of performance of the obligations in relation to those existing at the time the contract was concluded; (2) an exorbitant disproportion between the obligations of the parties which results in a mismatch of performances; and (3) the absence of any other remedy, this clause being a subsidiary one.

This being a very exceptional concept it will have to be evaluated on a case-by-case basis; however it has been granted, defined and updated in recent Supreme Court rulings, such as STS 2823/2014, 5090/2014 and 1698/2015, and it is therefore considered to be a possible suitable remedy for breach of contract disputes caused by the impact of this health emergency.

6.3. Employment relationships

Until specific measures are approved in this crisis, in the line requested by social operators ("express" temporary employment dismissal -ERTE by its Spanish acronym-, freezing companies' obligation to pay social security contributions during the suspension period, 100% unemployment benefit for workers on suspended contracts, etc.), some initial suggestions can be made in order to manage the serious economic consequences that the crisis is already provoking on companies:

- Temporary contracts for a specific project or service may be terminated, especially in companies performing activities discontinued as an effect of the annex to the Royal Decree.
- Smartworking should be encouraged by giving clear instructions in writing to workers, this not implying that the obligations to record working days should be disregarded. Also, special shifts, flexible working hours, leaves, etc, may be considered.
- Holidays can be granted to the staff in the next few days.
- Force majeure may be alleged in order to carry out ERTE, especially in companies whose activities have been discontinued as an effect of the Royal Decree, according to articles 47.3 and 51.7 of the Workers' Statute and Royal Decree 1483/2012, dated 29 October.

The procedure exonerates the company from a negotiation period with the workers' representatives, however it requires the approval of the Employment authority. It must be initiated by means of an application addressed to the Employment authority (Andalusian Regional Government or Ministry of Labour) and a simultaneous communication to the workers' representatives. The Employment authority will obtain a report from the Employment Inspectorate and must render a decision within five days.

The effects of the authorisation shall be dated back from the date of the event causing force majeure. The company shall decide on the suspension of contracts or reduction of working hours where appropriate, without the need for an agreement with the workers' representatives

Companies are still compelled to pay social security contributions, although exemptions may be granted and the workers will receive unemployment benefit during the period of discontinuance.

This provision applies regardless of the number of workers in the company and the number affected by the suspension.

- ERTE (temporary employment dismissal) may also be started for economic, organizational or productive reasons, following a mandatory period of consultation effective fifteen days after the communication of discontinuance measures. This will be the case of companies not affected by the closure of activities and that will wait to measure the extent of the crisis in their production process.
- Collective dismissal (ERE by its Spanish acronym) may also be initiated on the grounds of force majeure if the company considers that there is a structural impossibility to maintain the employment relationship, by means of a procedure similar to the one described for ERTE.
- ERE may also be initiated for economic, organizational or productive reasons in accordance with the procedure in force under Article 51 of the Workers' Statute, with its relevant formal obligations, consultation period and duty to negotiate in good faith.
- In companies with less than 100 employees, if termination affects less than 10 employees, they may proceed to individual dismissals for economic reasons.

6.4. Postponement of tax payments

In those cases where it is convenient to improve the liquidity of the taxpayer, deferrals of tax payments shall be managed, especially taking into account the new features referred to in paragraph 3.1(b) above.

Notwithstanding the fact that we will update on any new development regarding this matter, please note that the State Tax Administration Agency has published the following instructions:

https://www.agenciatributaria.es/static_files/AEAT/Contenidos_Comunes/La_Agencia_Tributaria/Le_Interesa/2020/Instrucciones_presentacion_aplazamiento.pdf

6.5. Analysis and necessary review of insurance policies and their coverage

Finally, from the perspective of coverage of insurance policies currently underwritten with insurance companies, extreme precautions must be taken in revision of policies when communicating any insured event that may occur in relation to the current health emergency (amongst others, health and life insurance, default of insured claims, etc) when identifying the circumstances that increase the contracted risks and file any claim that may arise, given that, in general, insurance companies do not cover claims arising from extraordinary risks, including epidemic.

6.6. The need to avoid future harmful own acts in settlement documents that may be signed

The wording of contractual or settlement agreements should be carefully assessed in order to ensure that they adequately and sufficiently cover the company against claims from third parties who may have access to those documents.

The analysis of possible liability claims

Potential liability claims against Public Administration for actions or omissions related to this situation that may cause undue damage to individuals must be carefully analyzed.

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