

# Covid-19 and labour law in Spain

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## Abstract

The Covid-19 crisis in Spain has led to the adoption of several pieces of legislation with labour law and social security content. The main priority of this fast-changing and frequently adapted legislation has been to avoid a sharp rise in unemployment. To do so, the legislator facilitated the use of the already existing procedures to temporarily suspend contracts (*Expedientes Temporales de Regulación de Empleo*) and prohibited certain kinds of dismissals (those based on economic circumstances and force majeure). To further develop a social shield with the ambition to protect the most vulnerable workers and families several measures that can be classified as income support have been adopted.

## Keywords

Suspension of employment contracts, prohibition of dismissals, social shield

## 1. Introduction

The Spanish Government declared on 14 March a state of emergency (Article 116 of the Spanish Constitution). Among other consequences, all recreational, cultural, sports and commercial activities were suspended on 14 March, as well as hospitality and educational activities that are carried out on-site (Royal Decree 463/2020). On 30 March, as the health crisis worsened, Royal Decree Law 10/2020 suspended all non-essential activities until 9 April. As the health crisis improved, the Government published, on 28 April, a plan for the re-activation of activity in Spain<sup>1</sup> that contemplates a progressive return to normal activity in four phases. The practical application, coordinated with the regions and directed by the Ministry of health, will consist of a gradual transition

1. <https://www.ecestaticos.com/file/586e3fe4193e6c9f05dca2c2e757b0c7/1588103416-plan-de-transicion-hacia-la-nueva-normalidad.pdf>

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and may be asymmetrical (different territories can progress at a different pace). The criteria to decide when a territory can progress to the next phase include indicators on public health, mobility, social situation and economic activity. Most of the territories in Spain will progress to Phase I (which is the second) from 11 May.

However, on 6 May the Parliament approved an extension of the state of emergency until 23 May. This seemed necessary because, from a technical point of view, all the Covid-19 related legislation has a temporary character linked to the state of emergency. To overcome this problem, it is necessary to 'decouple' the state of emergency and the measures adopted. On this point, an agreement was reached on 8 May between Government and social partners<sup>2</sup> that contemplates the extension of the most important adopted measures (and specifically the suspensions of contracts, with fiscal and social security payments suspensions) until 30 June 2020. This agreement will be incorporated into legislation by Governmental Decree on the next Council of Ministers (12 May).

In this context, a number of labour law and social security regulations have been adopted in Spain. The declared aims of the legislator are: to avoid an increase in unemployment; to protect workers' health; to protect the incomes of workers and self-employed; to help companies, especially SMEs, to overcome the crisis; and to safeguard as far as possible the productive potential of the economy for a quick recovery after the crisis. A 'social shield', as the legislator has named it, has been developed.

Approved in quick succession one after another, the regulations adopted are far from systematic, since they are constantly adjusted to the fast-changing events. The measures adopted are destined to keep changing and adapting as the situation evolves and have been conceived as temporary adjustments (first linked to the state of emergency, now and provisionally until 30 June 2020) to face the impact of crisis on the labour market. As of 8 May 2020, a total of eight regulations with labour law or social security impact have been adopted.<sup>3</sup>

It is not possible to go into a detailed analysis of all these regulations in this contribution. Therefore, the contribution will focus on the description of their main aims. The reader will find a description of the key crisis-related measures adopted in Spain so far, with a special focus on the rules on dismissal and suspension of employment contracts, the measures introducing or regulating income support for several categories of workers and citizens, the health and safety rules and the main teleworking-related provisions.

## 2. Rules on dismissal and suspension of contracts

The first of the crisis-related regulations with labour law content was RDL 8/2020, adopted on 17 March. It established the key objective of the Spanish Government in dealing with the crisis: to avoid an increase of unemployment.

The fear was that unemployment could sky-rocket as many companies have to suspend or decrease their activity in the current circumstances. To protect the levels of employment, two main measures have been adopted: the easing of the suspension of contracts and the prohibition of certain types of dismissals (this second measure had to wait for the adoption of RDL 9/2020 to become mandatory).

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2. <https://www.publico.es/politica/desescalada-gobierno-quiere-ampliar-erte-30-junio.html>

3. These are, in chronological order: RDL 8/2020, Orden SND 295/2020, Resolución 26 de marzo Dirección General de Transporte Terrestre, RDL 9/2020, RDL 10/2020, RDL 11/2020, RDL 13/2020 and RDL 15/2020. Some of them have been modified since their approval.

In a first step the legislator, in RDL 8/2020, facilitated the adoption of the existing procedures for temporary suspension of employment (the so-called ERTes, '*Expedientes de Regulación Temporal de Empleo*'). To adopt an ERTE, an employer must give a legally valid reason, since there is a legal requisite of valid cause. The RDL 8/2020 considered that, during the state of emergency, companies that would need to start an ERTE could do so under the force majeure cause, contemplated in Article 47.3 *Estatuto de los Trabajadores* (Workers' Statute), thus implying a speedy process with shorter procedural deadlines. To make this option more attractive, it was complemented with advantages for workers and companies: workers affected by an ERTE will have access to (contributive) unemployment benefits,<sup>4</sup> even if they do not meet the minimum contributory period to qualify for it. On top of that, the period of time they remain in unemployment during the state of emergency will not affect their acquired rights. As for the companies, they are granted extraordinary exemptions from their social security obligations. This amounts to 75% of their contributions in the case of large enterprises and 100% for those with fewer than 50 employees, provided that after they resume of their activity the companies maintain the previous levels of employment for a minimum period of six months.

In a second step, and due to the fact that dismissals were continuing despite the will of the legislator to favour suspensions of employment, the RDL 9/2020 prohibited dismissals based on force majeure as well as those grounded on economic, technical, organisational or productive reasons. As a consequence, all dismissals made on these grounds are qualified as null and void. Dismissals based on other reasons (for instance, subjective dismissals based on the disciplinary powers of the employer) are still possible, since they are not causally connected to the consequences of the crisis. The free resolution of the contract in the sector of domestic work (that is technically not a dismissal) is still possible.

In the Spanish context, where there is an extreme prevalence of temporary contracts, the legislator clarified in RDL 9/2020 that the suspension of employment in the ERTes applies to all temporary contracts, including formative and replacement contracts (*contratos de relevo*). During the time that these temporary contracts are suspended, the calculation of their maximum duration is also suspended, so during the state of emergency these contracts cannot finish even if they have reached their final term. The aim here is to guarantee the effective maximum duration of temporary contracts.

### 3. Measures introducing or regulating income support

As described in the previous section, access to (contributive) unemployment benefits has been guaranteed for all those workers involved in ERTes. This is the main element of the 'social shield' established by the legislator. But additional provisions have been introduced that can be considered as income support related.

As the paralysis of economic activities became more widespread in the worst weeks of the health crisis, the RDL 10/2020 established a remunerated leave (*permiso*) that will be recoverable in the future when the situation allows. This leave was compulsory and temporary (from 30 March

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4. Contributive benefits in the Spanish social security system are those that have been generated through contributions by workers and employers and, therefore, are closely linked to work and social security contributions attached to work. They oppose to non-contributive benefits, that are those designed for people in need that either have not contributed or have not contributed enough to access contributive benefits. Non-contributive benefits are a last resource and generally less generous and more targeted-oriented than contributive ones.

to 9 April). The aim was to compensate workers, protecting their income during the compulsory suspension of the activity in their companies. Recovery of the working time equivalent to this leave is anticipated in the period from the end of the state of emergency to 31 December 2020.

RDL 11/2020 introduced several measures that are indirectly aimed to support people and families in need. Its aim is to guarantee constitutionally protected social rights. It introduces an innovative concept of 'social vulnerability', establishing several criteria to define who might qualify as 'socially vulnerable'. The RDL 11/2020 foresees for this group of citizens some exceptions in the obligations they may have acquired in relation to their right to housing (Article 47 Spanish Constitution), and protection in case of unemployment (Article 41 Spanish Constitution). This legal construction is the basis for specific measures that temporarily suspend evictions, automatically extend rental contracts and guarantee the supply of gas, electricity, and water, among other minor provisions.

In relation to the self-employed, several measures have been adopted to support them, as well as to help SMEs. The most important ones from a labour and social security point of view are: the moratorium on the payment obligations to social security for the self-employed and the establishment of better conditions in the benefits that self-employed individuals receive in case of termination of activity. Other measures to protect the income of the self-employed and SMEs include easier access to credit and liquidity, cheaper tariffs for energy, and some others.

To protect some categories of workers that had been left outside the 'social shield' designed by RDL 8/2020 and 9/2020, two extraordinary subsidies are established in RDL 11/2020: an extraordinary subsidy for domestic workers and an extraordinary subsidy for temporary workers not covered by ERTes.

The subsidy for domestic workers is very important, since in Spain they do not have access to unemployment benefits. Domestic workers that can claim this benefit are only those integrated in the Special System of Social Security for domestic workers (it does not cover, therefore, all those working in the informal market). It can be claimed by domestic workers who have lost their job because their contract has been terminated during the state of emergency, and also by those whose level of activity has decreased due to Covid-19 related reasons.

The subsidy for workers who had a temporary contract that ended after the beginning of the state of emergency and are not included in any ERTE seeks to protect these workers, that remained outside the main protective strategy (i.e., the suspension of contracts), offering them some income support.

In the agricultural sector, some special rules have been introduced by RDL 13/2020. The most important one is the compatibility between several forms of employment in the agricultural sector (especially different types of temporary contracts) and the unemployment benefit.

Another special rule that seeks to guarantee the protection of workers, introduced by RDL 13/2020, establishes that any worker in a situation of isolation, illness or restriction of movement due to Covid-19 will be treated from a social security point of view as assimilated to a worker who suffered a work accident, following then the general rules established for this situation according to the social security law. This way, these workers will have the right to a social security benefit equal to those in case of a work accident. The worker does not have to prove that he or she has made a minimum amount of social security contributions. The amount of the benefits is equal to 75% of the employee's last wage.

Finally, the RDL 15/2020 offers protection to another group that was left outside: those workers whose contract had been terminated during the probation period (only for those after 9 March 2020) and the workers who had unilaterally terminated their contract because they were about to

enter a new contract that never started due to the Covid-19 crisis. All these workers will have access to unemployment benefits.

A lot of discussion has taken place within the Governmental coalition on the possibility to launch a minimum income policy to guarantee a level of basic incomes (*renta mínima vital*) for families in need, but so far, an agreement has not been reached. Some details of this measure have nevertheless been made public by the press: the income will benefit several typologies of families (instead of individuals) experiencing poverty or risk of poverty. It will be based on the number of children, type of family and income levels. According to governmental sources it will be approved in May.<sup>5</sup>

#### 4. Health and safety rules and teleworking

Since the adoption of the RDL 8/2020 on 17 March, the general rule has been the preference for teleworking when and where possible. This means that ideally the situation of workers during the state of emergency must be teleworking. When this is not possible, the health and safety of the workers must be guaranteed.

Only when these conditions cannot be met, the suspension of the contract will be an option (in non-essential activities). This will continue to be the general rule in Spain at least until 21 June, since RDL 15/2020 extended the preferential character of teleworking for two months.

The other rule introduced in RDL 8/2020 consists of the flexibilisation of working time to allow for the conciliation of work and care in the special circumstances of the Covid-19 crisis. The norm subordinates working time to the needs of care that may arise in connection with the crisis. When a worker needs to take care of his or her partner or close family members for reasons of illness, age or incapacity and as a consequence of the Covid-19 crisis (because schools or any other centre that provides care have closed or because the person or family member that used to do it cannot because of illness or other circumstances related to the health crisis), a right has been established to adapt the working time (change of shift, work hours, work location function, etc.) or to reduce working time. The reduction in working time can be up to 100% of the working time, with a proportional reduction in the salary. In principle, the decision corresponds to the worker that in this way has some control over his or her working time to adapt to the crisis and the care-related demands it may entail, although ultimately an agreement with the employer seems to be needed in practice.

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5. Royal Decree-law 20/2020 of 29 May finally introduced the minimum income (*ingreso mínimo vital*). This Decree has been approved in Parliament on 10th June with no single vote against it'. <https://elpais.com/economia/2020-04-18/el-coste-de-la-renta-minima-vital-se-acercara-a-los-5500-millones-de-euros.html>