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Madrid, 14 May 2020

On 13 May 2020, Royal Decree-law 18/2020, of 12 May, on social measures to protect employment (“**RD-L 18/2020**”), was published in the Official State Bulletin. RD-L 18/2020 includes measures relating to employment that expand on and develop those already adopted by previous royal decrees-laws, such as Royal Decree-law 8/2020, of 17 March, on extraordinary urgent measures to address the economic and social impact of COVID-19 (“**RD-L 8/2020**”), especially with regard to temporary workforce restructuring plans (“**ERTEs**”) and the conditions relating thereto.

In particular, RD-L 18/2020 sets out the following measures:

A. Special provisions applicable to ERTes due to force majeure regulated in RD-L 8/2020

It establishes that **total ERTes due to force majeure** which have already been processed by companies whose activity cannot resume as a result of the situation that led to the ERTE being requested, will remain in place until the situation is resolved and, at most, until 30 June 2020.

It provides for the possibility of establishing an additional extension of this type of ERTE and of the exemptions relating to contributions explained below, depending on the activity restrictions for health reasons that remain in place on 30 June 2020. Any extension will be agreed by the Council of Ministers.

Partial ERTes due to force majeure are foreseen in cases where there is the possibility of the companies partially resuming their activity, and they will also have a deadline of 30 June 2020.

In these cases, companies should bring back the affected workers to the extent necessary to carry out the activity, with reductions in the working day taking priority.

In terms of the processes to be carried out, the companies must: (i) inform the labour authority of the total waiver of the ERTE that was authorised within 15 days of the effective date thereof, and (ii) inform the Public State Employment Service of the waiver of the ERTE, of any modification of the ERTE that results in the suspension or regularisation of the payment of benefits, and of changes relating to ceasing to apply the measure in respect of all or part of the affected workforce (either in terms of the entire workforce returning to work or the corresponding percentage of partial activity).

B. Special provisions applicable to ERTes for economic, technical, organisational and productive reasons (“ETOP ERTes”) communicated from the deconfinement

Companies are allowed to continue to present this type of ERTE, which is regulated in article 23 of RD-l 8/2020, provided that it is initiated after the entry into force of RD-l 18/2020 and before 30 June 2020 (inclusive). This possibility may also be used by companies that have an ERTE due to force majeure in place.

On the other hand, in cases where negotiations for an ETOP ERTE begin after the end of an ERTE due to force majeure that the company had in place, the effective date will be backdated to the date of the end of the ERTE due to force majeure.

In relation to ETOP ERTes that had already been processed and implemented in companies, it is envisaged that the conditions that were agreed upon and included in the company’s final communication will be maintained.

C. Extraordinary measures relating to protection for the unemployed

RD-l 18/2020 clarifies the duration of the extraordinary measures relating to protection for the unemployed covered by article 25 of RD-l 8/2020.

Thus, paragraphs 1 to 5 of this article only apply until 30 June 2020 (e.g. recognition of unemployment benefits for those who would not otherwise qualify, not counting the time the unemployment benefit was received when considering future benefits, etc.) and the measures relating to unemployment benefits for fixed seasonal workers, and those who perform fixed and periodic work which is repeated on certain dates, will apply until 31 December 2020.

D. Extraordinary measures regarding contributions relating to ERTes due to force majeure

The exemptions from social security contributions provided for in RD-l 8/2020 (i.e. total exemption for companies with less than 50 workers and exemption from payment of 75% of contributions for the remainder) are limited to March and April 2020.

As regards the months of May and June 2020, the exemptions indicated in the previous paragraph are maintained only in cases where the company still has a total ERTE due to force majeure in place.

As regards partial ERTes due to force majeure, the percentage of exemption is reduced as follows:

- (i) For **workers who return to work**, in companies with less than 50 workers as of 29 February 2020, from the time of the waiver, the exemption will be 85% of the company social security contribution due in May and 70% of the contribution due in June 2020,

with respect to the periods and percentages of the working day worked since resuming its activity.

If a company had more than 50 workers on the above date, the exemption will be 60% of the contributions due in May and 45% of the contributions due in June 2020.

- (ii) For workers **whose contracts remain suspended**, in companies with fewer than 50 workers as of 29 February 2020, from the time of the waiver, the exemption will be reduced from 100% to 60% of the company social security contribution due in May and to 45% of the contribution due in June, with respect to the periods and percentages of the working day worked since resuming its activity.

If a company had more than 50 workers on the above date, the exemption will be reduced to 45% of the contributions due in May and to 30% of the contributions due in June 2020.

The above exemptions will be applied by the General Treasury for Social Security at the request of the company, which must communicate whether the situation of force majeure is total or partial, and identify the persons concerned and the period of suspension or the reductions of the working day.

E. Limits on dividend sharing and fiscal transparency during the deconfinement process

Companies with tax residence in countries or territories that are considered to be tax havens are expressly prohibited from implementing ERTes due to force majeure during the deconfinement process.

Another requirement to be able to implement the provisions regarding ERTes due to force majeure and to benefit from public resources, is that companies do not distribute dividends for the tax year in which these ERTes are applied, except if they repay the social security contributions they have been exempted from in advance.

This limit on the sharing of dividends will not apply to entities that had less than 50 workers registered with the Social Security Authorities as of 29 February 2020.

F. Maintaining employment

It clarifies that the commitment to maintaining employment affects companies that have implemented an ERTE due to force majeure. It also states that the 6-month period for this commitment will start from the date the activity is resumed, defined as the date that the persons affected by the ERTE return to work, even if only partially or only part of the workforce return.

This commitment shall be deemed not to have been fulfilled if any of the persons affected by an ERTE due to majeure are dismissed or their contracts are terminated, but it clarifies that the following situations are not instances of non-compliance: (i) a disciplinary dismissal that is declared to be fair, (ii) a resignation, (iii) death, (iv) retirement, (v) the total, absolute or severe permanent disability of the worker, (vi) termination of calls for people with a fixed-discontinuous contract, or (vii) the termination of temporary contracts due to the expiration of the agreed term, the works or service that were the subject of the contract having been carried out or when the activity that is being contracted cannot be carried out immediately.

The labour authority's assessment of fulfilment of this commitment in these sectors and companies is maintained, in view of the specific characteristics of the different sectors and the applicable labour regulations, and particularly taking into account the specific situations of companies with a great degree of variability or seasonality of employment.

In addition, companies which are at risk of undergoing insolvency proceedings will not be affected by this obligation.

Lastly, another of the most important developments is that the consequences of non-compliance are clarified. Such consequences will be that the contributions from which a company has been exempted will need to be repaid, but it is specified that the total thereof may be requested, along with the corresponding surcharges and late payment interest.

G. Limitations of the extraordinary measures to protect employment and in relation to temporary employment

Articles 2 and 5 of Royal Decree-law 9/2020, of 27 March, which adopted complementary measures relating to employment to mitigate the effects of COVID-19, remain in force until 30 June 2020.

This means that until that date: (i) situations of force majeure and economic, technical, organisational and productive reasons associated with the COVID-19 outbreak will not be considered legitimate reasons for dismissing workers or terminating their contracts and that (ii) suspending temporary contracts, including training, relief and provisional contracts for workers affected by ERTes linked to COVID-19 – both due to force majeure and for economic, technical, organisational or productive reasons – will entail the interruption of the calculation of the duration thereof and the corresponding reference periods.

The information contained in this Information Briefing is of a general nature and does not constitute legal advice. This Briefing was prepared on 14 May 2020 and Pérez-Llorca does not undertake any commitment whatsoever to update or review its content.